Neutral Citation Number: [2021] EWHC 2900 (Admin)

Case No: CJA/1/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 November 2021

Before :

MRS JUSTICE LANG DBE

- -

Between :

THOMAS JOSEPH O'CONNOR	**Applicant**
- and -	
CROWN PROSECUTION SERVICE	**Respondent**

- -
- -

Carolina Bracken (instructed by **Tuckers**) for the **Applicant**
Gary Pons (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 14 October 2021

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Approved Judgment

Mrs Justice Lang:

1. In 2006, the Applicant was convicted of two offences of conspiracy to cheat the revenue, and a confiscation order in the sum of £4,257,008 was made against him on 18 September 2007. On 20 January 2020, he applied for a certificate of inadequacy, pursuant to section 83 of the Criminal Justice Act 1988 ("the 1988 Act").

Legal framework

The 1988 Act

2. Section 83 of the 1988 Act provides:

> "(1) If, on an application made in respect of a confiscation order—
>
> (a) by the defendant, or
>
> (b) by a receiver appointed under section 77 or 80 above, or in pursuance of a charging order,
>
> the High Court is satisfied that the realisable property is inadequate for the payment of any amount remaining to be recovered under the order the court shall issue a certificate to that effect, giving the court's reasons.
>
> (2) For the purposes of subsection (1) above—
>
> (a) in the case of realisable property held by a person who has been adjudged bankrupt or whose estate has been sequestrated the court shall take into account the extent to which any property held by him may be distributed among creditors; and
>
> (b) the court may disregard any inadequacy in the realisable property which appears to the court to be attributable wholly or partly to anything done by the defendant for the purpose of preserving any property held by a person to whom the defendant had directly or indirectly made a gift caught by this Part of this Act from any risk of realisation under this Part of this Act.
>
> (3) Where a certificate has been issued under subsection (1) above, the person who applied for it may apply—
>
> (a) where the confiscation order was made by the Crown Court, to that court; and
>
> (b) where the confiscation order was made by a magistrates' court, to a magistrates' court for the same area,
>
> for the amount to be recovered under the order to be reduced.

> (4) The Crown Court shall, on an application under subsection (3) above—
>
> (a) substitute for the amount to be recovered under the order such lesser amount as the court thinks just in all the circumstances of the case; and
>
> (b) substitute for the term of imprisonment or of detention fixed under section 139 of the Powers of Criminal Courts (Sentencing) Act 2000 in respect of the amount to be recovered under the order a shorter term determined in accordance with that section in respect of the lesser amount.
>
> …….”

3. The term “Realisable property” is defined in section 74 of the 1988 Act as follows:

> “(1) In this Part of this Act, “realisable property” means, subject to subsection (2) below—
>
> (a) any property held by the defendant; and
>
> (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Part of this Act.
>
> … …
>
> (4) Subject to the following provisions of this section, for the purposes of this Part of this Act the value of property (other than cash) in relation to any person holding the property—
>
> (a) where any other person holds an interest in the property, is—
>
> > (i) the market value of the first-mentioned person's beneficial interest in the property, less
> >
> > (ii) the amount required to discharge any incumbrance (other than a charging order) on that interest; and
>
> (b) in any other case, is its market value.
>
> … …
>
> (10) A gift (including a gift made before the commencement of this Part of this Act) is caught by this Part of this Act if—
>
> (a) it was made by the defendant at any time after the commission of the offence or, if more than one, the earliest of the offences to which the proceedings for the time being relate; and

> (b) the court considers it appropriate in all the circumstances to take the gift into account.
>
> ……"

Case law

4. In *Glaves v Crown Prosecution Service* [2011] EWCA Civ 69, the Court of Appeal helpfully summarised the operation of the statutory scheme, per Toulson LJ at [10] to [18]:

