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Asset Recovery Efforts

“Ireland’s Non Conviction Based Forfeiture Law”

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Introduction

1. As Napoleon once said *“every army marches on its stomach”*. This statement is also true of criminal organisations no matter how large or small. The philosophy underpinning most criminality is driven by the criminal’s desire to acquire and retain the benefit from the proceeds of crime.
2. Following its Independence in 1921, Ireland experienced a very low level of serious criminal activity until the period 1968 – 1969 when the political turmoil in Northern Ireland, spurred a resurgence of the IRA and other splinter Republican Terrorist Groups who conducted their criminal activities both North and South of the border with Northern Ireland.
3. Unfortunately in the 1970’s and 1980’s Ireland, along with most other Western European Countries began to experience an explosion in the crime rate. Although much of the early increase in crime in the 1970’s related to the involvement of the IRA and other terrorist groups in Bank robberies in the South, there was also an explosion in the 1980’s of drug related crime which the Irish Authorities sought to contain using conventional methods of law enforcement based on the application of the Criminal Prosecutions System.

Prior to 1996

4. Non Conviction Civil Forfeiture has always been recognised by the Common Law but has seldom been deployed. In Ireland, one example of the response to terrorist fundraising was to the enactment of the Offences Against the State (Amendment) Act, 1985. This law was passed in response to a specific controversy. Over £ 1,000,000 had been identified by Police Investigation in an Irish Bank Account. The Gardai and the State believed that this money represented the proceeds of criminal activity by the IRA and that it was intended by the IRA to support their future criminal activities.

The Act was a tersely worded Statute. It permitted the Irish Minister for Justice to issue a certificate indicating that in his opinion, the monies held in a particular Bank Account were held by an illegal organisation. Thereafter, the Bank was obliged by Law to freeze the account. In order to ensure due process it was enacted that any person claiming to have legitimate ownership of the monies was entitled to bring an Application to the Irish High Court and that the onus would be on that person to prove that he was the legitimate owner of the monies. In due course a person came forward claiming that the funds were his property. However his primary challenge was a legal argument that the law was so draconian that it was unconstitutional. The Irish High Court rejected that challenge and held that the law was in accordance with the Constitution of Ireland.

In the case of *Clancy v Ireland* in 1987 the Irish High Court noted that the Act permitted a reasonable period upon which any legitimate owner of the property was entitled to make their case to an independent Judge in civil proceedings with a guarantee of due process. The existence of this mechanism, providing due process, was the best assurance that the legislation complied with the Standard of Four Procedures required by the Irish Constitution.

After the failure of the Constitutional challenge based on legal argument only, the Claimant did not seek to advance his case. The monies remained frozen. Nearly twenty years later an Application was made to pay the money over to the Irish State at which time the amount of money had increased to a figure in excess of € 10,000,000. No meaningful attempt was ever made by any Claimant to adduce evidence to prove the legitimate provenance of those funds.

The essential ingredients in the 1985 approach involved:

- (i) A Ministerial Certificate indicating an opinion on the part of the Minister for Justice
- (ii) The Certificate triggered an obligation on the part of the Financial Institution to freeze funds.
- (iii) An opportunity to contest the Ministerial decision in the Irish High Court was guaranteed to any person who wished to assert a legitimate interest in the frozen funds.
- (iv) The onus of proof effectively was shifted to a Claimant to prove, on the balance of probabilities, that he was the legitimate owner of the frozen funds.

In one sense, the 1985 model sought to transfer the primary onus of proof onto a Third Party Claimant. However it should be noted that if a Third Party Claimant had produced a plausible, factual case in support of his claim the State would have been obliged to disprove that case. In that sense it was not a case where the onus of proof was entirely shifted to a Claimant.

1996 to date

5. By 1996 it had become apparent that the Irish Authorities were in danger of losing the battle with some organised criminal gangs who had developed highly organised Drug Trafficking Operations. It had also become apparent, that a small number of drug dealers in Ireland had identified the demand for cannabis as providing them with an opportunity to develop large scale drug dealing operations. The profit margins were enormous. The clients were hard to detect and the preoccupation of Law Enforcement Agencies up to that time had been largely focused on interdicting the trade in heroin and other hard drugs.
6. Within a short period, Garda Intelligence and the campaigning work of the journalist Veronica Guerin, disclosed to an increasingly startled Irish public, that Ireland was developing a new breed of gang leaders who were very rapidly becoming multimillionaires and were using their proceeds of crime, to invest in legitimate businesses in accordance with classic money laundering strategies.

7. At first, the Irish Authorities sought to address these problems by traditional law enforcement methods. However following the dramatic murder of the journalist Veronica Guerin in 1996 a crisis was precipitated which galvanised the Government of the day which introduced a series of far reaching amendments to Drug Trafficking Legislation. One of those amendments incorporated a Civil Non-Conviction based Forfeiture System which was introduced by the Proceeds of Crime Act, 1996. This Act was then supplemented by the provisions of the Criminal Assets Bureau Act, 1996 which set up a dedicated Multi-Agency Unit to deploy the powers contained in the Proceeds of Crime Act.

