

PROCEEDINGS TAKEN BY THE CRIMINAL ASSETS BUREAU

RICHARD BARRETT*

INTRODUCTION

The Criminal Assets Bureau, though a 'National Unit' within the structure of the Gardaí, is a creature of statute, introduced to spearhead inter-agency action in the investigation and identification of criminal assets. It principally acts to restrain criminal assets with a view to:

- returning them to other parties;
- the payment of revenue debts; or
- to be eventually disposed of by the State.

The background to the establishment of the Bureau is well known¹ and its legal antecedents are the provisions in the Taxes Act concerning tax assessments, the provisions in the Criminal Justice Act 1994 concerning suspicious transaction reports and criminal confiscation, the precedent of the Offences Against the State (Amendment) Act 1985 restraining funds linked to unlawful organisations and the international conventions in relation to drug trafficking and money laundering.

The fundamental purpose of the laws relating to the Criminal Assets Bureau is disruption and discouragement rather than elimination of criminal activity through enforcement of the criminal law. The Bureau seeks to remove the motive (profit) and means (operating capital) to commit crimes. The underlying legal

* Barrister, Advisory Counsel at the Office of the Attorney General and formerly Bureau Legal Officer at the Criminal Assets Bureau. The views expressed are the author's own and do not necessarily reflect those of either of those organisations.

¹ See, for example, McCutcheon & Walsh, *The Confiscation of Criminal Assets: Law and Procedure* (Thomson Round Hall, 1999) pp.3-8; and Walsh, *Criminal Procedure* (Thomson Round Hall, 2002) paras. 2.06 to 2.13.

concept is unjust enrichment through public law processes in the public interest.²

In money terms, the most effective weapon in the Bureau's armoury is its tax powers.

However, the provisions which attract most legal attention are the Proceeds of Crime Act and the Bureau's multi-agency structure since it contains Garda bureau officers, Revenue bureau officers and Social Welfare bureau officers. Fundamentally, however, the unique feature of the Bureau, and the bedrock of its success, is that its multi-agency structure facilitates access to bodies of information which are accumulated for different statutory purposes. This runs contrary to the contemporary trend of restricting the use of information to the purpose for which it was collected.

The current statutory provisions³ in relation to the Bureau are the Criminal Assets Bureau Act 1996 (as amended in 2005⁴ and 2007), the Proceeds of Crime Act 1996 (as amended in 2005) and the Disclosure of Certain Information for Taxation and Other Purposes Act 1996. The Rules of the Superior Courts (Proceeds of Crime and Financing of Terrorism) 2006⁵ provided clarity on procedural matters as there were no court rules specifically for Bureau processes since the statutes of 1996.⁶

The purpose of this note is to summarise the current statutory position after recent amendments and to highlight some recent cases.

² Campbell, "Theorising Asset Forfeiture in Ireland", *Journal of Criminal Law* 2007 (71) 441.

³ The Taxes Acts and the Social Welfare Acts are of course applicable to action taken under those codes by the Bureau.

⁴ Significant amendments were made to the Criminal Assets Bureau Act 1996 and to the Proceeds of Crime Act 1996 in the Proceeds of Crime (Amendment) Act 2005, referred to hereinafter as "the 2005 Act".

⁵ S.I. No. 242 of 2006.

⁶ Before the 2006 rules, there was repeated debate about what form the proceedings should take and the nature of section 3 hearings under the Proceeds of Crime Act, particularly because of the use of the word "interlocutory". The case of *F. McK v. A.F. and J.F.* [2002] I.R. 242 (S.C.) clarified that a section 3 hearing was a substantive trial and was not interlocutory in the sense of being a step on the way to a full trial.

I. VARIETY OF APPLICATIONS

Most of the court applications brought by the Bureau are taken during the investigative stage by seeking search warrants,⁷ often sought in relation to solicitors and financial advisers, or production orders⁸ most often sought against financial institutions.⁹ The 2005 Act also introduced a new investigative application,¹⁰ whereby the Bureau may apply to the High Court for an order seeking disclosure of information regarding property held in a trust.

Provisions for restraining of property under the Proceeds of Crime Act 1996 provide what is legally the most innovative and controversial of the tools used by the Bureau. It has been said that:

The Proceeds of Crime Act 1996 is a muscular statutory initiative clothed in the finery of constitutional proprieties. It needed the most sophisticated drafting strategies to meet the challenge of complying with the requirements of due process and fair trial.¹¹

This jurisdiction is a statutory injunction process with possible interim *ex parte* application¹² and a hearing on notice which can result in a long term restraining order.¹³

Application to lift the restraint can be made at any time and there are provisions for payment out.¹⁴ There is useful guidance in

⁷ Under section 14 of the Criminal Assets Bureau Act 1996.