> "10. CJA 1988 has been repealed and replaced by the Proceeds of Crime Act 2002 (POCA 2002), but the structure of the Acts is similar. (See *May* [2008] UKHL 28, [2009] 1 Cr App R (S) 31 para 8 and *Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58, para 7). The court is required, before making a confiscation order, to address three questions:
>
> 1. Has the defendant (D) benefited from the relevant criminal conduct?
>
> 2. If so, what is the value of the benefit D has so obtained?
>
> 3. What sum is recoverable from D?
>
> 11. On the first and second questions the burden of proof rests on the prosecution (subject to any statutory assumptions, with which we are not presently concerned). As to the sum recoverable, CJA 1988 s71(6) provided that:
>
> > "…the sum which an order made by a court under this section requires an offender to pay shall be equal to -
> >
> > (a) the benefit in respect of which it is made; or
> >
> > (b) the amount appearing to the court to be the amount that might be realised at the time the order is made,
> >
> > whichever is the less."
>
> 12. POCA 2002 s7(2) provides that it is for the defendant to show that the amount available to him is less than the amount of the benefit. That section makes explicit what was implicit in the previous legislation. In *Wallbrook and Glasgow* (1994) 15 CR App R (S) 783, 786, the Court of Appeal Criminal Division considered the effect of a similar provision in the Drug Trafficking Offences Act 1986. Dyson J, giving the judgment of the court, said at page 786:

> "As has been emphasised in a number of authorities, the effect of section 4(3) of the Act is to impose on a defendant the burden of satisfying the court that the amount that might be realised in respect of property is less than the value of the proceeds of drug trafficking.
>
> This must, in our view, mean that where a defendant has an asset in the form of a debt, the onus is on him to satisfy the court that the realisable value of the debt is less than its face value. In our view, this he must do by producing clear and cogent evidence; vague and generalised assertions unsupported by evidence will rarely if ever be sufficient to discharge the burden on the defendant."

13. In *Summers* [2008] EWCA Crim 872, [2008] 2 Cr App R (S) 101 the Court of Appeal Criminal Division applied the same principle in relation to s71 of the CJA 1988. Penry-Davey J said at para 11:

> "It is clearly established by authority and was accepted in this case that the burden of establishing that the realisable amount was less than the benefit so as to justify a lower figure for the confiscation order was on the appellant to the civil standard on the balance of probabilities and it is equally clear that if he sought to establish that he had to do so by clear and cogent evidence; *Wallbrook and Glasgow* …followed in Anderson [2005] EWCA Crim 3384. Following from that, it is also clear that there is no burden on the prosecution to show a prima facie case of hidden assets, but for the appellant to provide evidence demonstrating the extent of his realisable assets: *Barwick* [2001] 1 Cr App R (S) 129 (p 445) and *Barnham* [2006] 1 Cr App R (S) 16 (p 83)."

14. The expression "hidden assets", used in *Summers* and other cases, is not an expression found in the legislation and it is capable of misleading. There may be cases in which a court makes a positive finding that a defendant has hidden away all or part of the proceeds of his crime, but it is not incumbent on the prosecution to establish that fact. In *Barnham* Gage LJ, giving the judgment of the court, said at para 41:

> "To hold that the prosecution must, in some way, show a prima facie case that the defendant has hidden assets in our judgment would defeat the object of the legislation. It is designed to enable the court to confiscate a criminal's ill-gotten gains. The expression "hidden assets" is indicative of the fact that the prosecution can have no means of knowing how and

> where a defendant may have dealt with or disposed of the proceeds of his criminal activities."

15. There is no requirement that the realisable amount should be connected with the benefit obtained from the criminal conduct. If the defendant has realisable assets equal in value to the amount of his benefit from his criminal conduct, the Act requires a confiscation order to be made for the full amount of the benefit. It is immaterial that he may be able to show that he has not retained any benefit from his criminal activity and that his realisable property comes from a lawful source.

…

18. The procedure by which a defendant can apply for a reduction in the amount of a confiscation order has changed under POCA 2002. The High Court is no longer involved. Instead, the defendant applies directly to the Crown Court for a variation of the order: POCA s23. However, this change does not alter the general principles established by the courts in a number of cases arising from applications under CJA 1988, s83 (the relevant section in the present case). The general principles were succinctly summarised by Mr David Holgate QC, sitting as a Deputy High Court Judge, in *B* [2008] EWHC 3217 at para 74:

