

**Neutral Citation no. [2005] NIQB 16**

**Ref: GIRF 5221**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

**Delivered: 08/03/05**

**2003 No. 7**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**

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**IN THE MATTER OF THE DIRECTOR OF THE CRIMINAL ASSETS  
RECOVERY AGENCY**

**AND IN THE MATTER OF**

- 1. THE PERSONAL REPRESENTATIVE OF STEPHEN WARNOCK,  
DECEASED**
- 2. SARAENA WARNOCK**
- 3. SEPHEN WARNOCK (JUNIOR) (BY HIS GUARDIAN AD LITEM)**
- 4. CLARE PATTERSON**

**and**

**IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002**

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**GIRVAN J**

[1] The Director of the Assets Recovery Agency brings these proceedings, claiming that certain property vested in the estate of Stephen Warnock, deceased ("the deceased") is recoverable property. Under Part 5 of the Proceeds of Crime Act 2002 ("the 2002 Act"). He seeks an order under section 267(1) of the 2002 Act that Louise Rivers be appointed trustee for civil recovery ("the trustee") and an order vesting recoverable property in the trustee. This appears to be the first such substantive application brought in this jurisdiction.

[2] The property, the subject of the application, is described in paragraph 1 of the originating summons issued on 6 July 2004 thus:

1. The real property situated at 166 Old Holywood Road, Belfast, registered in the name of Saraena Warnock the wife of the deceased in the Registry of Deeds.
2. The amount of £100,000 due in respect of the Norwich Union Life Assurance Policy No. 7105711LY.
3. A home entertainment system purchased for £6,000 approximately.
4. The proceeds from the sale of 9 Cambourne Crescent, Newtownards, believed to be £50,436.83 plus accrued interest held by McKenna, Sweeny & McKeown, Solicitors.
5. £40,965.46 cash plus accrued interest seized and held by PSNI.

At the outset of the hearing an application was made to adjourn the proceedings in respect of the property at 166 Old Holywood Road, Belfast. An affidavit had been filed shortly before the hearing by Mr Baxter implicating Saraena Warnock in criminal activity and it was necessary for the deceased's wife to have an opportunity to file a replying affidavit in response thereto. The application in relation to 166 Old Holywood Road, Belfast, accordingly will be disposed of at a later date when the evidence is concluded.

[3] Part 5 of the 2002 Act introduces a system of civil recovery of the proceeds of unlawful conduct. Section 240(1) describes the general purpose of this part of the Act, it is to recover assets and cash generated by criminal activity. Two forms of the retrieval of the proceeds of crime are provided for, namely civil recovery and cash forfeiture. Property obtained through unlawful conduct may be recovered in civil proceedings by the enforcement authority. Cash acquired in this way may be forfeited again in civil proceedings. Section 240(2) indicates that the powers conferred by Part 4 are exercisable whether or not any proceedings have been brought for an offence in connection with the property.

[4] Unlawful conduct in this context is defined in section 241 as,

"1. Conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part.

2. Conduct which -

(a) occurs in a country outside the United Kingdom and is unlawful under the criminal law of that country, and

(b) if it occurred in a part of the United Kingdom, would be unlawful under the criminal law of that part,

is also unlawful conduct.”

It is provided that proof of unlawful conduct is, on the balance of probabilities, (section 241(3)).

[5] Section 243 sets out the procedure for civil recovery, proceedings for a recovery order may be taken by the enforcement authority in the High Court against any person who the authority thinks hold recoverable property. The Director must serve proceedings on the person who holds the recoverable property and unless the court dispenses with service on any person who holds associated property, which the Agency wishes to be subject to a recovery action. The claim must specify the property to which it relates or describe it in general terms and state whether it is alleged to be recoverable property or associated property.

[6] Section 266(1) provides that if the court is satisfied that any property is recoverable, it must make a recovery order. No question of any discretion arises accordingly. The effect of a recovery order is to vest the property in the trustee (see section 266(2)). However, the court is prohibited from making a recovery order if the conditions in subsection (4) are met and it would not be just and equitable to do so. The conditions in section 266(4) are:

- (a) the respondent obtained the recoverable property in good faith;
- (b) he took steps after obtaining the property which he would not have taken if he had not obtained it or he took steps before obtaining the property which he would not have taken if he had not believed he was going to obtain it;
- (c) when he took the steps he had no notice that the property was recoverable; and
- (d) if a recovery order were made in respect of the property it would, by reason of the steps, be detrimental to him.