⁸ Under section 14A of the Criminal Assets Bureau Act, based on section 63 of the Criminal Justice Act 1994.

⁹ Note that the amendments in the 2005 Act specify that these processes do not capture documents covered by legal professional privilege. (See section 14A(6)(b) of the Criminal Assets Bureau Act 1996, as amended.)

¹⁰ Section 14C of the Criminal Assets Bureau Act.

¹¹ Byrne and Binchy, *Annual Review of Irish Law 2004* (Thomson Round Hall, 2005) p.368.

¹² Interim orders to restrain the proceeds of crime, section 2 of the Proceeds of Crime Act.

¹³ Interlocutory orders to restrain the proceeds of crime, section 3 of the Proceeds of Crime Act.

¹⁴ Orders out are variation orders under sections 5 and 6 and 2(3) and 3(3) of the Proceeds of Crime Act.

the case of *McK v. McD*¹⁵ on the steps that the trial judge of a Section 3 hearing has to go through to reach a long term restraint order and the guidance is particularly clear on the use of hearsay evidence as allowed by section 8. The guidance from that judgment has been subsequently relied on in the cases of *FMcK v. S.G.*¹⁶ and *Criminal Assets Bureau v. McE.*¹⁷

The role of the court in relation to section 8 evidence has been expanded upon in *McK v. H. & H.*¹⁸ Hardiman J. in the Supreme Court expressed the view that, once the two statutory pre-conditions are met in relation to the Chief Superintendent's statement of belief, that it is held and expressed, and that there are reasonable grounds for it, then the belief constitutes evidence. He continued:

This evidence is not conclusive and may be counteracted by evidence called by or on behalf of the defendant. Accordingly, the effect of the expression of an admissible belief under the Section, if it is not undermined in cross-examination, is to create a prima facie case which may be answered by the defendant if he has a credible explanation as to how he lawfully came into possession or control of the property in question, and established this in evidence.¹⁹

The Supreme Court also acknowledged that the Chief Superintendent can, in reaching his belief, make use of hearsay evidence and information contained in the affidavits of other Bureau officers, and in that regard the court referred to section 8(7) of the Criminal Assets Bureau Act, providing that

information, documents or other material obtained by a bureau officer or any other person under the provisions of this subsection shall be admitted in evidence in any subsequent proceedings.

¹⁵ [2004] 2 I.L.R.M. 419 (S.C.).

¹⁶ High Court, unreported, White J., 31 July 2007.

¹⁷ High Court, unreported, Feeney J., 31 July 2007.

¹⁸ Supreme Court, unreported, 28 November 2006.

¹⁹ Supreme Court, unreported, 28 November 2006, at pp.10-11.

There is also now specific statutory provision for the use of documentary hearsay in Proceeds of Crime cases.²⁰

The Proceeds of Crime scheme has now been specifically adapted and applied to property resulting from “corrupt conduct”.²¹ In this context it is presumed (in a concept borrowed from anti-corruption laws) that where the defendant is in a position to benefit others in the exercise of their official function, and such benefit has accrued without satisfactory explanation, the defendant was engaged in “corrupt conduct”.²²

II. COMMON CONCEPTS FOUND IN THE PROCEEDS OF CRIME ACT

There are common concepts in the Proceeds of Crime Act that require some analysis. The first is “possession or control”. A Proceeds of Crime application must have a respondent who is in possession or control of the asset.²³ Possession by the Gardaí or the Revenue is specifically excluded so if the asset is temporarily held by the Gardaí or the Revenue, it is still legally in the possession of the person from whom it was taken. Equally, possession by a receiver under an interim order does not constitute possession for that statutory purpose.²⁴

The concept of “proceeds of crime” is linked to criminal conduct and can include the proceeds of foreign offences. It should also be noted that the concept is not limited to offences committed or proceeds coming into existence after the enactment of the Proceeds of Crime Act 1996.²⁵ The definition of “proceeds of crime” includes any property *obtained* or *received* ... by or as

²⁰ Section 16A of the Proceeds of Crime Act, introduced by section 12 of the 2005 Act.

²¹ Section 16B of the Proceeds of Crime Act, as inserted by section 12 of 2005 Act.

²² Section 16B(3) of the Proceeds of Crime Act, as inserted by section 12 of the 2005 Act.

²³ The definition is in Section 1 of the Proceeds of Crime Act 1996 as inserted by section 3(a)(ii) of the 2005 Act.

²⁴ O’Higgins J. in *Murphy v. G.M., P.B., P.C. Limited*, High Court, unreported, 4 June 1999.