> (1) The burden lies on the applicant to prove, on the balance of probabilities, that his realisable property is inadequate for the payment of the confiscation order (see *Re O'Donoghue* [20004] EWCA Civ 1800, per Laws LJ at para 3).
>
> (2) The reference to realisable property must be to "whatever are his realisable assets as a whole at the time he applies for the certificate of inadequacy. If they include assets he did not have when the confiscation order was made, that is by no means a reason for leaving such fresh assets out of consideration" (Ibid and see also *Re Phillips* [2006] EWHC 623 (Admin)
>
> (3) A s83 application cannot be used to go behind a finding made at the confiscation hearing or embodied in the confiscation order as to the amount of the defendant's realisable assets. Such a finding can only be challenged by way of an appeal against the confiscation order. (See *Gokal v Serious Fraud Office* [2001] EWCA Civ 368, per Keene LJ at paras 17 and 24).
>
> (4) It is insufficient for a defendant to say under section 83 "that his assets are inadequate to meet the confiscation order, unless at the same time he

> condescends to demonstrate what has happened since the making of the order to realisable property found by the judge to have existed when the order was made". (See *Gokal* para 24 and *Re O'Donoghue* at para 3).
>
> (5) The confiscation hearing provided an opportunity for the defendant to show that his realisable property was worth less than the prosecution alleged. It also enabled the defendant to identify any specific assets which he contended should be treated as the only realisable property. The section 83 procedure, however, is intended to be used only where there has been a genuine change in the defendant's financial circumstances. It is a safety net intended to provide for post-confiscation order events. (See *McKinsley v Crown Prosecution Service* [2006] EWCA Civ 1092 per Scott Baker LJ at paras 9, 21-24, 31 and 35).
>
> (6) A Section 83 application is not to be used as a "second bite of the cherry". It is not an opportunity to adduce evidence or to present arguments which could have been put before the Crown Court judge at the confiscation hearing (para 38 of *Gokal* and paras 23, 24 and 37 of *McKinsley*)."

5. Toulson LJ gave guidance on the approach to take to an application for a certificate of inadequacy, at [52] to [56]:

> "52. The starting point for considering any application for a certificate of inadequacy is the confiscation order itself. Since the burden of proof at the time of the making of a confiscation order is on the defendant to show that his available assets are less than the benefit figure, it follows that there may be cases in which a confiscation order is properly made in a larger sum than the defendant is in truth able to pay, and this may result in him having to serve a period of imprisonment in default for failing to pay what he cannot pay. It may be that the defendant has been dishonest or cavalier in his evidence or it may be that, although truthful, he has not been able to produce evidence sufficient to discharge the burden of proof which rests on him. In the case of money which has gone through a bank account in modest amounts over the course of time, and for which he is not kept detailed records, he may be unable to give more than a generalised explanation.
>
> 53. Mr Dennison submitted that the fact that his evidence is of a general kind ought not to prevent a judge from accepting it, if the defendant is in truth being candid. I agree, and this is a point which should be remembered, although the prosecution usually take a less accommodating position on the making of such applications. As the prosecutor's statements in the present case

illustrate, courts are routinely reminded of the dictum in *Wallbrook and Glasgow* that the defendant must produce clear and cogent evidence, and that generalised assertions will rarely be sufficient to discharge the burden. The truth is that there is a balance of judgment to be struck. The courts are right to treat with some scepticism generalised assertions by someone whose credibility may be deeply suspect by reason of the facts of the offence. Absence of independent credible evidence to corroborate a defendant's account is not fatal as a proposition of law, but it may well be fatal as a matter of fact. That, as I have said, is a matter for the judgment of the court considering the confiscation application. The fact that a defendant may end up with a confiscation order for more than he can pay, because he has been unable to produce sufficient evidence to satisfy the court of his true means, rather than because he has been deceitful or evasive, is hard but not unjust. It is not unjust, because it is right that the burden of proof should be on him.

54. At the stage of an application for a certificate of inadequacy, the burden of proof is again on the defendant. He is unlikely to succeed unless the court is satisfied that he is being candid, and an application for a certificate of inadequacy is not intended to be a means of the defendant having a second bite at the same cherry. Those principles are clearly established. However, a rule of law which said that the court could not be persuaded that the defendant was unable to pay the outstanding amount by reason of a worsening of his financial circumstances unless he gave full disclosure of what had happened in the meantime to all his assets, including previously unidentified assets, would trammel the width of s83 by imposing a restriction which is not in the statute. It would also be capable of causing not merely hardship but hardship amounting to injustice.

