

THE HIGH COURT

[2012 No 4 CAB]

BETWEEN

CRIMINAL ASSETS BUREAU

APPLICANT

AND

PATRICK FARRELL AND C.C.

RESPONDENTS

JUDGMENT of Mr. Justice Birmingham delivered the 18th day of December 2013.

1. These proceedings commenced by originating notice of motion dated the 5th March, 2012. On the 20th March, 2012, an *ex parte* application was made to the Court pursuant to s. 2 of the Proceeds of Crime Act 1996, as amended. The late Feeney J., being satisfied that the property referred to in the schedule to the notice of motion, namely 116 Huntstown Avenue, Clonsilla, Dublin 15, constituted directly or indirectly the proceeds of crime made an order pursuant to section 2.

2. The application now before the court sees the Criminal Assets Bureau seek an order pursuant to s. 3 in respect of the property.

3. The application was heard largely on affidavit but there was also limited cross examination by counsel for the respondent and the respondent was cross examined by counsel for the applicant.

4. The second named respondent has not participated formally in the proceedings but it was indicated that the arguments that were advanced on behalf of the first named respondent also applied to her.

5. Section 3(1) provides as follows:

"Where, on application to it in that behalf by a member, an authorised officer or the Criminal Assets Bureau, it appears to the Court on evidence tendered by the applicant, which may consist of or include evidence admissible by virtue of section 8 –

(a) that a person is in possession or control of –

(i) specified property and that the property constitutes, directly or indirectly, proceeds of crime, or

(ii) specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime,

and

(b) that the value of the property or, as the case may be, the total value of the property referred to in both subparagraphs (i) and (ii) of paragraph (a) is not less than €13,000,

the Court shall, subject to subsection (1A), make an order ('an interlocutory order') prohibiting the respondent or any other specified person or any other person having notice of the order from disposing of or otherwise dealing with the whole or, if appropriate, a specified part of the property or diminishing its value, unless, it is shown to the satisfaction of the Court, on evidence tendered by the respondent or any other person –

(I) that that particular property does not constitute, directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime, or

(II) that the value of all the property to which the order would relate is less than €13,000:

Provided, however, that the Court shall not make the order if it is satisfied that there would be a serious risk of injustice."

6. Section 8 of the Act of 1996 renders admissible opinion evidence in certain circumstances. The same section also makes clear that the standard of proof is the civil standard. In this case, Detective Chief Superintendent Eugene Corcoran, Chief Bureau Officer of the Criminal Assets Bureau and "a member" within the meaning of the Proceeds of Crime Act 1996, has stated in the course of an affidavit sworn by him, that the respondent is in possession of the property referred to in the schedule and that the property in question constituted directly or indirectly the proceeds of crime and/or that the said property was acquired in whole or in part with or in connection with property that directly or indirectly constituted proceeds of crime and that the total value of the property was not less than €13,000.

7. *F.J., McK. v. G.W.D.* [2004] 2 I.R. 470 set out the procedure that is to be followed by a trial judge considering an application under s. 3 when presented with belief or opinion evidence pursuant to section 8.

8. I will follow the procedures directed by McCracken J. in that case.

9. In accordance with the procedure suggested, the first matter to be considered is the evidence given by the member, while at the

same time considering any other evidence that might point to reasonable grounds for the belief expressed.

10. The other evidence adduced on behalf of the Bureau was the evidence of Detective Garda Mark Davis, the evidence of Detective Garda David Kennedy, the evidence of Financial Crime Analyst no. 3, the evidence of Revenue Bureau Officer no. 39 and that of Social Welfare Officer no. 51. By reference to the other evidence in the case, I have been satisfied that there are reasonable grounds for the belief/opinion evidence presented by Detective Chief Superintendent Corcoran. Being of the view then that the belief evidence of Detective Chief Superintendent Corcoran is evidence, it is necessary to consider the entire body of evidence adduced on behalf of the applicant as well, of course, as the evidence by way of affidavit and oral evidence presented by the respondent.

11. From the evidence presented, it emerges that the property referred to in the schedule is the respondents' family home which was purchased by them in July 1999. The cost of purchasing the property (excluding legal costs) was €131,127.12. It has also emerged that mortgage payments of €51,909.72 have been made in relation to the property. It is also of note that a large extension has been added to the property. The cost of this extension is a matter of controversy and I will return to this topic. The case advanced on behalf of the applicant is that the respondents' initial purchase was part funded by criminal activity, and that the mortgage payments and extension also came, whether in whole or in part, from the proceeds of crime.

12. It is convenient to deal with these three aspects, initial purchase, mortgage repayments and extension in turn. Insofar as the initial purchase is concerned, a number of elements were involved. These were:-

(i) IR£2,000 was paid by way of deposit on the 17th June, 1999. The source of this is unknown.

(ii) IR£55,000 was provided by way of mortgage from Allied Irish Banks.

