



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 371

Record Numbers: 2018/269

IN THE MATTER OF THE PROCEEDS OF CRIME ACTS 1996 TO 2006

**Peart J.
Irvine J.
Whelan J.**

BETWEEN/

CRIMINAL ASSETS BUREAU

RESPONDENT

- AND -

MARGARET CONNORS

APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 29th day of November 2018

1. This is the appeal of Margaret Connors, the appellant, against the order of the High Court (Stewart J.) of the 11th June 2018.
2. By her order, the High Court judge refused an application made by Mrs. Connors to stay the within proceedings until:-
 - (i) the determination by the High Court of her appeal against the court's refusal to afford her legal aid under the ad hoc legal aid scheme and/or
 - (ii) the conclusion of certain criminal proceedings then pending before the Circuit Criminal Court.

Background to the application

3. On the 17th May 2016 Mrs. Connors was stopped by An Garda Síochána when driving her car on the Tallaght bypass. She was arrested and detained under the Misuse of Drugs Act (Section 23). No drugs were detected but she was found to be in possession of GBP£13,000, €8,000 and items of jewellery worth €4,000. These were seized under s. 7 of the Criminal Law Act 1976.
4. Mrs. Connors was later charged with money laundering contrary to s. 7 of the Criminal Justice Money Laundering and Terrorist Financing Act 2010 and her criminal trial is scheduled to commence on the 27th February next in the Dublin Circuit Criminal Court. She has been granted legal aid for the purposes of defending those proceedings.
5. Mrs. Connors is, of course, also the respondent to the within proceedings brought by the Criminal Assets Bureau under s. 3 of the Proceeds of Crime Act 1996-2006 ("the CAB proceedings") and that being so, she brought an application seeking legal aid under the ad hoc legal aid scheme legal aid to assist her in her defence of CAB's claim. That application was refused by order of the High Court of the 23rd June 2017 and her appeal against that refusal is due to be heard on the 4th February 2019.

Submissions on the appeal

6. In support of her appeal against the order of the High Court judge refusing to stay the CAB proceedings, Ms Moloney BL on behalf of Mrs Connors, submits that the High Court judge erred in law in failing to properly apply the principles set out in the decision of the Supreme Court in *Campus Oil v. Minister for Industry and Energy (No 2)* [1983] I.R. 88. She maintains that the balance of convenience or, the balance of justice (as she described the test) clearly favoured granting the stay. Counsel emphasised the risk of prejudice to her client if required to engage with the CAB proceedings prior to her criminal trial, particularly given that Mrs Connors would likely not be legally represented in the CAB proceedings. That was to be contrasted with the absence of any prejudice to CAB if the CAB proceedings were to be adjourned for the short period of time that would be required to allow the criminal proceedings be determined. Further, there would be no risk to the property seized by CAB as it would remain in its custody allied to the fact that even if CAB was successful in the within proceedings, it might not be in a position to dispose of the property for another seven years.
7. Ms Moloney also submits that the High Court judge erred in law in refusing the stay in circumstances where the relevant case law cautions against core issues that might arise in the criminal trial being dealt with in any proceedings that might be heard in advance of the trial.
8. One of the core issues in the CAB proceedings, according to counsel, will be the admissibility of the evidence obtained on foot of the search of Mrs Connor's car and the subsequent seizure by the respondent of the property that the subject matter of the criminal proceedings. There is, Ms Moloney submits, a risk that any decision made concerning the admissibility of that evidence could prejudice Mrs Connors in her defence of the criminal proceedings. Likewise, there is a risk that she could be prejudiced by her own evidence in the CAB proceedings, apart altogether from the fact that she might also be prejudiced by other findings made by the High Court judge.

9. On behalf of Mrs. Connors it is submitted that the balance of justice favoured granting the stay which she had sought and for this reason this court should grant the stay which was refused at first instance by Stewart J.

10. Finally, in light of the grounds of appeal and the written submissions filed, it is important to record that counsel did not seek to argue that the High Court judge had erred in law in concluding, as she did, that Mrs Connors was not entitled to seek a stay on the CAB proceedings to await the outcome of her appeal against the refusal of a legal aid certificate under the ad hoc scheme, given that a similar application had earlier been made and had been refused on the 22nd January 2018. It appears that it has been belatedly accepted that the High Court judge was correct to conclude that this issue was, as was contended for by the respondent, *res judicata*.

