



THE COURT OF APPEAL

APPROVED

Record Number: 2023 236
High Court Record Number: 2021 19CAB
Neutral Citation Number [2024] IECA 13

Noonan J.

Binchy J.

Butler J.

IN THE MATTER OF THE PROCEEDS OF CRIME ACTS, 1996 - 2016

BETWEEN/

CRIMINAL ASSETS BUREAU

APPLICANT/RESPONDENT

-AND-

MARY CASH (NEÉ KIELY)

RESPONDENT/APPELLANT

JUDGMENT of Mr Justice Noonan delivered *ex tempore* on the 18th day of January, 2024

1. This appeal is brought by the appellant (Ms. Cash) from the *ex tempore* judgment of the High Court (Owens J.) delivered on the 28th July, 2023.
2. On the application of the respondent (“CAB”), the High Court made various orders pursuant to the Proceeds of Crime Act, 1996 as amended, in relation to the property itemised in Schedule 2 to the said order. The order prohibited Ms. Cash from disposing of or dealing

with this property and appointed a receiver for the purpose of disposing of the property, other than the dwelling house. Schedule 2 to the order of the High Court lists 17 items which include a residential property, a motor car, various items of jewellery, handbags, and cash both in Euro and foreign currencies. This appeal is confined to the first item on the Schedule, being the property at 7 Harpur's Lane, Portlaoise, County Laois being the property comprised in Folio LS15101 which is claimed to be the family home of Ms. Cash.

Evidence in the High Court

3. Some 16 affidavits with extensive exhibits were put in evidence before the High Court and given the limited nature of this appeal, it is sufficient to provide a brief summary of that evidence. CAB's principal deponent was Detective Chief Superintendent Michael Gubbins, the Chief Bureau Officer. He avers that it is his belief, pursuant to s. 8(1) of the Proceeds of Crime Acts, this property constitutes directly or indirectly the proceeds of crime and/or that it was acquired in whole or in part with or in connection with property that, directly or indirectly, constitutes proceeds of crime and that the value of the property is not less than €5,000. The basis for his belief is summarised at para. 7 of his affidavit where he says:

"In summary, the grounds for the belief expressed in para. 5 include the following:

- (a) That the property the subject of this application represents the proceeds of crime, namely burglary.*
- (b) That significant amounts of cash from unknown sources in various currencies were located at the respondent's home, car and in her storage lock up, often concealed.*
- (c) The fact of the significant volume of expensive luxury goods (watches, jewellery, handbags, shoes) the subject of this application and/or that is*

apparent from the lifestyle review seen in the affidavit of Cian Stears already had herein when produced.

- (d) The fact that the respondent first came to the attention of the gardaí in Kilkenny when her child was spotted stealing toys from Argos while in her charge and in circumstances where she had no apparent connection to Kilkenny. This is detailed in the affidavit of Detective Garda Coleman already had herein when produced.*
- (e) That the respondent purchased her current vehicle, the Volkswagen Golf 171 D 47239 with, inter alia, €9,500 in cash in May 2018. She is also associated with a number of other high value vehicles over the years and the source of funds for same cannot be explained as Detective Garda Sarah Denvir sets out in her affidavit.*
- (f) The fact that the respondent's husband (Andrew Cash) is known to gardaí as being a member of an organised criminal group ('OCG') (together with, inter alia, the respondent's brother, Henry Kiely) which is involved in burglaries nationwide and who has a number of previous convictions and is currently awaiting trial on charges arising from a series of burglaries in the Cork and Waterford area, having tried to evade gardaí. I beg to refer to the affidavit of Detective Sergeant Niall O'Connell already had herein when produced. As can be seen therein, D/Sergeant O'Connell avers that Andrew Cash, the respondent and Henry Kiely are heavily involved in criminal behaviour throughout the island of Ireland travelling the length and breadth committing criminal offences for profit. Henry Kiely has a significant number of previous convictions also as set out in the affidavit of D/S*

O'Connell. The Respondent has convictions for road traffic offences but is now charged with nine counts of money laundering offences.