55. In the case of previously unidentified assets, it is possible that a defendant may genuinely have no idea or only a dim recollection what had originally happened to them. He should be allowed to try to persuade the court, if this be the case, that his identified assets have shrunk in value and that as a result he is not able to pay the amount outstanding. What the court makes of that evidence will be a matter for its judgment. Much will no doubt depend on the nature of the case. Cases involving unidentified assets can vary greatly. The case of an international drug dealer with evidence of a lavish lifestyle, ready access to large sums of cash and connections with a web of offshore companies and bank accounts, may merit different treatment from the case of a defendant whose apparent circumstances and amount of unaccounted for assets are much more modest. It is for the court to consider the totality of the evidence before concluding whether it accepts that the defendant has suffered a change of fortune such that he is probably not able to pay the

> balance of the outstanding money. If the defendant is not permitted the opportunity of trying to establish this, there is a real risk that even though he can demonstrate a change in his circumstances, possibly very great, he may serve an additional period of imprisonment through failure to do that which is impossible by reason of his change of circumstances.
>
> 56. The authorities cited by Mr Dennison do not take him as far as he seeks to go. They ban an attempt to have a second bite of the same cherry, but the respondent is not attempting to do so. Although he says that in fact he never had any undisclosed assets, he accepts the finality of that order as things stood at that date. On the question whether he can persuade the court that it is right to grant a certificate of inadequacy when he cannot now give any further account of what has happened to the previously unaccounted for assets, the court in *O'Donoghue* was cautious not to lay down a rigid rule. Laws LJ said that the proper conclusion would depend on the court's appreciation of all the evidence. Pill LJ added his own emphasis that the matter must depend on an overall view and that the court needs to keep a sense of proportion in conducting the exercise. The point that he emphasised is important. It has been said many times that the statutory scheme for confiscating the proceeds of crime is intended to be draconian. So it is, but in administering the scheme it is right that the courts should keep a sense of justice and proportion, bearing in mind the essential purpose of the scheme, which is not to punish a defendant a second time for conduct for which he will have been sentenced but to deprive him of the benefit of his criminal conduct. The court in *Telli* did not seek to lay down a different principle from the court in *O'Donoghue*. On the facts it involved a different scale of criminality from the present case – a drug dealer who had claimed to have available cash in the region of £1 million. The court referred to him as having chosen not to identify his realisable assets. Whether the same may be said of the respondent will be a matter for the court to decide when it has heard his evidence."

6. The Respondent relied on the case of *Telli v RCPO* [2008] 2 Cr App R (S) 48 in which Moses LJ, giving the judgment of the Court of Appeal, stated at [37]:

> "Once it is appreciated that the property held by the defendant included unidentified assets forming part of the total value of the realisable property at the time of the order, it is impossible for Telli to establish that the realisable property is inadequate now to meet payment of the outstanding amount. The order was made in 1996. If a defendant fails to identify all the assets he holds, no-one will know their true value and by the time of the application, the value of the assets he failed to identify may have increased, particularly after 10 years. Absent consideration of

> current value, no court could be satisfied that the realisable property was inadequate. If the assets remain unidentified no conclusion can be reached as to their current value."

7. Mr Pons accepted that, although Moses LJ appeared to be closing the door on applications for certificates of inadequacy where a finding of hidden assets had been made and a defendant failed to identify all the assets he holds, the Court of Appeal in *Glaves* decided that even if a finding of hidden assets had been made, it was still open to a defendant to obtain a certificate of inadequacy on the grounds that his identified assets had diminished in value.