11. On behalf of CAB, it is submitted by Mr Dodd BL that the test to be applied by a High Court judge when faced with an application to stay civil proceedings pending the outcome of criminal proceedings is not that which emerges from the decision in *Campus Oil*. That judgment deals with the test to be applied by the court on an application for an interlocutory injunction in an action where the substantive rights of the parties will ultimately be determined in the same proceedings at a plenary hearing.

12. There is, according to counsel, a different and distinct line of jurisprudence which identifies the factors to be considered by a court when asked to postpone civil proceedings to await the outcome of criminal proceedings. Reliance is placed upon the decisions in *Dillon v. Dunnes Stores* [1996] I.R. 397, *Wicklow Co. Council v. O'Reilly* [2006] 3 I.R. 623 and *C.G. v. Appeal Commissioners* [2005] 2 I.R. 223. Accordingly, it cannot be stated that the High Court judge applied the wrong test.

13. Mr Dodd submits that the onus was on Mrs Connors to establish a real risk of prejudice if the within proceedings were to be heard in advance of her criminal trial and she had not done so. The High Court judge had, in her judgement, made rulings concerning how the CAB proceedings would be conducted so as to protect against any prejudice that might otherwise occur by allowing those proceedings be determined prior to the criminal trial.

14. Counsel relies upon the fact that in a significant percentage of the claims brought by CAB under s. 3 of the Act there are co-existing criminal proceedings. In that respect there is nothing unique about the facts of the present case. And, if Mrs Connors can rightfully maintain an entitlement to have these proceedings stayed pending the outcome of the criminal trial, then all respondents in similar circumstances would enjoy a like entitlement, thus significantly slowing down the administration of justice.

Discussion and Decision

15. The decision in *C.G. v. The Appeal Commissioners*, a case in which the Revenue (Criminal Assets Bureau) was the Notice Party, is instructive on the proper approach to be adopted by a court when faced with an application to adjourn civil proceedings pending the outcome of criminal proceedings concerning the same or similar matters. The applicant, C.G., had appealed an income tax assessment by the Notice Party in respect of nine periods of assessment. There were also criminal proceedings pending against him in respect of his alleged failure to make tax returns for three of the years relevant to his income tax appeal. He applied to the respondent to adjourn his appeal pending the outcome of his criminal trial but that application was refused. C.G. then applied to the High Court for an order of *Certiorari* quashing that refusal and he also sought an injunction restraining the respondent from proceeding with this appeal pending the determination of the criminal proceedings.

16. In the course of her judgement, Finlay Geoghegan J. set out the principles to be applied by a court when met with an application to stay civil proceedings pending the outcome of criminal proceedings. She took as her starting point the decision of the Supreme Court in *Dillon v. Dunnes Stores* [1996] I.R. 397 where O'Dálaigh C.J. stated as follows:-

"As the plaintiff could not have had an order to postpone the criminal proceedings until the termination of the civil action, equally the hearing of the civil action cannot be required to await the conclusion of the criminal proceedings. No considerations of public policy are in question."

17. Finlay Geoghegan J. at page 479 of her judgment went on to state:-

"Likewise it is common case between the parties that each application to adjourn proceedings of civil nature pending the determination of criminal proceedings must be determined on its own facts....., that the onus on the applicant is to establish that there is a real risk of prejudice or injustice if the tax appeal proceeds."

18. In refusing the injunction application, the following is what was stated by Finlay Geoghegan J. at para 28 of her judgement concerning the submissions of the respondent:

"I am satisfied that each of the above submissions is well-founded. On the particular facts of this appeal I do not consider that the applicant has established that there is a real risk of prejudice or injustice if he were now to be required to proceed with this tax appeal which warrants a court granting an injunction even in respect of the appeals relating to the same years' assessment as the pending criminal charges. There is no evidence at present which suggests that the applicant will be required to give evidence of a self-incrimination nature at the hearing of the tax appeal. If there are different relevant facts then it is a matter to be considered and decided by the respondent, bearing in mind that it will be a matter for the trial judge at the criminal trial to ensure by appropriate rulings that there is no breach of the applicant's rights under Article 38.1 of the Constitution in accordance with the above principles."