- (g) The fact that the respondent is believed to be the driver and/or to provide a car for her husband and the OCG. I beg to refer to the affidavits of Detective Sergeant Niall O'Connell and Detective Garda Paul Coleman already had herein when produced.*
- (h) That the respondent's income and expenditure as reflected in her bank accounts and lifestyle expenditure is wholly inconsistent with someone of her known lawful means. There have been vast cash lodgements coming into the respondent's bank account in various amounts which are unexplained. The respondent displays significant unexplained wealth unconnected to her known income. Indeed, the respondent has no legitimate income associated with her save for means tested social welfare payments and child benefit. The total lodgements in the ten year lifespan for the bank account was €429,081.04 - a sum not possibly derived from the income of the respondent or any returns made to Revenue. I beg to refer to the affidavit of Detective Garda Paul Coleman as well as the affidavit of Revenue Bureau Officer No. 68 already had herein when produced. When under interview with gardaí attached to the Criminal Assets Bureau, the respondent refused to account for the sources of income that have come into her possession.*
- (i) As set out in the affidavit of Detective Garda Sarah Denvir, for the years 2015 to 2019, the expenditure on the respondent's bank account does not reflect what one would expect to support a family of four. During this period, there are no obvious transactions in the respondent's bank account*

relating to food, clothes, fuel and other day to day associated costs. The absence of such transactions is suggestive of cash payments from the cash withdrawals recorded in the statements and/or access to cash income from another source which is not reflected in her accounts.

(j) As set out in the affidavit of Sarah Denvir already had herein when produced, some transactions on the respondent's bank account are labelled/ referenced by the person lodging as 'horse', 'horse sold' and 'car sold'. However, the respondent does not have access to property or land to support the ownership of horses. As Detective Garda Denvir observes, there is no evidence in the accounts of stable fees, stud fees, animal feed or in fact anything that would support the assertion that the respondent was or is the owner of a horse. Moreover there is no evidence of the payment for any horses in the accounts and thus, if it transpires that such exist, would suggest that they were funded from unknown sources.

(k) Again, as is set out in the affidavit of Detective Garda Sarah Denvir already had herein when produced, on the question of whether cars were sold at the time of the lodgements into the respondent's bank account, there is no information or supporting documents to corroborate the selling of vehicles around this time save the lodgement of €27,500 into the respondent's account on the 11th April, 2018 referable to Audi A6 171-D-7598 which is addressed at paragraph 29 in the said affidavit.

(l) The fact that the respondent's residential property at 7 Harpur's Lane, Portlaoise, which is the subject of this application, was purchased in November 2018 without the requirement for a mortgage for the sum of

€100,000 which, from a review of her bank account, derived from significant cash lodgements over the course of 2018. These lodgements are detailed in the affidavit of Detective Garda Sarah Denvir already had herein when produced. This property has been renovated as is set out in that affidavit and there is no evidence of the various furnishings and fittings having been paid for from her bank account.

(m) As set out in the affidavit of Social Welfare Bureau No. 93, the respondent's known income is primarily from means tested social welfare payments and which income would not amount to the significant sums that it is evident she has access to."

4. These averments by DCS Gubbins are supported by a number of affidavits from various investigating gardaí, officers of the Social Welfare Bureau and Revenue Bureau. In her first replying affidavit, Ms. Cash denies that any of the items the subject of CAB's application are proceeds of crime. She avers that she is a lone parent with two young children, being separated from her husband, although that is in dispute. She resides with her two children at 7 Harpur's Lane, Portlaoise.

5. With regard to the purchase of the latter property, she says that between October 2015 and March 2016, she moved to Australia with her husband and engaged in casual work as a cleaner, a childminder and an escort. She says that her husband worked casually during this period providing power washing services and gravelling and tarmacking services. She avers that arising from this work, they earned in the region of €150,000 which was either held in cash or lodged into an Australian bank account from where it was subsequently transferred into the Bank of Ireland account referred to by the CAB officers.

6. Ms. Cash also refers to sums of approximately €20,000 and €5,000 received in respect of legal claims in 2011. She used these sums to trade in horses, caravans and jewellery at various fairs run by members of the travelling community as well as private sales. She accepts that she paid no tax on the income derived from any of these transactions. She claims that this income was utilised to purchase all the items in the Schedule with the exception of the family home. The latter items are no longer in issue as already explained.

7. Accordingly, in relation to Ms. Cash's family home, which was purchased for €100,000 in cash in 2018, she avers that these funds were solely attributable to monies earned by her and her husband during a five month period in Australia between October 2015 and March 2016. In her first affidavit sworn on 31st January, 2022, Ms Cash avers as follows at para 9:

(1) *"However, the money earned while residing in Australia was either held in cash or lodged into an Australian bank account and subsequently transferred to an Irish bank account with Bank of Ireland with account number 17431720 to allow for the purchase of 7 Harpur's Lane..."*

8. This affidavit was replied to by Detective Garda Denvir. She avers that with regard to Ms. Cash's alleged earnings in Australia, there is no evidence of the €150,000 referred to by her in Ms. Cash's accounts nor any transfers from Australian bank accounts into her Bank of Ireland account. There is no evidence of Australian Dollars being lodged in cash to this account.

