

THE HIGH COURT

[2021] IEHC 457
[2020 No. 24 CAB]

**PROCEEDS OF CRIME
IN THE MATTER OF SECTION 3(1) OF THE PROCEEDS OF CRIME ACTS 1996-2016**

BETWEEN:

CRIMINAL ASSETS BUREAU

APPLICANT

-AND-

MARLENE WALSH

RESPONDENTS

JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 6 day of July, 2021.

1. The main issue in this application is whether proceedings by the Criminal Assets Bureau ("the Bureau") under s.3(1) of the Proceeds of Crime Act 1996 ("the 1996 Act") are statute barred under s.9(2) of the Civil Liability Act 1961 ("the 1961 Act"). These proceedings relate to items of property which were under the power or control of John Gibson at the time of his death. The Bureau claims that these items constitute or represent proceeds of crime.
2. My conclusion on this issue is that s.9(2) of the 1961 Act has no application to proceedings under ss.2, 3 and 4 of the 1996 Act. The 1996 Act confers a special jurisdiction to make a determination relating to status of property. These proceedings do not relate to "any cause of action" of a type which can be said to have "survived against the estate of a deceased person" within s.9(2) of the 1961 Act.
3. John Gibson was shot dead in a gangland killing on 18 September 2017. Following an order of this Court on 6 November 2020 under s.2 of the 1996 Act, an originating notice of motion was issued by the Bureau seeking orders under s.3(1) of that Act in respect of credit balances in excess of €83,000 in current and savings accounts in Leixlip and College Green branches of Bank of Ireland and €5,440 and €4,130 in cash which were seized from him on 8 December 2015 and 2 December 2016. It is unclear when the Bureau first became aware that the credit balances in his two bank accounts may have represented proceeds of crime.
4. John Gibson died intestate. At the time of his death he lived with Marlene Walsh. He was survived by his two young children. These children became entitled to his estate. Marlene Walsh as their mother and guardian is entitled to apply to administer this estate. No grant of representation was applied for. On 18 January 2021 I made an order under O.15, r.37 appointing Marlene Walsh to represent the estate of John Gibson in these proceedings.
5. The material which the Bureau has presented in evidence establishes that there are reasonable grounds for the belief of Detective Chief Superintendent Michael Gubbins that the cash seized from John Gibson by gardaí represents proceeds of crime and that credit balances in the two bank accounts are also derived from proceeds of crime. I accept this belief as evidence that each of these four items of property represents proceeds of crime or was acquired with proceeds of crime.

6. The evidence establishes that the cash seizures related to drug dealing and that the money accumulated in the two bank accounts also had its origins in drug dealing. John Gibson was a drug dealer who was involved in organised crime in West Dublin. While his convictions were minor, garda intelligence associated him with significant drugs related activity and with major criminals.
7. Investigations of John Gibson's financial affairs disclosed no plausible legitimate source for the two sums of cash seized from him. His explanation that the money taken in December 2015 was earnings generated from employment by his mother as a fitness instructor at "Body Fitness Studio" in Lucan is unbelievable. The cash seized from John Gibson when he was stopped in his car at Balgaddy Road in Lucan in September 2016 also related to drug dealing. He had two mobile phones and bags containing cannabis and heroin on his person and in his car. His passenger also had bags of heroin.
8. Evidence also establishes that credit balances in John Gibson's two Bank of Ireland accounts is sourced from criminal activities and that these credit balances are indirectly proceeds of crime or were accumulated with property which, directly or indirectly, constitutes proceeds of crime.
9. Many lodgements to the account of Body Fitness Studio Limited which supposedly employed John Gibson, did not represent trading receipts. Payments to John Gibson purporting to be salary did not represent genuine earnings. While the gym did operate as a business, many of its receipts came in the form of large cash lodgements from various locations around the State which were far from Lucan. John Gibson's rates of pay exceeded those usually paid to fitness instructors. Investigations did not yield objective proof that he did any work which would justify payment of this "salary".
10. John Gibson was able to make substantial savings from his "salary". These savings were inconsistent with his likely expenditure on living costs during the relevant period. He received an unexplained payment of €25,000 in the form of a cheque drawn on a firm of solicitors in favour of an associate who was also involved in supply of controlled drugs. He was able to buy motor vehicles with assets which cannot be traced to source.
11. It is difficult to come to any conclusion other than that the arrangement under which John Gibson was ostensibly employed and receiving a wage from the gym was in fact a money laundering exercise to give him a pretended source of income using funds introduced into Body Fitness Studio Limited. His capacity to save much of this money arose because he could also fund his lifestyle from sources of income derived from crime.
12. Section 3(1) of the 1996 Act provides that if this Court is satisfied that "specified property...constitutes, directly or indirectly, proceeds of crime" or "property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime" and "that a person is in possession or control" of such property, it shall make an order "prohibiting the respondent or any other specified person or any other person having notice of the order" from dealing with the property or a specified part of the property. Subject to provisions in ss.11 and 13 which deal with

bankruptcies and liquidations of companies, the only circumstance which allows or mandates this Court to not make an order under s.3(1) arises where "the Court...is satisfied that there would be a serious risk of injustice. "