(iii) IR£35,000 was paid by way of bank draft on the 27th July, 1999. Of this amount, IR£10,000 was provided by way of a gift from the father of the second named respondent and IR£25,000 came from the first named respondent's AIB account, account no. 46388057. The source of the funds in this bank account remains unestablished. The funds established in account no. 46388057 came from cash lodgements totalling IR£27,356 and four cheques totalling IR£11,620.

(iv) IR£8,000 paid by way of bank draft on the 13th July, 1997. The source of this bank draft was also account no. 46388057.

(v) IR£3,271 by way of bank draft on the 4th August, 1999. Once more the draft was funded from account no. 46388057.

13. The case advanced on behalf of the applicant is that the sum of IR£36,271 funded through account no. 46388057 originated from Britain in the amount of approximately STGE£36,000. It should be explained that Mr. Farrell had been resident in the United Kingdom for a number of years. A number of convictions are recorded against him there. Of particular relevance is that in June 1996, he was sentenced to 30 months imprisonment in relation to 13 counts of obtaining property by deception. A month later, in July 1996, he escaped from prison and returned to Ireland.

14. The respondent says that he returned to Ireland with savings of about IR£35,000, legitimate savings which he attributes to the fact that while in Britain he worked on a self employed basis as a carpenter and was also involved in buying and selling cars. However, in cross examination, he appeared willing to concede or all but concede, he could not be described as a consistent or impressive witness, that whatever funds were available to him were "a mixed bag", by which I understood him to mean that the carpentry, the car dealing, the social welfare he was drawing while working, and the funds obtained by him through claims in two false names for unemployment and housing benefits all mingled together.

15. So far as the mortgage payments are concerned between August 1999 and September 2009, mortgage payments in the amount of €51,909.72 were made. These repayments came from the respondent's AIB bank account no. 16247056. Again, the source of funds into that account is not at all straightforward. There are a number of lodgements which appear to be non contentious, or which certainly could not be said on the balance of probabilities to constitute the proceeds of crime. I would instance in that regard a lodgement of €9,203.06 on the 3rd February, 2001, which appears to represent the settlement received by the second named respondent for a personal injuries claim and three lodgements in mid 2001 totalling €10,361.06 linked to WCA Car Auctions and €9,882 linked to Merlin Car Auctions.

16. However, there are other dealings on the account that are not as easy to understand. There is for example lodgements totalling €110,412.27 which the respondent has explained as repayment of a loan that had been advanced to an Australian national, Mr. Mark Blackburn. The suggestion by the respondent is that he made a profit of €20,000 for advancing a loan of over €90,000. However, no supporting documentation in relation to the loan has been produced by the respondent or indeed by Mr. Blackburn. Also in question is the significance played by the sale of a site at Edenmore Park, Raheny. It does not seem to be in dispute that the site was sold in June 2001, and that monies received were lodged to account no. 16247056. However, no satisfactory explanation has been forthcoming about how the respondent was in a position to purchase the site in the first place, particularly given that on his return to this jurisdiction from Britain that he was drawing unemployment assistance and also had a significant mortgage to meet.

17. The first named respondent has raised the prospect that at least some of the mortgage payments may have been funded by a legitimate car sales business. There is no doubt that the plaintiff did have such a business just as there is no doubt that he worked legitimately for a period as a carpenter. In October 2003, he opened an account in the name Patrick Farrell trading as North West Car Sales. However, all mortgage repayments were made from account no. 16247056 and there is no indication that funds were ever transferred from the North West Car Sales account to no. 16247056. Mr. Farrell has made the point that there was no clear demarcation line between the two accounts and that often whether a sum of money was lodged to one account or another depended on where funds were needed. However, the difficulty for Mr. Farrell is that more than half of the funds lodged to the car account between October 2003 and September 2009, themselves came from unknown sources. What is clear is that the mortgage payments were not fully accounted for or substantially accounted for by the car business.

18. So far as the extension is concerned, this was a substantial one, adding a study, dining room and utility room to the ground floor of the house and adding two bedrooms upstairs, one en-suite. The original house was 114sq. metres and the extension added 59sq. metres. The respondent has aptly described this as adding half a house. The estimated costs of the project as prepared by Mr. Paul Brennan, the Architect Technician who submitted the application for planning permission to Fingal County Council was €80,000. However, that was on the basis of engaging a contractor and it is accepted that the cost could be reduced by direct labour and further reduced by the house owner doing the work himself.

19. In the course of a garda interview on the 26th September, 2009, while the respondent was detained pursuant to s. 2 of the

Criminal Justice (Drug Trafficking) Act 1996, he told gardaí that the extension had cost around €50,000 or €60,000, after he had done all the donkey work, adding that all the VAT and taxes were paid on it.

20. In the course of an affidavit sworn by Mr. Farrell on the 27th July, 2012, he stated that the cost of the extension was in or about €7,800 and was completed over the period of a year with the assistance of a former colleague and his own labour. When challenged by Detective Garda Mark Davis, in the course of an affidavit sworn by him, about the discrepancy between what Mr. Farrell had said at the garda interview and what he swore in his affidavit, Mr. Farrell returned to the topic in the course of an affidavit sworn on the 27th September, 2012, in the context of an application for legal aid. There, at para. 6 he commented:

"I say that insofar as I estimated the cost of the extension to my house as between €50,000 to €60,000, I say that this may have been the value had it been built by commercial contractors, including all labour and materials. I say, however, that as I was able to do some of the work myself, and further that through my contacts in the building trade I was able to source the materials and build it for a considerably lower sum as referred to in my previous Affidavit."