8. In *Re Pearson* [2012] EWHC 1704 (Admin), Collins J. said:

> "13. … . It is clear from the approach of the Court of Appeal in *Telli v Revenue & Customs Prosecutions Office* [2007] EWCA Civ 1385 that it is incumbent upon the court at this stage to have evidence of or to be able to assess the current value of any assets. That will include, generally, hidden assets. That does not mean that the court is precluded from taking the view that even if such an exercise is not possible because the applicant in question does not admit the extent of or even the existence of hidden assets, having considered the evidence that that particular applicant put before the court, it can reach a favourable conclusion.
>
> 14. It seems to me to be that that can be said to follow from the decision of the Court of Appeal in *Glaves v Crown Prosecution Service* [2011] EWCA Civ 69, where (at paragraph 54) Lord Justice Toulson, who gave the only reasoned judgment, said:
>
> > "54 At the stage of an application for a certificate of inadequacy, the burden of proof is again on the defendant. He is unlikely to succeed unless the court is satisfied that he is being candid, and an application for a certificate of inadequacy is not intended to be a means of the defendant having a second bite at the same cherry. Those principles are clearly established. However, a rule of law which said that the court could not be persuaded that the defendant was unable to pay the outstanding amount by reason of a worsening of his financial circumstances unless he gave full disclosure of what had happened in the meantime to all his assets, including previously unidentified assets, would trammel the width of section 83 by imposing a restriction which is not in the statute. It would also be capable of causing not merely hardship but hardship amounting to injustice.""

Facts

9. On 18 May 2005, Gibbs J. made a restraint order against the Applicant which included the following assets:

i) The family home at 14 Langdale Avenue, Mitcham, Surrey CR4 4AE;

ii) The Walk, Roscommon, Eire;

iii) The balances of five bank accounts in HSBC, the Allied Irish Bank ("AIB") and the Halifax Building Society;

iv) A BMW X5 motor vehicle GV53 PXE;

v) Shareholding in O'Connor Construction (UK) Ltd.

10. The order also restrained his wife, Deidre O'Connor, from disposing or dealing with any of the Applicant's assets, in particular the family home and the shareholding in O'Connor Construction (UK) Ltd.

11. On 26 October 2006, the Applicant and his co-defendants were convicted of conspiracy to cheat the Revenue. The prosecution case related to false invoices generated by a company of which the Applicant was a director.

12. Sentencing was adjourned to 17 November 2006. The Applicant then left the UK for the Republic of Ireland. Medical evidence indicated that the Applicant had been admitted to hospital in Ireland as a result of chest pains, and so sentencing was adjourned to 11 January 2007. The Applicant failed to appear at the Crown Court. He was sentenced in his absence to 4 years and 6 months imprisonment.

13. On 26 February 2007, a European Arrest Warrant was issued in respect of the Applicant, but he successfully resisted his extradition.

14. On 18 September 2007, a confiscation order was made against the Applicant in his absence. The Court found that the criminal benefit from his criminal conduct amounted to the sum of £4,257,008. The Court determined that the Applicant had not satisfied it that the amount to be realised was less than the benefit figure, and accordingly it made a confiscation order in the same amount (£4,257,008), payable immediately with 5 years imprisonment in default.

15. On 12 October 2007, the restraint order was varied so as to permit the sale of 14 Langdale Avenue. It was varied again on 14 September 2011 to include the Applicant's interest in properties in Ireland (a property at Ballinaboy, Kilteveen, County Roscommon and two plots of land in Townland of Cloonerk).

16. A further European Arrest Warrant in respect of the Applicant was issued in 2011 and executed in March 2012. The Applicant contested the subsequent extradition proceedings but was unsuccessful. He was extradited to the UK in 2018.

17. On 28 June 2013, the High Court of Ireland made an order recognising the restraint order.

18. The Applicant applied for a certificate of inadequacy on 20 January 2020.

19. On 17 March 2021, Sir Ross Cranston, sitting as a retired High Court Judge, adjourned the application on the basis that the Applicant had not yet realised all of his assets and should be given the opportunity to do so.

20. On 15 April 2021, Swift J. approved a consent order varying the restraint order over the Applicant's assets so as to allow for payment of various sums held in his accounts to be paid in part satisfaction of the confiscation order. This matter was relisted for substantive hearing on 11 May 2021 however the Applicant requested that the hearing be vacated and relisted for a later date to allow him sufficient time to realise his assets. On 6 May 2021, Swift J. granted the Applicant's request for an adjournment and directed that the hearing be refixed for hearing from 1 September 2021.

The Applicant's assets

21. At the hearing, I considered oral and documentary evidence from the Applicant. Surprisingly, the Respondent did not make a witness statement for this hearing, but it provided copies of the witness statements made for the Crown Court and the application for a restraint order, and some Court orders. Neither party was able to produce the schedule of assets attached to the confiscation order or a transcript of the hearing before the Crown Court Judge who made the confiscation order.