8. The Proceeds of Crime Act provided for the confiscation of property having a value in excess of £ 10,000 in circumstances where the High Court was satisfied by evidence that the property constituted either directly or indirectly the proceeds of crime.
 - The Act made provisions for Applications to be made to the High Court. The evidence had to be tendered both orally and on Affidavit by a Member of An Garda Siochana not below the rank of Chief Superintendent. Thereafter other Witnesses could give Supplementary evidence.

 - Section Two of the Act permitted the High Court to grant interim Freezing Orders.

 - Section Three of the Act permitted the Court to make an Interlocutory Order.

 - Section Three of the Act permitted the High Court to make Freezing Orders in relation to the Respondents Assets.

 - Section Six of the Act permitted the Court to Order that monies might be made available to the Respondent from the frozen funds, for the purposes of discharging reasonable legal and / or living expenses.

 - Section Seven provided for the appointment of a Receiver over any property which had been made the subject of an interim or Interlocutory Order.

In effect, all of the mechanisms of a Statutory Civil Commercial Injunctive regime are enshrined in the Act. From the State's perspective the most significant advance was the authorisation by Parliament in Section 8, of the standard of proof which is required to determine any question arising in relation to the Act as proof on the balance of probabilities. The creation of this new mechanism, involved a departure from the more draconian type of procedure deployed by the Offences Against The State (Amendment) Act, 1985.

9. The 1996 reforms put the onus of proof on the State, to prove on the balance of probabilities that property was directly or indirectly the proceeds of criminal conduct. It was not that the State abdicated responsibility for adducing proof in relation to these cases; in fact it assumed the burden of doing so but on a civil standard. However once the State did introduce evidence in civil proceedings the radical effect of the Act, was to confront the Defendants, with the dilemma of having to provide an explanation to negate the evidence put forward by the Plaintiffs. As we will see later on, that proved more difficult than people might imagine.

It should be noted that prior to the implementation of the 1996 legislation, a number of commentators expressing concern about whether it was legitimate to introduce civil forfeiture in accordance with the Constitution of Ireland and / or the European Convention on Human Rights and whether this radical response to a criminal crisis, was not an overreaction. It was argued by some critics that the traditional armoury of criminal prosecution and enforcement was the only appropriate and just way to pursue criminal organisations and that the introduction of civil forfeiture would create a real risk of injustice.

10. In my experience, one of the critical features of the success of the 1996 legislation has been the fact that it requires that any Freezing Orders are subject at all times to independent adjudication, and supervision by the Irish High Court. Independent Judicial scrutiny is an invaluable safeguard of Human Rights but also serves to motivate the State Agencies, to analyse their own cases carefully and to scrutinise the evidence which they have gathered rigorously and not to pursue unmeritorious cases.

11. In due course the 1996 legislation was subject to a number of elaborate Constitutional challenges in the Irish High Court and Supreme Court. The Supreme Court upheld the Constitutionality of the legislation, unequivocally. At the same time, it interpreted the legislation in a strict fashion and rejected some submissions made on behalf of the State that the legislation should be construed in an expansive manner.

Criminal Assets Bureau

12. The day to day application of the Proceeds of Crime Act was assigned to the Criminal Assets Bureau ('CAB'). CAB is a Statutory Corporate Body which is operated by a Multi Agency Force of Gardai, Revenue Officials including Customs and the Social Welfare Officials.
13. In principle, the combination of different Statutory Authorities was a revolutionary measure in Irish Law. Prior to 1996, there had been a marked reluctance on the part of certain Statutory Bodies to share official information. Since 1996, the Gardai have been in a position to act not merely to access information about a Defendants Social Welfare status or tax affairs but are also in a position to pursue the Defendant for any violations of the Revenue Code or the Social Welfare Code. The law provided anonymity to Social Welfare Officers and Tax Inspectors who were transferred to the Criminal Assets Bureau. The Police did not receive an entitlement to anonymity.
14. The Criminal Assets Bureau has worked very effectively since 1996. Why is this?

I suggest a number of factors from my own experience.

- (i) **Coordination** – the coordination between different State Agencies. The elimination of 'red tape' and interdepartmental wrangling provides a clear focus to operational decisions and methods.
- (ii) **Access to Independent Legal Advice** – CAB has always had an internal legal advisor. The bureau legal officer can be recruited from either the Private Sector or the public sector. In addition, the Bureau from its inception briefed a small number of Independent Counsel to advise it in relation to strategy, statutory interpretation and the conduct of litigation.