21. He once more returned to this topic in the course of an affidavit sworn on the 2nd April, 2013. On this occasion at para. 20 he commented:

"I say that I used some of this money [monies linked to an investment property in Luton, England] to fund an extension to my house in 2004. I say that, as deposed to previously, I spent in or about €7,800 on this extension, but that its value was much higher as I was able to do some of the work myself and to source materials and labour at much lower rates than market value through my employment in Viewfair Limited and contacts in the building trade as accepted by Mr. Lambe when questioned by gardaí. I say, therefore, that it is difficult for me to estimate with any precision the total cost of the extension, but I say that it is closer to the estimates of €50,000 to €60,000 as referred to in garda interviews than the figure of €80,000 as suggested by the Applicant. I say also that this extension was not funded with the proceeds of crime."

22. Even if one was to set out to take a view of the evidence particularly favourable to the first named respondent, it is just not possible to accept that the initial purchase, the repayments and the extension can be explained by income from car dealing and his work as a carpenter with Viewfair following his return from England.

23. An amount of information has been put before the court in relation to Mr. Farrell's involvement in criminal activity. Mr. Farrell has 28 recorded convictions within this jurisdiction and 23 recorded convictions in Britain. In that connection I have referred to the very significant fact that the Department of Health and Social Security was defrauded to the amount of Stg£36,000 approximately.

24. Following Mr. Farrell's escape from prison and return to Ireland, he was arrested twice for offences relating to the cashing of stolen cheques. Then, in May 2009, 360 slabs of cannabis resin with a value of €630,000 were found in the van of the first named respondent that was parked outside Castlekevin Apartments in North Dublin. Inside apartment 12, two individuals were found loading slabs of cannabis valued at €1.8m into holdalls. Then in September 2009, cannabis to the value of €60,000 was found in the boot of the first named respondent's car while it was parked outside 116 Huntstown Avenue. When interviewed by gardaí he took responsibility for the drugs. In addition information has been put before the court in relation to his association with others involved in crime.

25. The combination of the information that is available about Mr. Farrell's criminal activities, the very substantial funds from unknown sources which were lodged to Mr. Farrell's accounts, a total of €368,009.62 between the 17th June, 2004 and the 3rd September, 2009, and the fact that the initial purchase, subsequent mortgage repayments and the addition of the extension cannot be explained by legitimate earnings as a carpenter or car dealer leads inescapably to the conclusion that the property at 116 Huntstown Avenue does indeed constitute directly or indirectly the proceeds of crime.

26. A number of points have been taken on behalf of the respondent. First it is said that if the suggestion is that the initial purchase of 116 Huntstown Avenue was part funded by the social welfare fraud in Britain that this would not allow for the making of an order under section 3. The point made is that the criminal activity in question, at the time it occurred, would not have provided or permitted the making of an order under the Proceeds of Crime Act.

27. However, the argument made is not supported by the language of the Act. Criminal conduct is defined in the Act as follows:-

"Criminal conduct means any conduct –

(a) which constitutes an offence or more than one offence, or

(b) which occurs outside the State and which would constitute an offence or more than one offence –

(i) if it occurred within the State

(ii) if it constituted an offence under the law of the state or territory concerned, and

(iii) if at the time when the application is being made for an interim order or an interlocutory order, any property obtained or received at any time (whether before or after the passing of this Act) by or as a result of or in connection with the conduct is situated within the State."

28. The definition is not in any event time limited but rather the focus is on the nature of the conduct. Also relevant is the definition of proceeds of crime which is as follows:

"Proceeds of crime means any property obtained or received at any time (whether before or after the passing of this Act) by or as a result of or in connection with criminal conduct."

29. Having regard to the statutory definitions, I am therefore of the view that the fact that the criminal activity in Britain may have occurred before the enactment of the Proceeds of Crime Act does not prevent the making of the order sought.

30. In addition, it is argued that even if it was accepted that some or all of the funds to purchase and maintain the property constituted the proceeds of crime, that it would constitute a real injustice to make an order. It is pointed out that the property is a

family home, that the first named respondent is the father of five children and is now dependent on social welfare while his partner works as a lowly paid care assistant and that the family would find it very difficult to secure alternative accommodation. It is also pointed out that the first named respondent has been diagnosed with cancer and has undergone surgery. In this regard, it is clear from the established jurisprudence in this area that the mere fact that the property is a family home is not a bar to the making of an order under section 3. Neither in my view is the first named respondent's medical situation a reason for not making the order sought at this stage. There are some matters here though which can be considered further in the context of a section 4 application, particularly given that the respondent did have some sources of legitimate income.

31. In summary then in light of the conclusions that I have reached I must make the order sought under s. 3 of the legislation.