

# Receivership

## Discharging a Receiver

*McCracken v CPS (No transcript available at the time of writing)*

1<sup>st</sup> November, 2011

1. This was an appeal from a ruling by a High Court judge in which he found that CPR Rule 69.10 was exhaustive in setting out the circumstances in which an enforcement receiver could be discharged by the Court.
2. The appellant interested party sought a discharge of the enforcement receiver on the basis that he had been granted the power to take possession of, and sell, a property that she claimed to have an interest in.
3. At the application in the High Court the respondent CPS successfully argued that the Court had no jurisdiction to entertain the appellant's application because CPR Rule 69.10 stated that the enforcement receiver could only be discharged on completion of the receiver's duties.
4. CPR Rule 69.10 provides:-  
*69.10*  
*(1) A receiver or any party may apply for the receiver to be discharged on completion of his duties.*  
*(2) The application notice must be served on the persons who were required under rule 69.4 to be served with the order appointing the receiver.*
5. The Court of Appeal allowed the appeal, finding that:-
  - i. As the receivership order itself provided that the order was to remain in force until varied or discharged, it carried an implication that the appellant could apply to vary it or discharge it;
  - ii. CPR Rule 69.10 was *permissive* and not *prescriptive* in nature, and it would be wrong to read it as providing an exhaustive list of circumstances in which an application to discharge the order could be made.
6. The case was duly remitted back to the High Court.

## Establishing a Beneficial Interest in Property Held by a Third Party

*RCPO v Johnson and Backhouse [2011] EWHC 1950 (Admin)*

25<sup>th</sup> July, 2011

7. This is a Criminal Justice Act 1988 case in which the Court provided some guidance to prosecuting authorities who seek to establish that defendant's have an interest in property held by a third party. RCPO were making an application to expand the scope of an order for an enforcement receiver against the defendant, to include an aircraft that was held by a third party.
8. The defendant, Mr. Johnson, was convicted of cheating the revenue and conspiracy to contravene section 17(1)(b) Theft Act 1968 in June 2006. He had been involved in a VAT carousel fraud worth some £20 million and had provided false accounting information in order to avoid detection. In October 2006 he was further convicted of money laundering, as a result of laundering £6.25 million for an associate who was involved in a separate carousel fraud.
9. A confiscation order was made in the sum of £26 million and the judge found that his Criminal Benefit was £167 million.
10. Mr. Backhouse was a businessman and associate of the defendant. Amongst a number of other companies in various jurisdictions, in June, 2009 he had a 100% shareholding in a company called "G-Jet J Ltd", a private company, limited by shares. That company owned an aircraft.
11. In 1998 another company controlled by Mr. Backhouse, Citation Flying Services ("CFS") had entered into a refinancing deal for the aircraft with a company called Finova, whereby Finova purchased the aircraft from CFS and immediately hired it back to CFS for 84 months, with an option to purchase.
12. During the currency of the hire purchase agreement, in 2002, CFS indicated that, against the \$1,350,000 sum that was the principal for the aircraft, a company controlled by the defendant, Helix, would be injecting \$354,003.60 in order to reduce that balance.
13. In fact, a payment in the sum of \$637,482 was made by one of the defendant's companies to CFS and it was from this sum that the \$354,003.60 was paid. In fact, then, the defendant had paid approximately 50% of the purchase price of the aircraft.
14. In correspondence with Finova in 2002 it was clarified, on behalf of Helix, that the money had been injected in exchange for certain rights to use the aircraft and a

share of any sale proceeds. This was clarified, in other documentation produced in 2003, to be a right to 50% of the sale proceeds.

15. Further, it was clarified that Helix would have no other rights or interests in the aircraft. In terms of operating the aircraft there was evidence that, for example, the expenses were borne on a 50/50 basis. The evidence reflected that the defendant paid approximately £70,000 in expenses whilst the agreement was in existence.
16. There was a complicated sequence of documents, agreements, and correspondence which purported to clarify the nature of the agreement and showed how events had transpired between the parties.
17. In particular, correspondence between Mr. Backhouse and the defendant in 2003 suggested that there came a time when the defendant had failed to keep up with his financial obligations under the agreement.
18. As a result, it was finally agreed that the defendant would stop making payments altogether upon the agreement that he would receive further benefits and that this would bring their contractual relationship to an end.
19. The aircraft was sold shortly after the end of the agreement in 2004 to Mr. Backhouse, trading as DAS. The total purchase price was \$1,609,750. On the same date the aircraft was sold on to G-Jet J for \$1,600,000.
20. RCPO obtained a restraint order and an order for a management receiver against the defendant. Part of the receiver's investigation into the defendant's assets involved making enquiries with Mr. Backhouse as to the defendant's interests in the aircraft.
21. Mr. Backhouse indicated that, whilst there had been a business relationship in respect of the aircraft, which had ended in 2003, the defendant did not have an interest in the aircraft itself, CFS or G-Jet J Ltd. Pursuant to court orders and requests by the receiver, Mr. Backhouse disclosed various documentation associated with the aircraft.
22. In summary, he maintained that the defendant had no share in the aircraft after he relinquished his entitlements under the agreement in 2003, that he had not been aware of the defendant's criminality, and that that theirs had been an arms-length business relationship.
23. RCPO went on to obtain an order for an enforcement receiver. Expressly *excluded* from the list of assets that the receiver could sell was an aircraft, the beneficial owner of which was the respondent in this case, Mr. Backhouse. With this application RCPO sought to establish that, in the aircraft, Mr. Backhouse had an asset that the receiver was entitled to in order to satisfy the confiscation order against the defendant.

24. The judge found that Mr. Backhouse had shown himself to be evasive when dealing with the receiver and, in relation to certain issues, he had lacked candour. He had drip-fed information to the receiver which was ultimately incomplete. In his evidence he had blamed others, such as his legal advisors, for the deficiencies in the information that he had provided.
25. Ultimately, the judge found that it was difficult for him to accept his evidence on issues other than those for which there was documentary support.
26. The judge found that the 2001 operating agreement was genuine. However, he found that the purported “clean break termination” in 2003 did not represent an act on the part of the defendant that was met with proper consideration; it did not make commercial sense for him to walk away with nothing for his investment of \$637,000 plus £70,000, except the use of the aircraft for two years [para. 54].
27. RCPO’s principal claim was that the defendant had a beneficial interest in the aircraft. The judge found that whilst the defendant *may* have owned a beneficial interest in it at some point in time, given the number of transactions that had taken place, and given the lack of analysis of how those transactions had impacted upon that interest, it was not open to him to find that he had *retained* that interest [para. 59].
28. A secondary submission in relation to the monies that were originally invested by the defendant also failed [para. 61].
29. However, in light of his earlier findings the judge found that, when he relinquished his rights to possession of the aircraft the defendant made a tainted gift, within the meaning of the Act, to the value of \$461,268.59, which represented the value of his investment minus various expenses [para. 64].
30. As part of his conclusion the judge made the following observation which is a point that must be absorbed, whether prosecuting or defending:-

*“65. In establishing a regime for pursuing the proceeds of crime Part VI of the Criminal Justice Act 1988 assumes the ordinary rules as to how a defendant has an interest in property. That means that the prosecution must analyse how under ordinary principles of property and trust law a defendant acquired and hold (sic) property which is said to be subject to the confiscation order...”*

**Quinton Newcomb Barnaby Hone**

Chambers of Michael Hubbard Q.C. and Karim Khail Q.C.

**ONE PAPER BUILDINGS**