Section 266(6) provides that in deciding whether it would be just and equitable to make the provision in a recovery order, where the conditions in subsection (4) are met, the court must regard to (a) the degree of detriment that would be suffered by the respondent if the provision were made in (b) the enforcement authority's interest in receiving the realised proceeds of the recoverable property.

[7] Sections 304 – 310 deal with recoverable property. Sections 305 and 306 allow the Agency to recover property which has not itself been obtained through unlawful conduct but which would represent such property. Section 307 provides that the property that is recoverable under sections 304 and 306 is to be taken to include accrued profits. Section 308 limits the Agency's ability to follow and trace property. Property is not recoverable while a restraint order applies nor is it recoverable if it has already been taken into account in making a criminal confiscation Order.

[8] In Walsh v The Director of the Assets Recovery Agency [2005] NICA 6, the Court of Appeal rejected the argument that the legislation was incompatible with the Convention, that argument having been that the legislation effectively gave rise to a criminal charge for the purposes of the Convention and that accordingly the Agency would have to prove that the appellant had engaged in unlawful conduct to the criminal standard, ie beyond reasonable doubt. The Court of Appeal concluded that the cumulative effect of the application of the tests in Engel v Netherlands (No 1) [1976] 1 EHRR 647 at 678-679 was to identify the proceedings as civil proceedings.

[9] In R (Director of the Assets Recovery Agency) v He & Chen [2004] EWHC 3,021, Collins J stated:

“As a general rule, no doubt, criminal conduct may be regarded as less probable than non-criminal conduct. But where there is evidence from which a court can be satisfied that it is more probable than not that criminal conduct has been involved, it does not seem to me that that is something that is so improbable as to require a gloss on the standard of proof. However, I recognise, and it is no doubt right, that since it is necessary to establish that there has been criminal conduct in the obtaining of the property, the court should look for cogent evidence before deciding that the balance of probabilities has been met. But I have no doubt that Parliament deliberately referred to the balance of probabilities, and that the court should not place a gloss upon it, so as to require that the standard approaches that appropriate in a criminal case.”

[10] The evidence adduced by the plaintiff entirely satisfies me that the deceased was pursuing a criminal lifestyle which generated significant sums of money obtained from illegitimate sources. His lawful income from state benefits was modest and would have been entirely insufficient to enable him to pursue the lifestyle he was able to pursue. No plausible evidence or explanation or argument was put forward to suggest that his income over and above those modest state benefits came from lawful sources (such as

gifts, inheritances or the proceeds of legitimate gambling). He had no declared income for tax purposes; he had a substantial criminal record and had served some 23 custodial sentences. His offences included offences of dishonesty and violence. The offences included theft, robbery, handling and deception. The evidence on the balance of probabilities establishes that he was a senior officer in the LVF. An LVF mural in Holywood depicts him as a Brigadier in that organisation, which is an unlawful para-military organisation involved in various criminal activities of which the court, at this point in history, can take judicial notice. He associated with a Robert Black, a known and proven drug dealer with 103 convictions for various offences including the importation of drugs, possession with intent to supply, robbery, burglary, deception and crimes of violence.

[11] Paragraphs 9 to 36 of the affidavit of Mr Baxter sets out details of the evidence relied on by the plaintiff and establish the deceased's criminality. The plaintiff seeks to rely on the belief of the PSNI that the deceased had become involved in drug trafficking on a significant scale and had become a major supplier of cannabis and ecstasy. These allegations were not proven in any criminal court and the evidence relied on by the plaintiff in these proceedings is based on the opinion of the police based on the material to which the police had access. Similar points arise in relation to the suspicion of the deceased's involvement in a serious robbery and serious burglary. Mr Hanna QC on behalf of the plaintiff contended that this evidence was admissible and relevant. While individual episodes could not be proved, the number of episodes giving rise to the police service's suspicions and the deceased's convictions for various offences, taken together and in conjunction with his lifestyle funded from other than legitimate sources and taken with his known associations, all pointed, on the balance of probabilities, to the conclusion that he was living on the proceeds of crime which were used in the funding of the acquisition of the properties the subject of the application.