- (iii) **Rigour** – one of the features of the Bureau has been a strong culture of critical analysis of its own case files. Cases are tested rigorously before they are brought to Court. High standards are demanded of all of the Officers in the Bureau in terms of the preparation of paperwork and the analysis of evidence. The fact that every case would be subject to ongoing judicial supervision and scrutiny is a good thing. It raises the standard of a State Agencies work. It militates against sloppiness or over enthusiasm or complacency.
- (iv) **Experience** – the deployment of experienced police investigators in support of civil litigation is of immense benefit. The role of the criminal investigator is often difficult, and requires painstaking attention to detail. However that un-dramatic work tends to produce results.
- (v) **Efficiency** – from its inception, CAB has internally set a demanding standard for its operatives in terms of case management and efficiencies.
- (vi) **Due Process** – The CAB goes to considerable lengths to ensure that it deals fairly with Defendants. The 1996 Confiscatory Scheme, has empowered, the State to confiscate a wide range of properties including:
 - (i) Houses, (including family homes).
 - (ii) Cars,
 - (iii) Boats,
 - (iv) Funds in bank accounts,
 - (v) Social Welfare allowances

The CAB has also been able to serve Tax Demands. These Statutory Powers are applied in a balanced and humanitarian way. Considerable tact and discretion has to be exercised when seeking to exercise the powers for example of receivership over family homes which represent the proceeds of criminal conduct.

- (vii) **Patience** - The legislation as it was initially crafted, envisaged that final Orders in relation to the transfer of confiscated property to the State could not be made until a period of seven years had elapsed within which Confiscation Orders could be challenged. In practice, many cases were resolved swiftly because Defendants capitulated or fled the jurisdiction but the maintenance of this type of Confiscation System requires a long term perspective.

The Impact

15. The 1996 reforms have been the most fruitful non-conviction confiscation methods deployed by the Irish State. The first five to six years of the operation of the 1996 Act had a very significant psychological impact on the criminal community. The visible dispossession of the Defendants' proceeds of criminal conduct, was extremely damaging to the morale of criminal organisations. The effect of the Confiscation Orders also incited many leading criminals to leave Ireland and to operate and work in other countries in Europe (often very unsuccessfully).

Today the operation of non conviction confiscation is a settled normal part of the legal landscape in Ireland. There is no sense that this is an emergency measure. It is an integral part of Irish domestic law.

The Defendants' Response

16. In my view, one of the most striking features of the history of the non conviction confiscation has been the inability of most Defendants to produce a coherent or credible explanation to prove that the property which they seek to retain, is not the proceeds of crime.

Most Defendants in the Irish High Court have sought to rely upon technical legal, technical or Constitutional Law arguments in defence of their cases. Those Defendants who have put forward factual explanations have usually failed. The fact that the CAB has access to Search Warrants, and Criminal Investigative Powers is significant. One example is the case in which one of the two Defendants sought to defend the proceedings by raising Constitutional Law challenges (unsuccessfully).

The second Defendant (who acted as a subordinate associate of the first Defendant), claimed that the properties and cash which were associated with him, were the fruits of an entirely legitimate contract with an African Company. The Defendant swore an Affidavit and Exhibited documentation including letters from a Company purporting to show that there had in fact been a legitimate commercial transaction which provided a legitimate explanation as to why he was in possession of substantial funds.

A Search Warrant was issued to search the Defendant's house. When the Gardai entered the house they found the Defendant's associate flushing papers down the toilet. These papers were retrieved before they could be destroyed. In addition, the Gardai seized the Defendants computer and shredder. The computer was subject to expert examination. The hard drive's memory was examined which disclosed a series of drafts of a letter with an African address which were unsigned. In substance, the letter was identical to a signed version which had been exhibited by the Defendant in the defence of his case. The Computer Expert was able to identify that the letter supposedly written in Africa had been written in Dublin months after the date which was contained on the signed version in the letter.

Thereafter the Gardai did something which I have not seen take place apart from the incident in the American Embassy in Tehran in 1979 – the Gardai emptied the shredder and spent several weeks piecing together every single fragment of paper. This exercise produced draft versions of documents which had been fabricated in Dublin and yet purported to come from Africa. The Defendant's credibility was destroyed and his ability to dispute the case on its facts was undermined.

Recommendations

17. I have been asked to suggest some recommendations which might reflect the benefits of the Irish experience of non-conviction Forfeiture. I am a Barrister. I am not an employee of the State. I make these suggestions on my independent assessment and practical experience

In my view, the critical elements which need to be incorporated in any system of Civil Non conviction Forfeiture include:

- (i) A Confiscation System which is subject to independent Judicial Scrutiny.
- (ii) An Agency, Task Force or Corporate Body (like the CAB) to implement the Statutory Confiscation Regime.
- (iii) Adequate Funding to ensure that the day to day management of the Agency is driven by dedication to efficiency and high standards
- (iv) The Confiscation Agency should have access to independent legal advice and should be encouraged to avail of that advice – it is an extra layer of scrutiny and experience.
- (v) Efficient Management Personnel should be recruited (if necessary from the Private Sector) in order to enhance internal administrative efficiency and to motivate the Confiscation Agency Staff to work with enthusiasm and rigour.
- (vi) There should be careful selection of highly motivated and experienced Police Investigators to work with Civilian Civil Servants from Tax and Customs Authorities in the Confiscation Agency.