22. In the absence of a witness statement, the Respondent referred me to an email dated 6 September 2021, from one of its enforcement caseworkers, which stated that the Applicant had paid £76,092.01 towards the confiscation order. There remained an outstanding balance of £4,180,915.99. Interest has accrued and, as at 6 September 2021, it amounted to £4,679,774.08. Thus, the total amount due to be paid by the Applicant, as at 6 September 2021, was £8,860,690.07.

Identified assets

23. In this section of my judgment, I set out my conclusions on the Applicant's assets, following consideration of the Applicant's statement in this application and the exhibits thereto; the restraint order dated 18 May 2005; and the Respondent's witness statements (the witness statement of James McColgan, dated 31 January 2007, the witness statement of Ian Arnot, dated 6 September 2007, and the witness statement of Philip Newport, dated 2 September 2011).

(1) 14 Langdale Avenue

24. The Applicant's share of the net equity in the family home was estimated at £56,500 at the date of the confiscation order. Upon sale of the property, the amount of £61,635.34 was paid towards the satisfaction of the confiscation order on 18 January 2008.

(2) Cash

25. Cash in the sum of £12,139.75 was seized by the police during a search operation in 2004. It was paid towards the satisfaction of the confiscation order on 24 December 2017.

(3) HBOS shares

26. At the date of the confiscation order, Mr Arnot's evidence was that the Applicant held 185 shares in HBOS plc. They were valued at £1,651. The Respondent was unable to provide any up-to-date information for this application.

27. The Applicant commissioned a report from a chartered accountant, Ms Angela Hennessey. She explained that the Applicant was given the shares in 1997 when the Halifax Building Society, in which he held savings accounts, floated on the stock exchange. In 2001, Halifax Building Society merged with the Bank of Scotland to form HBOS. Shares in the Halifax Building Society were automatically exchanged for shares in HBOS. HBOS was acquired by Lloyds TSB Group plc on 16 January 2009, and at that date, the Applicant's shares were automatically exchanged for the reduced number of 116 shares in Lloyds TSB Group plc.

28. As at 12 November 2019, the share register showed the Applicant holding 116 ordinary shares in Lloyds Banking Group Plc, with a total value of £70.90 (before dealing costs). The Applicant submitted that the value may have decreased since then. I accept Ms Hennessey's report, explaining the reduced value of the shares.

(4) HBOS bank accounts

29. At the date of the confiscation order, the Applicant held funds in HBOS bank accounts with an estimated total balance of £3,500.

30. As at 16 August 2021, the funds in those accounts were as follows:

    i) Instant saver account: £1,317.23

    ii) Current account: £176.76

    iii) Liquid gold: £822.93

31. The Applicant closed the accounts and paid the balance of £2,326.92 to satisfy the confiscation order on 16 August 2021. The total balance in August 2021 was £1,173.08 less than the estimated value at the date of the confiscation order. I accept that the funds were dissipated by the Applicant.

(5) Clooneybeirne, Roscommon, Eire

32. The Applicant's share of the equity in this property was valued at £85,850 at the date of the confiscation order. The restraint order was varied to include it by order of 13 September 2011.

33. According to the Applicant, he bought this property jointly with his wife, Deidre O'Connor, in about 1995-1996. They separated in about 2009 and entered into a separation agreement on 13 May 2010 which assigned the title in the property to his wife. She continues to reside at the property and takes sole responsibility for payment of the outstanding mortgage. The current valuation of the property is approximately €200,000.

34. The Respondent submitted that, at the date of the separation agreement, the Applicant's interest in the property was subject to the restraint order which prevented a dissipation of his assets. Matrimonial proceedings should not be used to circumvent the provisions of the 1988 Act. I accept the Respondent's submission that the Applicant's transfer of his interest in this property was a gift caught by the 1988 Act and which therefore fell within the definition of realisable property in section 74(1) of the 1988 Act.

35. There are 7 substantial judgments against the Applicant and Deidre O'Connor, entered by the Bank of Ireland and AIB which have been registered as charges against the property. The amount of the judgments far exceeds the value of the property and so the Applicant submits its value to him is nil, even if it is part of his realisable property. However, following the recognition of the restraint order by the High Court of Ireland, there is a Land Registry entry which states:

> "02-JUL-2013
>
> All dealings with the property and with any charge(s) thereon is inhibited until the Court Order dated 28th June 2013 is discharged."