13. Section 9 of the 1961 Act deals with "Time limit in respect of causes of action which survive against estate of deceased person" and provides as follows:

"(1) In this section 'the relevant period' means the period of limitation prescribed by the Statute of Limitations or any other limitation enactment.

(2) No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless either -

- (a) proceedings against him in respect of that cause of action were commenced within the relevant period and were pending at the date of his death, or
- (b) proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his death, whichever period first expires."

14. This section is contained in Part II of the 1961 Act which also deals with survival of certain causes of action on death for the benefit of the estate of a deceased. Section 8 deals with causes of action where damage as a result of a wrong caused by a deceased is only sustained after death. In these circumstances, any cause of action in respect of the act causing the damage is deemed to be subsisting against that person before death and the two-year limitation period under s.9(2)(b) is applicable.
15. Factors such as date of knowledge or infancy which operate to extend running of time under the Statute of Limitations 1957 ("the 1957 Act") do not blunt the effect of s.9(2) of the 1961 Act.
16. In many cases, investigations which lead to applications by the Bureau under s.3 of the 1996 Act are complex and reveal extensive efforts to conceal and disguise proceeds of crime over periods of years. A person who has died might be discovered long after death to have been in control of property identified as proceeds of crime.
17. The case made by the respondent invites me to apply a limitation period to assist dishonesty. In general, the policy of the law is that limitation periods afford procedural defences and cannot be availed of to assist dishonesty. Accordingly, running of time under limitation statutes in cases of actions based on fraud starts when fraud is discovered.
18. This rule preceded enactment of s.71 of the 1957 Act. It has its origin in equity and became part of general law in Ireland in 1877: see *Barber v. Houston* [1884] 14 L.R Ir. 273; [1885]18 L.R. Ir. 475 and the comments of Lord Denning M.R. in *Eddis and Another v. Chichester Constable and Others* [1969] 3 W.L.R. 48 at p. 54.

19. Section 71 of the 1957 Act does not apply where the limitation period under s.9(2) of the 1961 Act applies to a cause of action: see *Corrigan v. Martin* (Unreported, High Court, Fennelly J., 13 March 2016). However, it is unclear whether the underlying rule may still apply where a deceased has been involved in fraud which does not come to light until after death, as sometimes happens. The Judgment of Fennelly J. in *Corrigan v. Martin* leaves open a possibility that time might run in such cases for two years after discovery of fraud.
20. The respondent argues that the right of the Bureau to seek an order under s.3 of the 1996 Act in respect of property claimed to be derived from proceeds of crime is a "cause of action" for the purposes of s.9(2) of the 1961 Act. The respondent relies on authorities which indicate that s.9(2) of the 1961 Act applies to all "causes of action" and that these include causes of action which are not caught by specific time limits imposed by the 1957 Act, such as claims for contribution, and actions for specific performance or other equitable remedies. The respondent submits that use of the word "whatsoever" in s.9(2) of the 1961 Act is significant and that this captures the Bureau's claim to property which is the subject matter of this application. The respondent points to absence of any specific provision in the 1996 Act excluding the operation of section 9(2).
21. Section 2(1) of the 1961 Act defines "action" as "includes counterclaim and proceedings by way of arbitration;". The term "action" is not used in s.9 of the 1961 Act. Section 9 applies to "proceedings" in respect of any "cause of action" which has arisen against a deceased during their lifetime. The term "action" is defined for the purposes of the 1957 Act in s.2(1) of that Act as "includes any proceeding (other than a criminal proceeding) in a Court established by law;". No provision of the 1957 Act is capable of being read as imposing a limitation period on commencement of proceedings under s.3 of the 1996 Act. The 1996 Act provides for forms of legal process which are unique. These are not analogous to actions to recover a "forfeiture": see *Murphy v. Gilligan and Others* [2011] IEHC 464.
22. The purpose of limitation provisions in the 1957 and 1961 Acts is to prevent the bringing of stale legal claims to enforce payments and other remedies. Those who can show that a claim is time-barred are not troubled with having to defend on the merits. In the case of actions brought against the estate of a deceased in respect of causes of action deemed to arise prior to death, a two-year limitation period from date of death is fixed to facilitate finality in administration of estates. Provisions in the 1957 Act also deal with extinguishment of title to land and personal chattels on expiry of limitation periods for recovery of such property or to bring an action claiming sale of mortgaged land.
23. The 1996 Act postdates the 1957 Act and the 1961 Act. There is no policy reason why the Oireachtas should be taken to have regarded exercise of rights of recourse of the Bureau and other authorised persons to this Court under ss.2(1) or 3(1) of the 1996 Act as being subject to any provision which prevents the bringing of an action after expiry of any limitation period fixed under either the 1957 Act or the 1961 Act.

