

Recoverable Amount

Beneficial Interest: Wives

Edwards v Crown Prosecution Service [2011] EWHC 1688 (Admin)

4th July 2011

1. The applicant applied for a declaration that she held a 50 per cent beneficial interest in three properties which she owned jointly with her husband ('D') who had convictions for money laundering and was the defendant to confiscation proceedings concerning those properties.
2. One of them, Turton Heights, was in the United Kingdom and the other two were in Spain. D accepted that from 1996 his earnings had included the proceeds of money laundering. However, he claimed that the money used to purchase Turton Heights, in 2003, had derived from the sale of previous matrimonial homes, Farnborough Road, and before that the Grange. He claimed that when the Grange was sold, the sale proceeds were used to purchase Turton Heights and one of the Spanish properties.
3. During the years before his arrest, large sums of money had passed through his bank accounts. The couple had been married for almost 40 years and the appellant had brought up the children whilst D ran his business. She was not able to provide details of how the various purchases had been financed.
4. At the confiscation hearing, D accepted that the appellant's quantifiable interest in the matrimonial estate was a ring-fenced sum of £108,818, representing one third of the value of Turton Heights, an amount which was paid to her. The appellant argued that she had provided consideration by bringing up the children of the family and it had been intended that she should have a 50 per cent interest in all three properties, irrespective of her financial contribution and the source of the money used to purchase them. She argued that it had not been established that the money used for the purchase of the Grange had not truly come from D's business and the equity in Farnborough Road.
5. The court refused the application on the following grounds. First, though the appellant was entitled to 50% of the earlier property, Farnborough Road, this had decreased as they moved to later properties. It was found that later properties had been tainted by D's criminal proceeds. It was also found that D had paid the deposit

and serviced the mortgage on the later two properties, and there was no agreement between the couple as to the equity they would both hold in the property.

6. Therefore the appellant's beneficial interest was reduced from 50 per cent because that was the common intention and because there was an element of gift: *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432 was followed. The ordinary presumption of an equal beneficial interest had been rebutted in relation to the United Kingdom properties the best estimate of the appellant's beneficial interest in Farnborough Road was that reached in the confiscation proceedings. Second, all of the evidence in relation to the two Spanish properties was deeply unsatisfactory. There was no evidence that the appellant had made any contribution or given any consideration to the properties. Therefore placing the properties into her name could be regarded as by way of gift. The presumption of equal beneficial ownership had been rebutted.
7. On that basis the court found that there was no further sum due to the appellant. This case restates establishes principles, but it does highlight important evidential considerations. The key in similar matters is the importance of clear financial and documentary information setting out the way in which assets were funded.

Pensions

R v McGoldrick [2011] EWCA Crim 2444

13th October, 2011

8. This was a case involving a confiscation order based upon an erroneous, but agreed, figure as to the value of a pension policy as at the date of confiscation. Whilst the Court do not set out the details of how this miscalculation came about but in essence it would appear that, whilst the pension had matured, the parties were unaware that only 25% of the policy could be realised by the appellant as a lump sum as at the date of confiscation; the remainder would be paid by way of annuity.
9. It is essential for practitioners to be familiar with the position in respect of pension policies, and similar policies such as endowments, for the purposes of confiscation. If a policy has not yet matured, often no money can be obtained by the holder *at all* and, hence, the value for the purposes of the Available Amount is nil. For a reminder of the proper approach to such cases, see *R v Chen* [2009] EWCA Crim 2669.

Hidden Assets

R v O'Connor [2011] EWCA 2476

11th October, 2011

10. The defendant was made subject to a confiscation order, equal to the Criminal Benefit in his case, in the sum of £1,021,300. He had been convicted for conspiracy to supply heroin and cocaine. He was given 6 months in which to pay and the default term was set at five and a half years. He had organised the importation of large quantities of the drugs from Belgium into the UK, in two consignments of 20kg heroin and 18 kg cocaine.
11. The Benefit Figure was made up of the following:-
 - a) Value of the drugs: the judge had, at the appellants invitation, used the wholesale value in Belgium which was £780,000;
 - b) Cash transfers: £230,000 had been transferred to the appellant prior to the importations. The judge rejected an argument to the effect that this was money that was contributed to the purchase price of the drugs imported and that, to include both figures would represent double-counting. He did so on the basis that the appellant had not given evidence and, consequently, had not defeated the assumptions;
 - c) Living expenses: £38,000 was an estimated figure as to the appellant's living expenses whilst he was at large.
12. No assets were either identified by the prosecution or disclosed by the appellant. The appellant had also chosen not to give evidence on his own behalf. In those circumstances, the judge found that section 7 required him to make an order in the same sum as the Criminal Benefit figure. He gave justifications for his findings which are referred to in the judgment.
13. It was asserted by the appellant that this order was *manifestly excessive* because:-
 - a) the judge had been wrong to aggregate the part-payment for the drugs from the intended purchasers with their wholesale value;
 - b) that he had been wrong to include a figure provided by the Crown for living expenses whilst he had been at large, having absconded;
 - c) that he was wrong to find that the Available Amount was equal to the Criminal Benefit.