This entry pre-dates five of the registered judgments. The two registered judgments which pre-date this inhibition are said to be subject to it.

36. For these reasons, I do not accept that this property is no longer available to satisfy the confiscation order.

(6) Torrevieja apartment, Alicante, Spain

37. Prior to the confiscation hearing, the Applicant admitted that he purchased this property in 2003 for €131,000, with a mortgage in the sum of €120,000 which was secured against the Applicant's family home at 14, Langdale Avenue.

38. At the confiscation hearing, Mr Arnot assessed the current value of the property to be €169,000. Mr Arnot's valuation was based on data for average property prices in the region; there was no valuation of the property by an estate agent.

39. The deed of sale indicates that the property was sold in 2012 for €80,000 by his legal representatives. The deed of sale states that payment was made between the parties in cash. The Applicant states that, following payment of fees, €50,000 remained. The Applicant states he has used it to pay debts, and so it has been dissipated.

40. The deed of sale refers to a Spanish tax liability of €2,400, but there is no further information about fees.

41. Whilst I accept that the property has been sold for the amount of €80,000, the absence of any record of payment to the Applicant means that I cannot be satisfied as to the net amount which the Applicant received. I conclude, on the balance of probabilities, that the funds he received (whatever they were) are likely to have been dissipated.

(7) Cloonerck

42. The Applicant purchased land at Cloonerck, Eire in equal shares with his brother, in September 2010, for the sum of €350,00. Shortly thereafter, in October 2010, the property was transferred to the sole ownership of Deidre O'Connor. The current valuation is €200,000. The restraint order was varied to include it by order of 13 September 2011.

43. In my judgment, the Respondent is correct in its submission that the Applicant's 50% share of this property was a gift from the Applicant to Deidre O'Connor which post-dated the restraint order and the confiscation order and is caught by the provisions of the 1988 Act. It is realisable property.

(8) Ulster Bank account no. 82352012

44. A letter from Ulster Bank confirms that the balance of the account as at 26 May 2019 was €13.16. The Applicant submits the balance remains the same, and this is not disputed by the Respondent.

(9) HSBC business account no. 51391542

45. This account was listed in the restraint order, but HSBC has confirmed in a letter dated 7 May 2019 that the account was closed on 2 June 2005. The bank no longer has any records relating to the account. Neither the Applicant nor the Respondent are able to identify any funds in that account.

<u>Hidden assets</u>

46. In his statement of 31 January 2007, Mr McColgan invited the Court to find that the Applicant had hidden assets, as his identified assets did not reflect the full amount of the benefit he obtained from his offences.

47. Mr Arnott, in his statement of 5 September 2007, added that because of the Applicant's failure to co-operate, it had not been possible to identify and/or value some of the assets which were believed to exist. In particular, he referred to accounts with AIB, property in Eire, and BMW motor vehicle. I turn to deal with those assets now.

AIB account 31290-002

48. Mr Arnott, in his statement of 5 September 2007, stated that this account had a balance of €4,470.93 as at 3 August 2004.

49. The Applicant's evidence, confirmed in a letter from AIB dated 15 May 2019, was that this was a joint account in the name of the Applicant and his wife. As at 27 November 2019, the account was overdrawn in the sum of €2,239. There has been no activity on the account since then.

50. In the light of this evidence, I accept that there are no funds in this account which are available to meet the confiscation order. It is possible that there were funds in this account which were dissipated.

Other AIB accounts

51. There was another AIB account referred to in the restraint order (no. 44492035) but AIB has confirmed by letter dated 15 May 2019 that the reference is incorrect, as this is not an AIB account number. I accept this evidence. There do not appear to be any other AIB accounts.

Properties in Eire

52. Mr Arnot said that the Applicant admitted at interview under caution on 7 September 2004 to having purchased a two acre plot of land for development purposes in Eire. During his trial he admitted to owning two other properties in Eire.