24. The 1996 Act is not concerned with claims for recovery of money or property or claims for damages or to enforce private rights. These types of proceedings are "causes of action" in the sense in which that term is used in s.9(2) of the 1961 Act. Sections 2 and 3 of the 1996 Act give the Bureau special public law rights to apply to seek adjudication that property has the status of being proceeds of crime or derived from proceeds of crime. Issues of who might be able to establish ownership or entitlement to possession or control of that property if the dispute was solely a matter of private law are irrelevant to that finding.
25. Statutory consequences flow from proof of this status. The circumstances in which those assets were acquired are only relevant if they assist in establishing some matter which would make it unjust to disregard the interests of a person claiming entitlement. Where property is shown to be derived from crime, the only excepting circumstance which may be established by a person adversely affected is that, for whatever reason, the making or continuance of orders would cause "injustice".
26. There is nothing in the 1996 Act to indicate that the Oireachtas intended to permit time-bars which may apply to other types of claim as a further excepting circumstance.
27. The policy of the 1996 Act is that there is no right of enjoyment of proceeds of crime or of assets derived from proceeds of crime. The benefits of criminal activity are not regarded by public law as being the property of their holder. Support for this interpretation of the effect of the 1996 Act is to be found in the judgment of the Supreme Court delivered by Keane C.J. in *Murphy v. GM and Others* [2001] 4 I.R. 113 at pp. 152-153 where he quotes from an analysis in the judgment of Stevens J. in the United States Supreme Court in *United States v. Ursery* (1996) 518 U.S. 267 at p. 298.
28. Property which is subject to an interim order, an interlocutory order, or a disposal order under the 1996 Act is excluded from the property of a person adjudicated bankrupt for the purposes of the Bankruptcy Act 1988: see s.11(1) of the 1996 Act. A similar provision applies where a winding up commences in relation to a company after any interim order, interlocutory order or disposal order has been made: see section 13(1).
29. Statutory exceptions in ss.11 and 13 of the 1996 Act exclude property held by a bankrupt or held by a company prior to liquidation from the ambit of the powers conferred by ss.2 and 3 of the 1996 Act in one circumstance only. The claims of the official assignee or the liquidator and creditors take precedence where a bankruptcy or winding up has commenced prior to the time when this Court hears an application for a s.2 or s.3 order.
30. Where adjudication of bankruptcy has taken place, or a winding up has commenced, the power to restrain dealings with property representing proceeds of crime or derived from proceeds of crime cannot be exercised to prevent the official assignee or a liquidator from realising and applying property to discharge liabilities of a bankrupt or of a company to creditors and associated costs of bankruptcy or liquidation. While no special exception is made for creditors of estates, a personal representative might succeed in showing that

these should be provided for out of property derived from proceeds of crime in order to avoid injustice.