14. The most interesting aspect of the judgment is that which deals with the third of these. The basis upon which it was argued that it was wrong for the judge to have found that the Available Amount was equal to the Criminal Benefit figure was what might be considered to be common sense points, such as the fact that the appellant had not made a 100% profit on the drugs and, so, he would not have actually made a *profit* equal to the value of the drugs.
15. In relation to this point the Court considered the relevant authorities on determining the Recoverable Amount, including the case of *McIntosh et al* [2011] EWCA Crim 1501. In that case Moses LJ took a fresh look at his own judgment in the case of *Telli v RCPO* [2008] 2 CrAppR (S) 48, in light of *May* [2008] 1 AC 1028 and *Glaves* [2011] EWCA Civ 69.
16. In *McIntosh* the judge had determined that, having disbelieved the appellant who had asserted that he had no assets, authority suggested he had to make an order in a particular sum. This was as a result of the judgment in *Telli* which he interpreted as being authority for the proposition that “*If the defendant does not satisfy the evidential burden then the court has no power to make a lesser order than in the amount of the benefit so found.*”
17. Having so found, the judge nonetheless proceeded to make an order in a lesser amount, having found that “*despite what is said in Telli it would be wholly wrong for me to make an order in that sum*”.
18. Moses LJ endorsed the judge’s approach, saying that he had applied *justice and proportionality*. He stated that the proposition identified by the judge was correct but that, in such cases, a *just and proportionate* view of the facts might lead to the position where a defendant could satisfy the evidential burden even where his evidence proves to be *untruthful, unreliable, or even non-existent*.
19. On the facts of this case the appeal was dismissed. However, the judgment makes it plain that the assumptions can, in certain circumstances, be defeated in such cases without the need to call evidence from a defendant.
20. This is a question which arises commonly in cases involving a Criminal Benefit calculated according to a *pecuniary advantage*, such as evading duty, where what is “obtained” never actually materialises into an asset that could properly be included as part of the defendant’s Available Amount.

R v McIntosh; R v Marsden [2011] EWCA Crim 1501

22nd June, 2011

21. The appellants were convicted of conspiracy to cheat the public revenue. They had been involved in a 6-month Missing Trader Intra Community ("MTIC") fraud that generated in excess of £35 million. The agreed Criminal Benefit for each of these appellants was £3,668,990. At the confiscation proceedings, to which the Criminal Justice Act 1988 ("CJA") applied, each of the appellants sought to argue that they had no realisable assets.
22. At the conclusion of the hearing the judge had found that the appellants were concealing their assets and, consequently, that he was bound to make an order in the full sum of the Criminal Benefit, pursuant to section 71(6) of the CJA.
23. The appellants appealed upon the basis that the judge had misdirected himself by suggesting that, having found that the appellants were concealing their assets (in other words a finding of "hidden assets"), he had to impose an order in a sum equal to the Criminal Benefit figure in each case.
24. The Court used this as an opportunity to review the relevant authorities in this area. Having done so the court concluded, at para. 15, that *there is no principle that a court is bound to reject a appellant's case that his current realisable assets are less than the full amount of the benefit, merely because it concludes that the appellant has not revealed their true extent or value, or has not participated in any revelation at all. Indeed, the court must answer the statutory question in s.7 in a just and proportionate way.*
25. The Court went on to observe that it might be that, in looking at the case as a whole, and any evidence in the case that would tend to suggest that the appellant's assets do not amount to the sum of the Criminal Benefit figure, a court may come to the conclusion, independent of evidence from the appellant, that *the assets available to the appellant are less than the full value of the benefit.*
26. However, the facts of this case the Court upheld the confiscation orders, finding that the judge had demonstrated the correct approach in respect of a co-appellant, who had been dealt with separately, which, combined with his detailed ruling in respect of these appellants, tended to suggest that he had taken the correct approach with these appellants.

Cost Considerations when Determining the Value of the Available Amount

27. An interesting decision which demonstrated an awareness by the Court of Appeal of the commercial realities of litigation is *R v Walker* [2011] EWCA Crim 103.
28. The case related to the issue of whether an entitlement under a trust fund was “free property” for the purposes of section 82 POCA and, consequently, whether it was appropriate to include it within the Available Amount. The Judge at first instance had declined to include it in the Available Amount and the appellant prosecution agency challenged that decision.
29. It was found as a fact that the respondent’s trust fund was such that he was entitled to call for any income produced from the fund and that it would have been possible, in theory, to obtain a valuation of that sum as at the date of the confiscation order, although no valuation was available to the Judge or the Court of Appeal at the hearing. In those circumstances the Court of Appeal indicated that the appellant succeeded on the point of principle.
30. However, the Court of Appeal refused to interfere with the confiscation order on the basis that the cost of adjourning to allow a calculation of the value of the fund and, indeed, the cost of obtaining expert evidence in order to do so would have resulted in “*considerable and disproportionate costs*” and that, consequently, it was not in the “*public interest*” to prolong the proceedings.

Assets that are Difficult to Realise

31. An important judgment dealing with assets which are *difficult* to realise, for the purposes of the available amount, was handed down on the 22nd April, 2010. *R v Modjiri* [2010] EWCA Crim 829 the defendant had a third share in a property. His two co-owners did not wish to sell the property. On the application of the defendant the Judge in the Crown Court had made a ruling that there was no value in the defendant’s share of the property as it could not be realised, and did not take account of the value of the property when calculating the realisable amount.
32. The Crown appealed the case, arguing that it was the value of the property that mattered, and it was not for the court to be concerned about how a defendant realised his assets. The Court of Appeal allowed the appeal on the basis that s.79(3) of the Act was not concerned with the realisation of property but only with its valuation.

33. The court then went on to say that that the Crown Court should proceed on the basis that the defendant could obtain an order under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 for the sale of the property as a whole (an “Order for Sale”), and that he would, on such a sale, receive his due proportion of the proceeds.
34. In summary, it was stated that the possibility of the defendant not being able to obtain an order for sale of the property as a whole did not affect or diminish its market value so there should be no reduction to reflect the fact that the interest in the property was shared. Therefore, the judge should have included it in the available amount for the purposes of the confiscation order.
35. This case is merely a clarification of earlier interpretation of s.79(3) of the Act. What *Modjiri* shows clearly is that the court is concerned only with what assets the defendant has, and any difficulties in realising those asset are for the defendant to overcome.

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