

**THE HIGH COURT
JUDICIAL REVIEW**

[2006 No. 816 JR]

BETWEEN

**DYLAN CREAVERN SILICON TECHNOLOGIES (EUROPE) LIMITED AND
BRADENVILLE HOLDINGS LIMITED**

APPLICANTS

**AND
DISTRICT JUDGE PATRICK CLYNE AND
THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM**

RESPONDENTS**Judgment of Mr. Justice Clarke delivered the 6th October, 2006.****1. Introduction.**

1.1 This matter came on for hearing as an urgent application during the long vacation. The reason for the urgency was that the issue raised in the proceedings had the potential to have a significant effect on criminal proceedings pending in the United Kingdom. Leave to seek Judicial Review of a production order made by the respondent District Judge on the 30th June, 2006, was given by Peart J. on 10th July, 2006. The purpose of the production order was to make certain documents (to which I will refer in more detail later in the course of this judgment) available to the prosecuting authorities in the United Kingdom for the purposes of that pending criminal trial. The applicants contend that the production order of the respondent District Judge was made in circumstances where no jurisdiction to make such an order existed.

1.2 By virtue of the urgency of the matter I indicated to the parties at the close of the argument that I would consider the matter over a short number of days and inform the parties of my conclusion concerning the issues raised in these proceedings but reserve the delivery of a detailed written judgment until a later date. On that basis I indicated to the parties that, in general terms, I agreed with the submissions made on behalf of the applicants and proposed making an order of certiorari quashing the production order. The purpose of this judgment is to set out, in detail, my reasons for coming to that view.

2. Background

2.1 On Friday 30th June, 2006, on the direction of the second named respondent ("The Minister") an application was made to the respondent District Judge for a production order pursuant to the terms of s. 55 and 63 of the Criminal Justice Act, 1994, as amended. The application was successful and the production order was duly made.

2.2 The material which was the subject of the production order had already been seized, in November 2002, from various premises on foot of five different search warrants issued under s. 55 of the Criminal Justice Act, 1994 as amended together with eight warrants issued under s. 14 of the Criminal Assets Bureau Act, 1996. The relevant premises, from which the material was seized, were connected with one or other of the applicants or their advisors. The material consisted of a very large volume of business documentation.

2.3 A challenge was brought to the validity of the relevant warrants which was substantially successful both in this court and, on appeal, in the Supreme Court. However by that time all of the relevant material had been transmitted to the United Kingdom on foot of a request for international mutual assistance arising out of an investigation being conducted by HM Customs and Excise in the United Kingdom into an alleged VAT carousel fraud. The first named applicant ("Mr. Creaven") was arrested, tried and acquitted in the United Kingdom of such charges. However charges remain outstanding and were, at the time of the hearing before me, pending against other persons connected with the same investigation.

2.4 On foot of the quashing of the relevant orders, the relevant material (or at least most of it) was returned from the United Kingdom to this jurisdiction. There it was placed in the possession of the Criminal Assets Bureau. There was a dispute as to certain documentation which, it is contended, may have gone missing. However, in any event, the material remained in the possession of the Criminal Assets Bureau up and until the making of the production orders by the respondent District Judge.

2.5 It would, however, appear that the applicants were, in principle, entitled to the return of the relevant documentation and that same was, at all material times, the property of one or other of the applicants. In that context it is necessary to turn to the basis put forward for the making of the production order.

3. The Production Order

3.1 The process commenced with a letter of request to the Minister written on behalf of the United Kingdom Secretary of State at the Home Office dated 5th May, 2006, incorporating a more detailed request from the United Kingdom Director of Revenue and Customs Prosecutions ("DRCP").

3.2 It is unnecessary to set out in detail the basis for that request. For the purposes of this application it is necessary only to note that the stated basis for the relevant materials being required can be principally found in paragraphs 2 and 3 of part 2 of the detailed request from the DRCP which states as follows:

"2. As part of the prosecutors continuing duties in relation to disclosure of unused material, an obligation exists to provide material to the defence that has the capacity to suggest potential submissions that could lead, inter alia, to the exclusion of evidence or a stay of proceedings.