²⁵ The retrospective aspect was examined by McGuinness J. in *Gilligan v. Criminal Assets Bureau* [1998] 3 I.R. 185 (H.C.).

a result of or in connection with criminal conduct”.²⁶ An issue has arisen in the past as to whether property can be said to be the proceeds of the offence of money laundering. This possibility was accepted by O’Higgins J. in the case of *Murphy v. Broderick*.²⁷ A similar conclusion was reached in Australian cases²⁸ under similar proceeds of crime legislation in that jurisdiction. It is possible, therefore, for the same property to be both an instrument of, and the proceeds of, the offence of money laundering.²⁹ The Supreme Court also decided in the case of *McK v. A.F.*³⁰ that the targeted asset does not have to be linked to a particular offence. The court said that the Act would be “useless and unworkable” if so interpreted.³¹

In the 2005 Act the term “criminal conduct” was introduced to replace “criminal activity”, as the former is the phrase used in the context of money laundering. The conduct must constitute an Irish offence but there is also now a specific provision for offences outside the State depending on correspondence of offences and the location of the property.³² In practice, therefore, the combination of foreign criminality and the expansive concept of money laundering, and the fact that it is not necessary to identify a precise link between offence and asset, means that property which is located in Ireland, and believed by the Bureau³³ to be the proceeds of criminality can be restrained under the Proceeds of Crime Act even though it may not be certain where the productive criminality took place. This facilitates the return of assets to foreign receivers representing groups of victims, and

²⁶ Section 1 of the Proceeds of Crime Act 1996 as amended by section 3(a)(i) of the 2005 Act. Emphasis added.

²⁷ High Court, unreported, O’Higgins J., 29 July 1999.

²⁸ *In the Matter of s.19 of the Proceeds of Crime Act 2002; In the Matter of Funds in a Bank Account; In the Matter of Sunshine Worldwide Holdings Limited and South East Group Limited* [2005] N.S.W.S.C. 117 (1 March 2005).

²⁹ Inserted by Section 3(a)(ii) of the 2005 Act.

³⁰ [2005] 2 I.R. 163 (S.C.).

³¹ [2005] 2 I.R. 163, at 169. *Per* Geoghegan J. at para. 15.

³² This was a consequence of the Supreme Court decision in *McK v. D.* [2004] 2 I.L.R..M. 419 (S.C.).

³³ Probably on the basis of information from law enforcement agencies abroad.

helps ensure that Ireland is not an easy retirement home for foreign criminals and their accumulated wealth.

Property restrained under a section 3 order remains so restrained for seven years unless application is made during that period to restore it to the respondent or some other owner. The 2005 Act included provision³⁴ whereby the 7-year period need not apply if there is consent of all parties and the agreement of the court. This allows restrained assets to be disposed of to the State by agreement and has allowed more flexibility for dealing with property in circumstances where proceeds of crime cases are disposed of by consent.

It is worth noting that the Proceeds of Crime Act contains elaborate provisions for mandatory notification of orders by the court registrar to the Companies Office, Land Registry and Registry of Deeds.³⁵ While this point has not yet arisen, it is possible that third parties might raise issues in relation to notice where the notification was not sent.

As indicated, the Bureau includes tax officials and officers of the Department of Social and Family Affairs who operate under their own statutory code. Judgments handed down by the courts in these cases essentially belong to those codes but occasionally specific Criminal Assets Bureau issues arise, such as anonymity and the sharing of information. The officials from those agencies attached to the Bureau keep all the powers relevant to their own agencies. Equally, the Garda bureau officers continue to be members of the Garda Síochána and if a Bureau investigation discloses grounds for a criminal investigation, Garda bureau officers may use criminal law powers of arrest and detention. This most often arises in the area of tax offences. When persons are detained under the Criminal Justice Act 1984 or the Criminal Justice (Drug Trafficking) Act 1996, they can be interviewed by tax or social welfare bureau officers with Garda bureau officers.³⁶

³⁴ Section 4A of the Proceeds of Crime Act.

³⁵ Section 10 of the Proceeds of Crime Act 1996.

³⁶ Section 8(6)(a) of the Criminal Assets Bureau Act as inserted by section 58 of the Criminal Justice Act 2007.