9. In a supplemental replying affidavit sworn on 4th November, 2022, Ms. Cash takes issue with Detective Garda Denvir's assertions. Ms. Cash says that she has now obtained relevant Australian bank accounts which show that the account was opened on the 4th March, 2015 and closed on the 30th December, 2015, dates which do not correspond with those given

in her first affidavit. She avers that arising from her work as a cleaner, childminder and escort in Australia, she deposited a total of €125,740 in cash into that bank account between March and December 2015. She says the following at para. 5:

“I say that arising from my work being a cleaner, child minder and an escort in Australia, I did deposit a total of €125,740.00 in cash into the bank account during the period from 4th March 2015 to 30th December 2015. I say that I did then utilise this money to purchase my home at 7 Harpur’s Lane...”

10. This affidavit is in turn replied to by a further affidavit of Detective Garda Denvir who had reviewed the Australian bank accounts. She notes that the sums lodged amount to AUS\$125,740 rather than Euro. Detective Denvir avers that the latter sums were transferred on various dates to the respondent’s Bank of Ireland account but thereafter, there are significant withdrawals reducing the balance to €2,771.12 by the 20th October, 2017. Detective Denvir avers that sums totalling in excess of €90,000 were lodged into the account between the 27th November, 2017 and the 11th April, 2018 and these were again reduced down by the 18th July, 2018 to €12.91. This was followed by a large volume of lodgments between the 22nd August and 11th October, 2018 when the balance was €100,573.16. It was from this latter sum that the payment for 7 Harpur’s Lane came. Detective Denvir therefore concludes that the monies transferred from Australia by Ms. Cash had all been expended by the 20th October, 2017, 13 months prior to the purchase of the house.

11. Shortly prior to the hearing of this matter in the High Court, Detective Denvir swore a further affidavit for the purpose of updating the court. In this affidavit, Detective Denvir avers that Ms. Cash pleaded guilty on the 18th July, 2023 at Kilkenny Circuit Court to money laundering charges.

Judgment of the High Court

12. Before delivering his short *ex tempore* judgment, the judge indicated that he wished to read all the papers again, particularly with regard to the various bank accounts, to re-familiarise himself with the issues before delivering the judgment a little over a week later. With regard to the Australian money, as the judge described it, he said that he concluded that the money was in fact whittled away on discretionary spending. He noted that all the money which was used to purchase the house came into the account within a few months.

13. It should be noted that there was evidence put before the court that in addition to the purchase price of the property, significant expenditure was incurred in relation to refurbishment, which was unexplained. The judge concluded that there was no real explanation in relation to the funds used to purchase the house or to refurbish it. He noted that there was significant money found by the gardaí hidden in the house and elsewhere which was the proceeds of crime and has now been admitted to be such by Ms. Cash.

14. Although the judge accepted that the Cash's may have been engaged in trading of some sort, he found that there was no real indication from their earnings that they could possibly have the sort of assets to assemble what he described as the sort of luxuries concerned, both in terms of goods and lifestyle, without resorting to the proceeds of crime. In this connection he observed:

“Very few people in this country can suddenly accumulate the guts of €100,000 by cash lodgments and, they are very obviously cash lodgements, and go off and purchase a house almost at the drop of a hat.”

15. The judge summarised his approach to the application as follows:

“The difficulty with these cases for respondents is that what I do when looking at them is I, firstly, look at the material that is put forward by the Bureau and their various witnesses, I then look at the belief evidence of the Chief Bureau Officer, that I am entitled to take into account, I form a view as to the reasonableness of that belief, I then have a look at what weight I give that belief and the overall evidence and once that is done, I assess whether a prima facie case has been made out on the balance of probabilities. After that, it is for the defendants to shift it away from the prima facie case by actually engaging with the various pieces of evidence in the affidavits, and, in this case, I have to say that there was a singular lack of engagement in relation to these matters and the various excuses, simply, did not hold weight.”

16. In the same vein, at the conclusion of his judgment, the judge said:

“The evidence put forward by Mary Cash or Kiely, depending on what she wants to call herself, is utterly unpersuasive...”

The Appeal

17. There is only one ground of appeal and it is admirably succinct. Ms. Cash contends that the trial judge erred in determining that CAB had satisfied the standard of proof pursuant to s. 8(2) of the Proceeds of Crime Act, 1996. That subsection provides simply that:

“The standard of proof required to determine any question arising under this Act shall be that applicable to civil proceedings.”