3. The prosecutor takes the view that in the light of Mr. Creaven's contact with the Irish Revenue Commissioners and his provision of witness statements prior to his arrest, there may be a desire on the part of this defendants representatives to rely, at least, partly, on such information in an application to stay proceedings against him."

3.3 It is, therefore, clear that the purpose for which the letter of request was issued was to comply with the disclosure obligations of the United Kingdom Prosecution Authorities to the occurred in the pending proceedings. It was not contested at the hearing before me that it was, therefore, open to the respondent District Judge to form the view that there was a basis for considering that the materials were potentially relevant to that pending criminal trial. The issue which arises in this case is as to whether or not that consideration is a sufficient basis in law for the making of the Production Order. Against that background it is necessary to turn to the basis of the applicants challenge to the Production Order.

4. The Challenge.

4.1 The challenge to the order and the competing arguments of the parties can be simply put. The applicants contend that on a proper construction of the relevant statutory provisions, no jurisdiction exists (save in specific and limited cases not relevant to these proceedings) to make a production order of the type actually made by the respondent District Judge in this case, in aid of a substantive criminal trial in a foreign jurisdiction as opposed to circumstances where, post conviction, there is before the criminal courts in the relevant foreign jurisdiction a confiscation process analogous to the similar regime which exists in this jurisdiction.

4.2 In other words the applicants contend that production orders can only be made to assist forgiven prosecuting authorities in a post conviction confiscation process rather than for a substantive criminal trial.

To understand the competing arguments of the parties on that issue it is necessary to turn to the relevant statutory regime.

5. The Statutory Regime.

5.1 Section 63(1) of the Criminal Justice Act 1994 ("the 1994 Act") provided, as originally enacted, as follows:

"A member of the Garda Síochána may, for the purpose of an investigation into drug trafficking or an offence under section 31 of this Act or an investigation into whether a person has benefited from drug trafficking or an offence in respect of which a confiscation order might be made under section 9 of this Act, apply to a judge of the District Court for an order under subsection (2) of this section in relation to any particular material or material of a particular description."

5.2 That section was amended by s. 39 of the Criminal Justice (Terrorists Offences) Act 2005, (" the 2005 Act"), which operates to substitute a new sub-section 1 in the following terms:

"(1) A member of the Garda Síochána may apply to a judge of the District Court for an order under subsection (2) of this section in relation to any particular material, or material of a particular description, for the purpose of an investigation into any of the following matters:

- (a) drug trafficking,
- (b) the commission of an offence of financing terrorism,
- (c) the commission of an offence under section 31 of this Act,
- (d) whether a person has benefited from drug trafficking,
- (e) whether a person holds funds subject to confiscation,
- (f) whether a person has benefited from an offence in respect of which a confiscation order might be made under section 9 of this Act."

5.3 Similarly s. 63(2) of the 1994 Act as originally enacted, empowers a judge to make a Production Order where satisfied that certain conditions are fulfilled. The relevant conditions are set out in s. 63(4) which states in material part:

"The conditions referred to in subsection (2) of this section are-

- (a) that there are reasonable grounds for suspecting that a specified person has carried on drug trafficking or has committed an offence under section 31 of this Act or has benefited from drug trafficking or from an offence in respect of which a confiscation order might be made under section 9 of this Act."

5.4 That section has again been amended by the 2005 Act and now reads as follows:

"(a) that there are reasonable grounds for suspecting that a specified person-

- (i) has carried on drug trafficking,
- (ii) has committed an offence of financing terrorism,
- (iii) has committed an offence under section 31 of this Act,
- (iv) has benefited from drug trafficking,
- (v) holds funds subject to confiscation, or,
- (vi) has benefited from an offence in respect of which a confiscation order might be made under section 9 of this Act."

5.5 The 2005 Act was in force when the Production Order in this case was made.

5.6 There is no question of there being, in the United Kingdom, of any relevance to these matters, any investigation into any of the matters set out at sub-ss. (a) to (e) of s. 63(1) as amended.

