

Neutral Citation No: [2020] NICH 3

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: SIM11203

Delivered: 21/02/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

2017 No. 83965

CHANCERY DIVISION

BETWEEN:

**HAZEL KIM McCOURT, TRUSTEE FOR CIVIL RECOVERY
ON BEHALF OF THE NATIONAL CRIME AGENCY**

Plaintiff:

-and-

**[1] AURANG ZEB KHAN
[2] SHAKAR BEGUM**

Defendants:

SIMPSON J

[1] This is an application by the plaintiff for an order for possession of a dwelling house. Mr Bernard Brady QC appeared for the plaintiff; Mr Matthew Corkey of counsel appeared for the defendants. I am grateful to both for their helpful skeleton arguments and succinct and cogent submissions.

[2] The plaintiff is the Trustee for Civil Recovery on behalf of the National Crime Agency, having been appointed under a Civil Recovery Order. That Order was made on 20 January 2017 in the Queen’s Bench Division of the High Court of Justice in England and Wales by O’Farrell J. Permission was granted by Colton J on 12th April 2017 for that Order (“the Order”) to be registered against the present defendants in this jurisdiction, and it was so registered on that date.

[3] The Order declared that a number of properties (2 in this jurisdiction; 2 in Birmingham) were “recoverable property within the meaning of Part 5 of the Proceeds of Crime Act 2002 (“POCA)”. One of the properties identified in the Order is situated at 11 Marlo Heights, Bangor, County Down (hereafter “the property”). The Order further recited that the property “shall immediately vest in the Trustee pursuant to section 266(2) of POCA upon the making of this Order.”

Schedule 7 of the Act provides the Trustee with the power to “start, carry on ... any legal proceedings in respect of the property.”

[4] The defendants are husband and wife. The property was acquired by them on 2nd January 2001 for £99,250. The acquisition was by way of an initial deposit of £64,180, and a buy-to-let mortgage of £29,706.25 with Southern Pacific Mortgages Ltd. In August 2004 the mortgage was redeemed by a payment of £30,403.21. The property was transferred into the sole name of the second defendant on 20 June 2011. It is the defendants’ family home.

[5] O’Farrell J’s Order followed from her judgment in the case of *National Crime Agency v Aurang Zeb Khan and Others* reported at [2017] EWHC 27 (QB), which case was heard by her over 4 days in October 2016. An attempt was made to appeal her decision, but it was out of time, and on 23rd January 2018 the Court of Appeal dismissed the application for an extension of time.

[6] It is important to note from O’Farrell J’s judgment, particularly her discussion of factual matters contained in paragraph 55 and in paragraphs 65-71, that she made adverse findings in respect of financial matters relating to both defendants in the present proceedings. Having analysed in significant detail the sources of funding for the property (among other properties) O’Farrell J concluded:

- “(a) that the deposit funds “must be derived from drug dealing, money laundering or tax evasion”:
- (b) that the moneys used to redeem the mortgage “were derived from drug dealing, money laundering or tax evasion”.

[7] Thus, the entire funding for the eventual outright purchase of the property derived from unlawful conduct.

[8] In addition (paragraphs 95-96) O’Farrell J stated that there was:

“strong evidence that the first and second defendants [i.e. the defendants in the present proceedings] were aware of the money laundering through their network of bank accounts. Therefore they did not acquire or subsequently deal with the property in good faith. In any event, they have not suffered detriment so as to render any recovery of the property unfair or inequitable ... they have had the benefit of living in the property for many years and any detriment suffered by the Khans is outweighed by the NCA’s interest in realising the proceeds of the recovered property.”

[9] At the hearing before me Mr Corkey did not seek to argue that the property was not recoverable property. Although factual issues were raised in the affidavit of the second defendant which, at first blush, appeared to amount to a collateral attack on the findings of O'Farrell J, as the hearing progressed these issues fell away. While other Convention rights were adverted to in his skeleton argument, Mr Corkey submitted that the issue for my consideration was whether or not an order for possession in this case would amount to a breach of the defendants' Convention rights under Article 8.