19. The principles outlined in C.G. have been approved of in many more recent decisions including that of Clarke J., as he then was, in *Wicklow County Council v. John O'Reilly* wherein he emphasised the importance of protecting a plaintiff's right to achieve a timely resolution in their civil proceedings and confirmed that the onus is on an applicant who seeks to postpone civil proceedings to await the outcome of criminal proceedings to establish that there would be a real risk of prejudice or injustice if the civil case were allowed to proceed. Each case had to be judged on its own facts to assess whether there was a real danger of causing an injustice in the criminal proceedings by allowing the civil proceedings advance. Clarke J. summarised the legal position at para 35 of his judgement in the following terms:

"It would, therefore, appear that there is no hard and fast rule as to how contemporaneous civil and criminal proceedings arising out of the same matter should be progressed. It is clear that the onus rests on the party seeking a stay of the civil proceedings to establish the grounds necessary to enable the court so to do. In coming to any such assessment the court must, on the one hand, give due recognition to the importance of allowing the plaintiff or other moving party in the civil proceedings to achieve a timely resolution of those proceedings and obtain the benefit of any orders which might be appropriate. On the other hand the court has to balance, as against that, the extent to which there may be a real risk that prejudice might be caused to the criminal proceedings. I am satisfied that in giving consideration to this latter matter

the court must attempt to analyse the likelihood of there being any such prejudice and have regard to the extent to which it may be possible by measures to be adopted in the criminal process to minimise or ameliorate any such prejudices might arise."

20. To the aforementioned statement of Clarke J. I would add that, in my view, the court should also consider the extent to which *in the course of the proposed civil proceedings* the judge might, by reason of any relevant statutory provision or otherwise, be in a position to minimise, ameliorate or otherwise further safeguard the applicant from any potential prejudice in the criminal proceedings.

21. Of particular importance in these proceedings is what was stated by the trial judge at para 13 of the transcript where she observed that whilst it was customary in the vast majority of contested s. 3 applications for the respondent to explain on affidavit how the property the subject matter of the application came into their possession, that s. 9(2) of the Proceeds of Crime Act 1996, as amended by s. 11 of the Proceeds of Crime (Amendment) Act 2005, provides that any such affidavit is not admissible in criminal proceedings. The section, insofar as it refers to such an affidavit, provides as follows:

"(2) Such an affidavit is not admissible in evidence in any criminal proceedings against that person or his or her spouse, except proceedings for perjury arising from statements in the affidavit."

22. The High Court judge, in the course of her ruling, went even further for the purposes of seeking to protect Mrs Connors from any potential prejudice in that she directed that not only would any affidavit sworn by her pursuant to s.9 not be admissible in the criminal proceedings but she would also direct that "any evidence" given in the course of the s. 3 proceedings would not be admissible in the criminal proceedings. She did so for the stated reason of seeking to protect Mrs Connors from any possible prejudice that might arise for her in her criminal proceedings if it happened that she was to be cross examined on her affidavit in the course of the CAB proceedings and her evidence sought to be introduced in the criminal proceedings.

23. Further, the High Court judge gave directions that the provisions of s. 8(3) and (4) of the 1996 Act were to be deployed in the CAB proceedings and that this direction would have the effect of protecting Mrs. Connors further from prejudice in the context of her criminal proceedings. The CAB proceedings would be heard in camera and she would make an order prohibiting the publication of any information in relation to the application.

24. These sections provide as follows:

"(3) Proceedings under this Act in relation to an interim order shall be heard otherwise than in public and any other proceedings under this act may, if the respondent are any other party to the proceedings (other than the applicant) so requests and the court considers it proper, be heard otherwise than in public.

(4) The court may, if it considers it appropriate to do so, prohibit the publication of such information as it may determine in relation to proceedings under this act, including information in relation to applications for, the making or refusal of and the contents of orders under this act and the persons to whom they relate."

25. Whilst counsel for Mrs Connors expressed concern that any finding by the High Court judge made in the context of the s. 3 proceedings concerning the validity of the search and seizure conducted by officers of CAB might be admitted to her detriment in the criminal proceedings, that is clearly not the case. Every element of the offence with which she has been charged under s. 7 of the Criminal Justice Money Laundering and Terrorist Financing Act 2010 will have to be established in the course of the criminal trial and her guilt proved on the higher criminal standard. Nothing that may occur in the course of the s.3 proceedings will prejudice Mrs Connors in terms of the arguments she may wish to make in the course of the criminal proceedings concerning the lawfulness of the search and seizure carried out by the officers of CAB or the admissibility of evidence as a result thereof. And, it will be for the judge in charge of that trial to ensure, as was referred to by Finlay Geoghegan J in C.G. "to ensure by appropriate rulings that there is no breach of the applicant's rights under Article 38.1 of the Constitution."