5.7 In substance therefore, in order for the respondent District Judge to make the production order concerned, he would need to have been satisfied that the material sought were required for the purposes of an investigation into "whether a person has benefited from an offence in respect of which a confiscation order might be made under s. 9 of this Act" and would also need to be satisfied that there were reasonable grounds for suspecting that a specified person "has benefited from an offence in respect of which a confiscation order might be made under s. 9 of this Act".

5.8 None of the other provisions in the relevant sections are material. The net question between the parties is as to whether those two provisions permit the making of a production order in aid of a substantive criminal trial which might, theoretically, give rise to a confiscation order application after conviction or whether the making of production orders are confined to the confiscation process itself. Before going on to consider that net issue it is, however, necessary to make some reference to other provisions of the 1994

Act.

5.9 Section 63 itself is, of course, concerned with the making of production orders in aid of investigations within the State. However its provisions are made applicable in the sphere of international mutual assistance by reason of the provisions of s. 55(2) of the 1994 Act, which states as follows:

"Section 63 of this Act shall have effect as if references in that section to drug trafficking or an offence in respect of which a confiscation order might be made under section 9 of this Act included any conduct which is an offence under the law of a country or territory outside the State and would constitute drug trafficking or an offence in respect of which a confiscation order might be made under section 9 of this Act if it had occurred in the State."

5.10 It is clear, therefore, that where there is an analogous regime in place in a country which seeks mutual assistance, then a production order can be made for the purposes of assisting a criminal investigation in the requesting country concerned. However it is equally clear that the parameters within which a production order can be properly made for the purposes of providing mutual assistance to a foreign country are the same as those which apply in this jurisdiction. Whatever are the limits on the jurisdiction to make production orders in aid of the Irish criminal process, those limits apply equally to mutual assistance in respect of a foreign criminal process. While, therefore, strictly speaking, the production order in this case was governed by s. 55(2) of the 1994 Act it is, in practice, governed by whatever limitations may be found in or may be derived from a proper construction of s. 63.

5.11 It is also necessary to refer to s. 9 of the 1994 Act, which makes provision for confiscation orders.

Section 9 provides as follows:

"1. Where a person has been sentenced or otherwise dealt with in respect of an offence, other than a drug trafficking offence, of which he has been convicted on indictment, then, if an application is made, or caused to be made, to the court by the Director of Public Prosecutions the court may, subject to the provisions of this section, make a confiscation order under this section requiring the person concerned to pay such sum as the court thinks fit.

2. An application under this section may be made if it appears to the Director of Public Prosecutions that the person concerned has benefited from the offence of which he is convicted or from that offence taken together with some other offence (not being a drug trafficking offence) of which he is convicted in the same proceedings or which the court has taken into consideration in determining his sentence.

3. An application under subsection (1) of this section may be made at the conclusion of the proceedings at which the person is sentenced or otherwise dealt with or may be made at a later stage.

4. For the purposes of this Act, a person benefits from an offence other than a drug trafficking offence if he obtains property as a result of or in connection with the commission of that offence and his benefit is the value of the property so obtained.

5. Where a person derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this section as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage.

6. The amount to be recovered by an order under this section shall not exceed-

(a) the amount of the benefit or pecuniary advantage which the court is satisfied that a person has obtained, or

(b) the amount appearing to the court to be the amount that might be realised at the time the order is made, whichever is the less.

(7) The standard of proof required to determine any question arising under this Act as to—

(a) whether a person has benefited as mentioned in subsection (2) of this section, or

(b) the amount to be recovered in his case by virtue of this section, shall be that applicable in civil proceedings."

5.12 Section 9 has also been amended by the 2005 Act, but solely by the addition in sub-ss. (1), (2), and (4) of reference to an offence of financing terrorism as an exclusion in addition to drug trafficking offences.

5.13 It is therefore clear that s. 9 applies, in principle, to all offences other than those in respect of drug trafficking and financing terrorism for which alternative regimes are in place.