53. The Applicant has now disclosed that he owned a property called Ballinaboy, Kilteevan, Roscommon, Eire. According to the Claimant, this property was given to him by his father in about 2002-2004. Under the terms of the separation agreement, his interest in it (described as "the Yard") was assigned to his wife, Deidre O'Connor. It is currently valued at approximately €50,000.

54. The Respondent pointed out that the Applicant withheld any information about this property from the prosecution and the Court when the confiscation order was made, and so it was part of his hidden assets. The restraint order was varied to include it by order of 13 September 2011. As in the case of the property Clooneybeirne, the Respondent submitted that, at the date of the separation agreement, the Applicant's interest in the property was subject to the restraint order which prevented a dissipation of his assets. Matrimonial proceedings should not be used to circumvent the provisions of the 1988 Act. I accept the Respondent's submission that the Applicant's transfer of his interest in this property was a gift caught by the 1988 Act and which therefore fell within the definition of realisable property in section 74(1) of the 1988 Act.

55. The Applicant relied upon the substantial judgments registered against the property by the Bank of Ireland and AIB, which meant that the value of the property was nil.

56. However, following the recognition of the restraint order by the High Court of Ireland, there is a Land Registry entry dated 2 July 2013 which inhibits dealing with the property until the restraint order is discharged, in the same terms as set out above for Clooneybeirne. Two of the registered judgments post-date this entry, and the four registered judgments which pre-date it are stated to be subject to it.

57. For these reasons, I do not accept that this property is no longer available to satisfy the confiscation order.

BMW vehicle

58. Mr Arnot's evidence for the confiscation hearing was that the Applicant was the registered keeper of a BMW X5 series motor vehicle with an estimated value of £18,500. The registered keeper changed on 15 April 2005. Mr Arnot presumed that the Applicant then had a cash asset of £18,500. It was treated as a hidden asset.

59. The Applicant explained in his evidence that he purchased the vehicle new in 2003, for £43,441. It was funded by a part exchange and a hire purchase agreement. He had an accident in the vehicle and sold it to an Irish breaker. He later settled the hire purchase agreement with a payment of £10,813.46 on 6 April 2005.

60. The purchase and the settling of the hire purchase agreement are documented in evidence, but there is no evidence of the sum which the Applicant received when he sold the car to an Irish breaker. The Applicant invited me to infer that the amount received was £10,813.46, but I am not satisfied that inference can be drawn in the absence of any evidence.

Conclusions

61. The terms of the confiscation order were based upon finding by the Crown Court that the financial benefits the Applicant gained from the fraud amounted to £4,257,008, and the Applicant had failed to satisfy the Court that the amount which could be realised was less than the benefit figure. Although the Applicant's identified assets were far less than the benefit figure, the Court was satisfied that the Applicant also had substantial hidden assets.

62. The Applicant's case was that, in support of this application, he and his solicitors had gone to considerable lengths to identify his assets and their true value for this application, and he was now co-operating with the Respondent and the Court. He invited the Court to accept that there were no further assets beyond those disclosed, and that if there were hidden assets in 2007, they would have been discovered in the confiscation enforcement proceedings.

63. The Respondent pointed to the fact that the Applicant had evaded dealing with the confiscation order until after his extradition to the UK, and he was only co-operating now against the backdrop of a risk that he will be required to serve the default term. The Respondent criticised the Applicant's failure to realise the value of the disclosed assets to meet the confiscation order, at least in part.

64. In my judgment, the Respondent's criticisms were justified. Furthermore, the Applicant has done all that he could to evade both the restraint order and the confiscation order, by gifting assets to his wife, selling assets for cash and not recording the amounts received, and dissipating his assets in general expenditure.

65. The Applicant has not attempted to explain what has happened to the hidden assets, nor where the £4 million benefit which he derived from his fraud has gone. In truth, by submitting that there are no hidden assets (see paragraphs 68 and 70 of his statement), he is asking me to set aside the Crown Court's finding that he had hidden assets, and that his realisable property was equal to the benefit figure. However, I cannot go behind

the terms of the confiscation order, and there is no new evidence before me to demonstrate that the hidden assets have depreciated in value, or are no longer available to him.

66. Therefore, I conclude that the Applicant has failed to prove, on the balance of probabilities, that his realisable property is inadequate for the payment of the confiscation order, and so his application is dismissed.