[12] Mr McLaughlin, on behalf of the Official Solicitor who was appointed to represent the estate of the deceased, very properly sought to rely on any legitimate argument open to the Official Solicitor to protect the interests of the next of kin of the deceased. He contended that the definition of unlawful conduct required the court to decide whether any matters alleged to constitute unlawful conduct have occurred. He argued that this required that specific conduct by the deceased should be alleged and that those allegations would have to be made good. However, section 242(2) provides that in deciding whether any property was obtained through unlawful conduct, it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct. In the decision in Walsh the Court of Appeal stated:

“We do not accept that it is in any way inevitable that the recovery proceedings will be confined to an examination of specific events as committed by the appellant. We consider that it would be open to the Agency to adduce evidence that the appellant had no legal means of obtaining the assets without necessarily linking the claim to particular crimes.”

[13] In relation to the items of property the subject of the claim so far as the money found in the car is concerned, this was found on the passenger seat and in a plastic bag in the rear of the car in which the deceased was murdered. The circumstances of the finding of the money, the lack of any explanation as to a lawful source, the criminal background and associations of the deceased, all point to the overwhelming conclusion that the money was the proceeds of crime and recoverable property.

[14] In relation to the proceeds of the sale of 9 Cambourne Crescent, Newtownards, this property was in the name of Clare Patterson, a girlfriend of the deceased with whom he was having an affair while still married to his wife. She did not lay claim to the proceeds of sale and did not appear in the proceedings. When the property was purchased the deceased paid the deposit of £20,000 which was put through the bank account of Patterson. The deceased told her that it was nothing to do with her where the money came from. I am entirely satisfied that the deposit did not come from legitimate sources and represented the proceeds of the criminal activities of the deceased. Substantial sums of money were paid into Patterson’s account averaging £8,000 per month, vastly in excess of the legitimate income of the deceased. Again the overwhelming inference is that this money was the proceeds of criminal activity. After the death of the deceased, Patterson sold the house. After discharge of the mortgage, the balance was £50,436.83 currently held by solicitors in an interest bearing account. I am satisfied that these monies are recoverable property.

[15] The deceased held a life assurance policy No. 7105711LY with CGU Life, now merged with Norwich Union to form CGNU. The monthly premiums for this policy were initially drawn from the wife’s Ulster Bank account (which was funded by the deceased from unknown sources) and from April 2000 from Patterson’s Ulster Bank account. No legitimate source for the cash payments has been identified and given the deceased’s criminal record, his known associations and information supplied by the police, the conclusion must be drawn that the money was the proceeds of crime. I am satisfied that the Norwich Union policy was kept up by the use of money obtained from criminal sources. The insurers have not yet paid out on foot of the police and on investigation they may decide that they are entitled to repudiate on the policy. I am satisfied that the entitlement of the estate under the policy is recoverable property. Even if the insurers repudiate liability on

foot of the policy, it would seem likely that the premiums paid over the years would be repayable and thus fall within the recoverable property.

[16] In relation to the home entertainment system, this comprises, inter alia, a plasma tv, video and DVD player. The deceased's wife stated that the deceased had purchased this equipment and it was initially located in Patterson's house. It is alleged that the deceased had given the equipment to Stephen Warnock but it was not moved from Patterson's house until after the death of the deceased. In the case of an *inter vivos* gift of a chattel, delivery of possession is necessary to vest the chattel in the donee, unless the donor constitutes himself a trustee for the donee or unless the gift is by deed. There is nothing to suggest that any trust was created in respect of the equipment and there was no delivery by the deceased to his son. Therefore there was no effective gift. Equity will not perfect an imperfect gift and the taking of the property after the death of the deceased could not be considered to be a delivery by the deceased. The property accordingly remains vested in the estate of the deceased. On a balance of probabilities and for the reasons indicated in respect of the other property, I am entirely satisfied that this too was recoverable property.

[17] If there was an effective gift of the equipment to the son, section 266(3)(a) was called on aid by the son. If the conditions in subsection 4 are met the court may not make a recovery order if it would not be just and equitable to do so. The son, however, was not a bona fide purchaser for value. Apart from taking the equipment and using it (which was temporarily for his benefit) he took no steps which he would not have taken if he had not obtained the property. He had no moral claim on the equipment. There is nothing to show that it would not be just and equitable to make a recovery order in respect of the equipment if it had been the subject of a valid gift (which in my view it was not).

[18] In the result I am satisfied that the items of property, which were the subject of the hearing, are recoverable property. Accordingly the court is required to make an order vesting the recoverable property in the trustee and I shall appoint Louise Rivers to be the trustee.

[19] I shall hear counsel on the question of costs and in relation to the final form of the order. The claim in respect of the remaining property stands adjourned to a date to be fixed.