[10] Article 8 provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

[11] I observe, from the judgement of Deeny J in *Swift Advances v McKay* [2011] NICH 2 at paragraph [17] that Article 8 “does not prevent possession orders in themselves but merely ensures that they must constitute a necessary and justified interference with the privacy rights of occupants and they must be according to law”, and from the judgement of Horner J in *Bank of Scotland PLC v Brennan and Brennan* [2014] NICH 1 at paragraph [14], that “an order for possession of a person's home is a substantial interference with their Article 8 rights which needs to be justified under Article 8(2).”

[12] The civil recovery order was made under the provisions of Part 5 of POCA. Part 5 of POCA is “directed at the recovery of specific identified property which has been obtained by the defendant through unlawful conduct” – see *National Crime Agency v Azam and another* [2016] 1 WLR 2560, paragraph 46. As described above, O'Farrell J has found that the property represents the proceeds of unlawful conduct. This court has power to make an order for possession of the property. An order for possession is a step towards the recovery of the proceeds. Without the making of a possession order, the value of the property could not be realised for the benefit of the NCA; thus, the proceeds of the unlawful conduct could not be recovered. Therefore, the making of an order for possession is an outworking of, and a necessary step in, achieving a legitimate aim of the proceeds of crime legislation. The civil recovery order was made according to law, and any order for possession made by this court is made according to law.

[13] In relation to the defendants' family circumstances I have available to me the evidence of the second defendant – through her affidavit – and I also heard oral

evidence from the first defendant. I expressly record that I have taken all of the defendants' evidence, written or oral, into account in reaching the conclusion to which I have come, although I may not rehearse every aspect of that evidence in this judgment. There are 3 children of the family: the oldest child, who is now 18 years of age, and taking her A levels this spring in three subjects; the middle child, who is now 15 years old, and taking part of his GCSE examinations this year, with the remainder next year; and the youngest child, who is 7 years old. The evidence in the affidavit, and the oral evidence of the first defendant, together articulated the nature and extent of the distress to both defendants and their children. It is to be remembered that the children are wholly innocent.

[14] In addition, the defendants' evidence touched upon financial matters and matters of creditworthiness, and their concerns in relation to both. I observe, however, that there was no documentation supporting their evidence either of their resources or income, nor was there any corroborating evidence of the creditworthiness of the defendants.

[15] The first defendant gave evidence that he had a history of drug use, that he had been "clean" for some 6 or 7 years, but that he was frightened that he might relapse. He also said that the property had been his home for almost 20 years, and had been the children's home for all their lives. He added that he had worked hard all his life. It must be observed, however, that the fact that the family has benefitted from the property for so long is essentially due to its acquisition by way of funding derived from proven unlawful conduct.

[16] I recognise, and take into account, that the loss of a home is a most extreme form of interference with Article 8 rights and will inevitably cause upheaval and distress. I recognise also, and take into account, the effect that an order for possession will have on all three children; more so the two older children, who are fully aware of events and who have examinations this year. None of the children bears the slightest responsibility for the source of the funds for the acquisition of the property.

[17] I was provided by Mr Brady QC with several provisions of the Housing (Northern Ireland) Order 1988 with a view to his highlighting the duties on the relevant housing authorities in relation to priority for accommodation. Mr Corkey submitted that I ought not to place any weight on this material, as the court had no evidence as to how such duties might be approached by any authority. I accept that submission. I record that I have not taken any of those legislative provisions into account in carrying out the balancing exercise which I have undertaken.

[18] Having taken into account all of the circumstances of the defendants and the three children, and balancing those as against the legitimate aim of the legislation - namely the reduction of crime, including by depriving people of the proceeds of unlawful conduct - I consider that the family's rights must give way to the legitimate aim of the legislation. To refuse the plaintiff's application would result in the defendants continuing to benefit from the proceeds of unlawful conduct. However,

in assessing the proportionality of the making of an order for possession in the circumstances of this case, and in order to alleviate the effects on the two older children, I consider that there should be a stay on the enforcement of the order for possession for a period of 6 months. This will allow the children to take those examinations which have to be taken this year while remaining in the family home. While I recognise that there will still be upheaval and distress, I consider that the stay will reduce the more significant impact on the children at an important stage in their education. In addition the stay will allow the defendants a substantial period of time to make enquiries of the appropriate housing authorities, and any other relevant person or body, with a view to arranging accommodation for the family by the end of the school summer holidays.