26. Relevant also, in my view, to the exercise by the court of its discretion on an application such as the present one is the fact that it is clear from the Proceeds of Crime Act, 1996 that it is envisaged that there will be both civil and criminal proceedings relating to the same activities in existence at the same time. Accordingly, there are significant public policy reasons, in my view, as to why the civil proceedings, such as those which emanate from s. 3 of the act, should not be postponed until the determination of any criminal proceedings concerning the same activities.

27. Having reviewed the evidence that was before the High Court judge and considered the submissions that were apparently made on her behalf, I am first of all satisfied that the High Court judge applied the correct principles when met with Mrs Connors application to stay the proceedings pending the determination of the criminal proceedings. The test is not that advised in *Campus Oil*. It is the test identified by Finlay Geoghegan J. in C.G, amongst other decisions. To that extent I would here restate that the onus is on the applicant who seeks to postpone civil proceedings to await the outcome of criminal proceedings to establish a real risk of prejudice if the stay is refused. It is a high threshold and one which is not susceptible to reduction or offset by the happenstance that the applicant may be in a position to establish that the plaintiff in the civil proceedings may not be prejudiced by any delay that might thereby be visited upon the civil proceedings.

28. Second, the High Court judge correctly considered the manner in which the s. 3 proceedings might impact upon the criminal proceedings and in order to ameliorate any unnecessary risk of prejudice to Mrs Connors gave a number of directions in accordance with the provisions of the 1996 Act which were to her benefit. After noting that any affidavits sworn by Mrs. Connors could not be admitted in the criminal proceedings, she directed that *any evidence* given in the s. 3 proceedings would not be admissible in the criminal proceedings. She also directed that the s. 3 proceedings be heard in camera and imposed reporting restrictions as earlier advised.

29. Third, I am satisfied that the High Court judge, particularly having regard to the directions to which I have just referred, was correct as a matter of law and fact when she concluded that Mrs Connors had not established that she was at a real risk of prejudice if the s.3 proceedings were heard and determined in advance of the criminal proceedings. As already stated, every application must be treated separately by the court and decided on its own facts. And, Mrs Connors had not identified any specific facts pertinent to the s. 3 proceedings to support what was otherwise a bald assertion that she would be prejudiced if those proceedings were not stayed pending the outcome of the criminal trial. This may well be because she was under the misapprehension that she was entitled to a stay once she could establish that the duration of any such stay as might be granted was likely to be modest and the resultant prejudice to CAB insignificant.

30. Fourth, as was stated by Clarke J. in *Wicklow Co Council v. O'Reilly* the court must give due regard to the importance of allowing a

plaintiff move ahead in civil proceedings to achieve a timely resolution of those proceedings. I consider this to be of even greater significance in the circumstances of the present case in which the legislation governing the civil proceedings envisages that there will, in many instances, be both civil and criminal proceedings relating to the same activity.

Conclusion

31. For the reasons earlier stated in this judgment I am satisfied that the High Court judge applied the correct test when considering Mrs Connors application to stay the s.3 proceedings until the determination of criminal proceedings. On the facts before her the High Court judge was correct to conclude that Mrs Connors could not establish that she would be at risk of real prejudice if the s. 3 proceedings were to be heard and determined in advance of her criminal proceedings. Furthermore, the High Court judge correctly sought to ameliorate the risks to which Mrs. Connors might be exposed in her criminal proceedings arising from the CAB proceedings by directing that no evidence heard in the s. 3 proceedings might be admitted in the criminal proceedings in addition to which she made orders under s. 8(3) and 8(4) of the 1996 Act. As already stated Mrs Connors will also benefit from the further protection which arises by reason of the provisions of s. 9(2) of that Act which precludes any affidavits sworn in those proceedings being admitted in criminal proceedings of the nature outstanding against Mrs O'Connor.

32. For all of the aforementioned reasons I would dismiss the appeal.