III. WHAT THE CRIMINAL ASSETS BUREAU IS NOT

Firstly, it is not a process of criminal law. Although some of its processes may be punitive or constitute a penalty (as do elements of revenue law), the criteria for a criminal process under either Irish or ECHR jurisprudence are not found in the proceeds of crime system. The major constitutional challenge in *Gilligan v. Criminal Assets Bureau*³⁷ decided that the Proceeds of Crime Act was not criminal law. On the tax side, the case of *Criminal Assets Bureau v. S.(P.)*³⁸ shows that its tax powers are not criminal. In the case of *Cecil Walsh v. The Director of the Assets Recovery Agency*,³⁹ Lord Chief Justice Kerr came to a similar conclusion in relation to the comparable UK legislation, declaring that an application made by the Director of the Assets Recovery Agency for the recovery of assets from Mr. Walsh was civil in nature and did not engage Article 6(2) of the European Convention on Human Rights concerning criminal trials.⁴⁰

Mr. Walsh's complaint to the European Court on Human Rights was declared inadmissible in November 2006. The Court accepted that the proceedings were restitutionary in nature. In both the *Gilligan* case in Ireland and the *Walsh* case in Northern Ireland and in the European Court on Human Rights, emphasis was laid on the fact that the proceeds of crime proceedings were proceedings *in rem*. While the statutory objective of the Criminal Assets Bureau is to "deprive or to deny *those persons*" access to assets,⁴¹ that does not make the Bureau's use of the proceeds of crime legislation a criminal process against those persons. This approach is mirrored in other jurisdictions which have an assets recovery jurisdiction, such as Canada.⁴² Equally, in the United States, the Racketeer Influenced Corrupt Organisations (RICO)

³⁷ [2001] 4 I.R. 113, at 146 (S.C.), *per* Keane C.J.

³⁸ High Court, unreported, Finnegan P., 19 October 2004.

³⁹ [2005] N.I.C.A. 6 (26 January 2005).

⁴⁰ See also the cases of *Belton v. Assets Recovery Agency* [2006] N.I.C.A. 2 (27 January 2006) and *Breslin v. McKenna & Others* [2007] N.I.C.A. 14 (15 March 2007).

⁴¹ Criminal Assets Bureau Act 1996, s.4(b).

⁴² In the case of *Normand Martineau v. Minister of National Revenue* [2004] S.C.R. 737, the Supreme Court of Canada declared forfeiture proceedings not to be penal in nature.

statute (1970) processes are recognised as punitive but not criminal.⁴³

It should further be recognised that Criminal Assets Bureau processes and proceeds of crime applications are entirely different from the operation of criminal confiscation provisions post-conviction by the DPP under the Criminal Justice Act 1994, as amended. The Bureau has no statutory role in relation to criminal confiscation post-conviction. It is not unusual, however, for the two processes to arise in the same case as when, for instance, the respondent to a proceeds of crime application is subsequently convicted of offences giving rise to criminal confiscation orders. When this arises, the Proceeds of Crime Act provides that that jurisdiction must take second place to the criminal confiscation route.

While the phrase “civil forfeiture” is regularly applied to processes such as the Proceeds of Crime Act, that jurisdiction in Ireland is best seen not as forfeiture but as a form of civil restraint which can ultimately result in forfeiture if the assets are not returned or otherwise disposed of. In the context of the application of the Statute of Limitations, the Supreme Court in *McK v. H. & H.*⁴⁴ repeated the court’s findings in *McK v. D*⁴⁵ that an order under section 3 is not an order of forfeiture. Whether the ultimate “disposal” to the State under section 4 is a forfeiture has not been decided but that point no longer has significance for limitations purposes as section 10 of the 2005 Act specifically disapplied the forfeiture reference in the Statute of Limitations to proceeds of crime proceedings.

In addition, while the courts have decided that Criminal Assets Bureau processes, and specifically the proceeds of crime jurisdiction, is civil in nature, it is not “civil or commercial proceedings” for the purpose of the Brussels Convention.⁴⁶ The Brussels Convention requires that the defendant be sued in his national court in civil and commercial matters but not in the case of a public authority which is acting in the exercise of its public

⁴³ *Austin v. United States* (1993) 509 U.S. 602, at 618-619.

⁴⁴ Supreme Court, unreported, 28 November 2006.

⁴⁵ [2004] 2 I.L.R.M. 419 (S.C.).

⁴⁶ *Criminal Assets Bureau v. J.W.P.L.*, High Court, unreported, 24 May 2007, *per* Feeney J.

authority powers. In the first case brought by the Bureau under the corrupt enrichment provisions,⁴⁷ Feeney J. decided⁴⁸ that “The rights and duties which the Criminal Assets Bureau is seeking to exercise in pursuing a claim for a corrupt enrichment order goes beyond those which apply to private persons” and are therefore not civil or commercial in the sense of the Brussels Convention. The logic applied by the court to corrupt enrichment orders would also appear to apply equally to restraint orders under sections 2, 3 and 4 of the Proceeds of Crime Act.

As most Criminal Assets Bureau litigation tends to end up in the Supreme Court we can expect more illumination from there on many of these issues in the years ahead.

⁴⁷ Section 16B of the Proceeds of Crime Act.

⁴⁸ *Criminal Assets Bureau v. J.W.P.L.*, High Court, unreported, Feeney J., 24 May 2007.