[19] Although, in oral submissions, no emphasis was placed on the Convention rights under Article 1 of the First Protocol, such a submission was included in the defendants' skeleton argument and I should, lest this matter be considered elsewhere, set out my views on this. The text of the Article reads:

"1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[20] As the ECtHR has repeatedly stated, the Article comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property. The second rule, contained in the second sentence of the first paragraph, covers only deprivation of possessions and subjects it to certain conditions. The third rule, stated in the second paragraph, recognises that the Contracting States are entitled, *inter alia*, to control the use of property in accordance with the general interest (see e.g. *Sporrong and Lönnroth v Sweden* [1982] 5 EHRR 35, paragraph 61).

[21] The three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to the peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see e.g. *Brunckona v Finland* [2005] 41 EHRR 28, paragraph 65).

[22] To be deemed compatible with the Article, the interference must fulfil certain criteria - it must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised (see e.g. *Beyeler v Italy* [GC] [2001] 33 EHRR 52, paragraphs 108-114).

[23] The case of *Azam (op cit)* involved a consideration of A1P1. The appellant Sanam was the wife of Mr Azam. She had been gifted the property which was in her sole name, but the funding for the purchase of the property had been through the proceeds of her husband's criminal activity. The Court of Appeal recorded that she was described by the judge as "a complete innocent caught up in the web of Mr Azam's conduct." Rejecting, at paragraph 70, the submission that a recovery order would violate Ms Sanam's rights on the basis that such an order would be disproportionate to the legislative aim, the Court of Appeal said:

"71. ... She has not acted to her detriment in any respect in reliance on those gifts or the prospect of them such that it would be unjust and inequitable to deprive her of them. She does not fall within any of the exceptions, exemptions or other defences specifically provided by Parliament in Part 5 of POCA for the protection of third party recipients of property obtained through unlawful conduct. Parliament could have provided, but chose not to provide, a defence for such third parties if a recovery order would leave them dependent on state benefits. Parliament could have provided a defence crafted to meet the situation of a spouse in the situation of Mrs Sanam but it did not do so.

72. We have no hesitation in rejecting the argument that the result of the social policy of Parliament to require the making of a recovery order in those circumstances is disproportionate and casts an excessive burden on Mrs Sanam when balanced against the public interest in the reduction of crime by the forfeiture of property obtained through criminal conduct."

[24] In the circumstances of this case, where the activities of both defendants, and their knowledge, are as was described in the judgment of O'Farrell J, I conclude that the making of an order for possession - in the factual circumstances of this case - would not be disproportionate when balanced against the public interest described in paragraph 72 of *Azam*, and would not breach the A1P1 rights of the defendants.

[25] Finally, in the defendants' skeleton argument there was also a reference to Article 14 of the Convention (Prohibition of Discrimination). Article 14 provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[26] There is no evidence before me, written or oral, that there was any discrimination towards the defendants and no argument was presented by counsel at the hearing before me. Therefore, I conclude that there is no basis on which Article 14 would prevent the making of an order for possession in the circumstances of this case.

[27] In conclusion, I consider that the making of an order for possession in the particular circumstances of this case is a proportionate measure and does not breach the relevant Article 8 rights. Further, I consider that there is no breach of the rights under Article 1 of the First Protocol and there is no evidence of any breach of Article 14.

[28] Accordingly, consistent with what I said above in paragraph [18], I order that the plaintiff recover possession of the premises situate at 11 Marlo Heights, Bangor, but that there be a stay on the enforcement of the order for possession for a period of 6 months; so that the defendants give possession of the premises on 21 August 2020.

[29] I will hear counsel as to the appropriate order for costs.