18. The appellant’s submissions, which again are brief and to the point, essentially rest upon the proposition that in preferring CAB’s evidence to that of Ms. Cash, the judge misapplied the relevant standard of proof, being on the balance of probabilities. It seems to

me that in essence, the appellant invites this Court to reach a different conclusion on the evidence than that arrived at by the High Court.

19. I think it important to recognise at the outset that this appeal is not a rehearing of the High Court application, although it seems to me that the appellant purports to treat it as such. The standard of review in cases based on affidavit evidence was considered by this Court in *AK v US* [2022] IECA 65 in which Murray J., on behalf of the Court, said:

“52. As explained in Ryanair Limited v Billigfleuge.de GmbH [2015] IESC 11, in cases of this kind the party appealing the decision bears the burden of demonstrating that the trial judge was incorrect in relation to the findings of fact which underpinned the decision so that ‘the appellant must establish an error in those findings that is such as to render the decision untenable’ (per Charleton J. at para. 5). Charleton J. explained this further in McDonagh v Sunday Newspapers Limited [2017] IESC 46 (at para. 163) as follows:

‘... the role of an appellate court in reassessing what in the court of trial was affidavit or documentary evidence is easier than when witnesses were involved, but even where that is the case, the party claiming that the trial judge assessed the facts wrongly bears the burden of proving that the trial judge was wrong.’”

20. The primary ground of appeal relied upon is that the judge was wrong to conclude that CAB had discharged the onus of proof in circumstances where there was a conflict of evidence in the affidavits on both sides which was unresolved by cross-examination. Reliance is placed on a passage in McGrath on Evidence (3rd Ed.) at para. 2.157 which states:

“So, in a case heard on affidavit, if there is a dispute of fact in relation to an issue and there is no cross-examination on the affidavits such that the trial judge cannot

determine which version of events is more probable, the issue will be determined against the party bearing the burden of proof.”

21. Counsel for Ms. Cash in written submissions contends that in relation to the money earned in Australia, there was an unresolved conflict which he characterises as follows (at para. 16):

“It is this money which the Respondent states was utilised over time to buy and sell horses, caravans and other goods which ultimately allowed her to purchase the Property for a sum of €100,000 in November 2018 without a mortgage”.

22. That submission in my view is not supported by the evidence. Ms. Cash states nothing of the kind. As appears above, Ms. Cash has sworn on two separate occasions in the clearest terms that the money earned in Australia was used to buy the house. Indeed, in her second affidavit, she does so in the teeth of the clear averment by Garda Denvir that this money could not have been utilised for the purchase. Instead of engaging with that evidence, she simply restates what was sworn in her previous affidavit, despite it now being obvious that it could simply not be true. Accordingly, this submission is quite misconceived. In truth, in my judgment there was in fact no real conflict on the affidavits which required resolution by cross-examination. Even if it could be said that there was such conflict, as *McGrath* notes in the passage above, the conflict should be resolved against the party who bears the burden of proof and in this case, CAB having established a *prima facie* case as the judge found, that onus rested on Ms Cash.

23. It seems to me that Ms. Cash has fallen far short of demonstrating any error in the approach of the trial judge to the evidence in this case, less still that his conclusions were untenable. The case clearly made on affidavit by the appellant was that the money for the

house came from earnings in Australia. A subsequent analysis of the Australian bank accounts by CAB officers demonstrated that this could not have been the case. The uncontroverted evidence was that virtually the entirety of the monies generated in Australia had been dissipated well in advance of the purchase of the house which was based on later very substantial lodgements that remained entirely unexplained.

24. I cannot see how it can be said that CAB had not established a *prima facie* case on the basis of the evidence to which I have referred. The evidence was clear to the point of being overwhelming that there was no, or no legitimate, explanation forthcoming for the source of the funds used to buy the dwelling house. That being so, the onus clearly shifted to Ms. Cash to rebut that *prima facie* case - see in that regard the judgment of the Supreme Court in *McK v D*. [2004] 2 IR 470 at 491 - 492. This is precisely the approach adopted by the trial judge here and in commenting on Ms. Cash's purported rebuttal of CAB's *prima facie* case, he held that there was a singular lack of engagement with the CAB evidence and explanations offered which were simply put, not credible, or as the judge said "*utterly unpersuasive*".

25. Accordingly, I am quite satisfied that no error has been demonstrated by the appellant in the approach of the trial judge and I would dismiss this appeal.

26. [Binchy J.]: I have listened to the judgment just delivered by Mr. Justice Noonan and I am in complete agreement with it and I have nothing to add to it.

27. [Butler J.]: I have also listened to the judgment just delivered by Mr. Justice Noonan and I am also in agreement with it.