5.14 It is also clear that an application under s. 9 can only occur at or after the sentencing process in respect of a person convicted of the offence concerned and where that conviction has occurred on indictment.

5.15 Leaving aside, therefore, the limited exceptions in respect of which an alternative regime is in place, the section can, in principle, apply to any offence in respect of which a person may be tried on indictment. However in those cases where a trial on indictment is possible but not mandatory, it is clear that the section only applies where the prosecution is, in fact, on indictment.

5.16 On the basis of that statutory regime it is now necessary to turn to the arguments put forward by the parties as to the proper interpretation of s. 63.

6. The argument

6.1 In the course of developing the arguments on both sides, the question of the proper construction of the relevant provisions of s. 63 came down to two competing contentions.

6.2 On behalf of the State it was argued that an investigation into "whether a person has benefited from an offence in respect of which a confiscation order might be made under s. 9" involved two separate requirements. Firstly that there be an offence and

secondly that it be an offence in respect of which, post conviction, it might reasonably be expected that a confiscation order might be sought. On that basis it was submitted that an investigation, within the meaning of the subsection, included an investigation into the substantive offence itself, on the basis that an investigation into the substantive offence was part of the process which might ultimately lead to a confiscation order.

6.3 In reply Counsel for the applicants suggested that the only reasonable basis for there being a reference to s. 9 confiscation orders in s. 63 was for the purposes of confining the making of production orders to investigations in respect of the confiscation process itself. He argued that if it had been the intention of the Oireachtas to provide that production orders could be made as part of the investigation into the substantive offence (and having regard to the fact that s. 9 orders can, for the reasons I have set out above, be made in respect of any offence save for the limited and, to these proceedings irrelevant, exceptions), the statute could easily have said so and provided the production orders could be made in aid of any prosecution (or at least any prosecution on indictment).

7. Conclusions

7.1 It is important to note that in order to justify the making of a production order there must be an investigation into whether a person has benefited from an offence in respect of which a confiscation order might be made. It seems to me that the natural meaning of the provision as drafted concentrates on the investigation into the benefit. It is, of course, the case that certain types of offences lend themselves more naturally to the possibility of an application for a confiscation order being made post conviction. Cases of fraud are an obvious example. Assuming the fraud to have been successful then it is likely that the persons guilty of fraudulent activity would have benefited and will, therefore, be open to the possibility of a confiscation order. However the fact that it might be reasonable to assume that the United Kingdom prosecution authorities might well consider applying for a confiscation order in the event of securing a conviction on indictment does not mean that, properly speaking, there can be said to be an investigation into whether a person has benefited or, at a minimum, even if there be such an investigation whether the materials the subject of the production order in this case could be said to be relevant to that inquiry.

7.2 For the reasons which I have set out above it is clear that the materials sought by means of the production order would not appear to have been directed towards any inquiry as to whether the accused had benefited from crime. Rather the materials were required as part of the substantive criminal process on foot of the disclosure obligations placed upon the United Kingdom prosecuting authorities. In those circumstances the relevant materials would have no relevance to an inquiry into whether the accused currently before the United Kingdom courts has benefited from crime. The materials could only, therefore, come within the scope of the section if, on a proper construction, the inquiry into whether a person had benefited from a relevant offence could be said to encompass the substantive inquiry into whether the offence was committed in the first place.

7.3 I was not satisfied that that was an appropriate construction to place upon the section. While it is undoubtedly the case that it is necessary for the prosecuting authorities to establish (in the criminal process) that an offence has been committed in order that a confiscation order can be made, it seems to me to be more appropriate to regard the successful (from the prosecution authorities point of view) conclusion to a criminal trial on indictment as amounting to a condition precedent to an application before a confiscation order can be applied for rather than being part of a single process ultimately leading to such a confiscation order. The natural wording of the section seems to me to concentrate on the inquiry into benefit rather than the offence itself.