31. If it was contemplated that s.9(2) of the 1961 Act or any other statutory time-bar was applicable to proceedings under the 1996 Act, one might expect that the Oireachtas would have included a provision extinguishing entitlement of the State to property claimed to be proceeds of crime or derived from proceeds of crime on expiration of the relevant limitation period.
32. It was not necessary for the Oireachtas to include in the 1996 Act any special provision specifically exempting proceedings under that Act from the operation of s.9(2) of the 1961 Act.
33. The phraseology "possession or control" has been used deliberately in ss.2(1) and 3(1) of the 1996 Act. The use of these words reinforces the point that the issue to be decided is not a private law contest relating to a right to ownership or possession of property. Possession or control may derive from ostensible ownership, as where a person is named as a customer who holds a credit balance in a bank account. Control might also arise where the ostensible owner or bailee of cash or other property which has been seized as evidence of money laundering has a potential claim for its return.
34. Control may also be that of a bank or payment processing agent where money is held on deposit for a person who may not be identifiable and who may use cards or other payment mechanisms to effect withdrawals. A respondent named in proceedings under s.3 of the 1996 Act may have no interest in claiming the property which is the subject matter of the application.
35. The purpose of s.2(2)(b) and s.3(2)(b) of the 1996 Act is to give notice of the making of orders. Those who may be adversely affected have an opportunity of asserting rights to the property, either to contest an application for an order under s.3(1) or apply under ss.2(3) or 3(3) to discharge or vary an order which has already been obtained. It is not necessary to direct service of orders under ss.2(3) or 3(3) on persons potentially affected if it is established that it is not reasonably possible to ascertain their whereabouts. All of these provisions are inconsistent with intention of the Oireachtas that a participant in these proceedings may advance a time-bar defence under the 1961 Act.
36. Control of property comprising proceeds of crime or which is derived from proceeds of crime may pass from one person to another in many circumstances. This may happen as a result of death. Any such property may come into the hands of the estate of a deceased person or of a beneficiary entitled to share in that estate. However, that property is not part of the estate and its status continues to be that of proceeds of crime or property derived from proceeds of crime.
37. The same result would flow from legal arrangements under which property constituting proceeds of crime or derived from such proceeds is held on joint tenancy and one of the joint tenants dies. There is no reason why interposition of a death in the route by which

property derived from crime comes into ultimate possession or control of a person at any point in time should have the benefit of a special time-bar defence which permits speedy administration of estates.

38. The respondent's argument misconceives the nature of the remedies given by the 1996 Act. The remedies are not "causes of action" which came into existence in the lifetime of John Gibson and which are being pursued against his estate in respect of some activity which he engaged in while he was alive. The only involvement of John Gibson's estate in this application is because of the potential interest of that estate in the four items of property if it is not established that these assets were derived from proceeds of crime or if some special factors exist which would satisfy me that to make an order under s.3(1) of the 1996 Act would cause serious risk of injustice.
39. Section 9(2) of the 1961 Act only applies to a cause of action "which has survived against the estate of a deceased person". The necessity to analyse the nature of any activity which is claimed to constitute the "cause of action" and to see whether the legal process initiated is in fact a proceeding "in respect of a cause of action which 'has survived against the estate of a deceased person'" has been emphasised in the judgment of Clarke J. in the Supreme Court in *Cavey v. Cavey and Others* [2014] IESC 16.
40. I will give an example. A deceased may have been in unlawful possession of land prior to death. A cause of action for damages by the owner relating to this trespass will become statute barred against the estate of the deceased if legal proceedings are not started within two years after death. If a personal representative or those who are entitled to succeed to the estate, or other persons take possession of the land after the death, they also become trespassers. A separate action for damages will lie against them in respect of their trespass with a six-year limitation period.
41. Those trespassers would only be entitled to avail of the provisions of the 1957 Act to defeat an action for recovery of the land if they could show that the owner was out of possession as a result of adverse possession by successive occupiers for a period of 12 years prior to date of commencement of any proceedings to recover the land.
42. Any claim by the owner of the land against those trespassers relating to their unlawful occupation is not advanced on the basis that a right to damages for trespass or to recover possession of the land has survived against the estate of the deceased trespasser. It is based on the right to possession of the owner and lack of entitlement of those who are now trespassing and are in wrongful possession. The shortened period of limitation provided for by s.9(2) of the 1961 Act is not relevant to this cause of action.
43. The position in this case is similar. Any property held by John Gibson which was derived from proceeds of crime was never owned by him and never passed to his estate. Any acts and omissions of those who hold or control property or of those who have in the past held or controlled that property are only relevant to the factual issues of whether such property is proceeds of crime or derived from proceeds of crime and the obligation of this

Court either not to make an order or to discharge or vary an order, if facts establish that such an order would result in or has caused injustice.

44. The circumstances that John Gibson may have enjoyed and controlled the property claimed by the Bureau and would have been a respondent to this application if it had been brought during his lifetime do not turn this application into "proceedings...in respect of" a "cause of action...which has survived against the estate of a deceased person" within s.9(2) of the 1961 Act.
45. The respondent has not succeeded in making out any defence to the Bureau's application. Nothing has been presented at this stage which indicates that any serious risk of injustice would result from the making of an order under s.3(1) of the 1996 Act. This order must follow from my finding that the evidence satisfies me that the four items of property referred to in the schedule to the originating notice of motion are derived from proceeds of crime.