7.4 In addition it is difficult to understand why there would have been any reference to "confiscation orders under s. 9" in the section if it had been intended that production orders made under sub-s. (1) (f) could be used in aid of the substantive criminal process. It would, as counsel for the applicants pointed out, amount to an extraordinarily convoluted means of stating something very simple if the intention of the Oireachtas had been to permit the making of confiscation orders in respect of the substantive criminal process under sub-s (1) (f).

7.5 I am therefore satisfied that both in its ordinary meaning, and having regard to what might be said to be the overall purpose of the legislation, the proper construction to place upon s. 63 requires that in order that materials be required for the purposes of an investigation covered by sub-s. (1) (f) there should be an investigation in being, into benefit which might lead to an application for a confiscation order. Furthermore the materials sought should be relevant to that investigation. In that context questions as to the proper approach to statutory construction do not seem to me to arise in this case.

7.6 I leave over for further consideration to a case when the issue specifically arises, an issue which arose in the course of argument as to whether it was necessary for there already to be in place a conviction, before a production order could validly be made in aid of an inquiry into benefit. It is at least open to argument that there might be a legitimate investigation into benefit in advance of a criminal trial so that the prosecution authorities would be in a position to present the case for a confiscation order at the sentencing hearing in the event that a conviction is secured. As will have been seen earlier in the course of this judgment s. 9 of the 1994 Act contemplates the possibility of a confiscation application taking place at the same time as the sentencing hearing. I would not rule out, therefore, the possibility that it may be permissible to conduct an inquiry, with the aid of s. 63, into benefit prior to conviction. However in order to invoke s. 63, for the reasons which I have set out, it seems to me that the materials sought would, in any event, have to be relevant to the inquiry into benefit rather than relevant to the substantive trial.

7.8 Finally I should deal briefly with an argument which was touched upon most particularly in the written submissions filed on behalf of the respondents. It is, of course, the case that where legislation is designed to implement Ireland's international obligations the court should have regard to those international obligations in construing any relevant implementing statute.

7.9 It would appear that Part VII of the 1994 Act, is designed to facilitate assistance in international criminal investigations or prosecutions and permits Ireland to comply with its obligations under the 1959 Council of Europe Convention on mutual assistance in criminal matters. The application for assistance in this case was made by the United Kingdom authorities under the terms of Article 3 of that Convention.

The provisions of Article 3 of the Convention state as follows:

- "1. The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.
2. If the requesting Party desires witnesses or experts to give evidence on oath, it shall expressly so request, and the requested Party shall comply with the request if the law of its country does not prohibit it.
3. The requested Party may transmit certified copies or certified photostat copies of records or documents requested,

unless the requesting Party expressly requests the transmission of originals, in which case the requested Party shall make every effort to comply with the request.”

7.10 It is clear, therefore, that the Convention does not require any particular form of procedure or process to be engaged in by the requested country. Rather those matters are left to be determined “in the manner prescribed for by its law”. There is nothing, therefore, in the Convention that would require that a broader meaning be given to the entitlement to seek a production order on foot of a request for mutual assistance than would be given in respect of the entitlement of the Irish authorities to seek such an order in relation to a purely domestic investigation. Equally there was clearly nothing on the facts of this case which would necessarily have prevented other procedural processes being put in place (such as search warrants or the taking of evidence) in aid of the United Kingdom prosecution.

7.11 The limitation which I have found is inherent in s. 63 applies in exactly the same way in relation to Irish or foreign investigations. A requesting country therefore will have the same access to materials for the purposes of its investigations as appropriate Irish authorities. In all those circumstances it does not seem to me that there is a need to depart from what would otherwise be the appropriate construction of s. 63 for the purposes of ensuring compliance with Ireland’s international obligations.

7.12 For those reasons I, therefore, came to the view that the proper construction of s. 63 limited production orders to circumstances where the materials sought were required for the purposes of an investigation into benefit. There was no suggestion on the facts of this case that the materials the subject of the production order were required for such a purpose. On that basis it did not seem to me that the respondent District Judge had jurisdiction to make the production order in this case and it therefore follows that an order of certiorari should be directed to the production order in question.