Neutral Citation Number: [2014] EWCA Crim 2344

Case No: 201303560B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM HARROW CROWN COURT
HHJ Mole Q.C.
S20110408

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2014

Before:

SIR BRIAN LEVESON: PRESIDENT OF THE QUEENS BENCH DIVISION
MR JUSTICE GREEN
and
SIR COLIN MACKAY

- -

Between:

Hussan Hussain	**Appellant**
- and -	
The Crown (London Borough of Brent)	**Respondent**

- -
- -

K. Khalil QC and Q. Newcomb (instructed by **Hodders Law**) for the A**ppellant**
E. Robb (instructed by **London Borough of Brent**) for the **Respondent**

Hearing dates : 4 November 2014

- -

Approved Judgment

Sir Colin Mackay:

Introduction

1. On 16 December 2011 after a two day trial before Magistrates, the appellant was convicted of, and committed to the Crown Court for sentence and confiscation proceedings in respect of, the offence set out below.

2. On 10 June 2013, at the Crown Court sitting at Harrow before HHJ Mole Q.C. he was sentenced for breach of an enforcement notice contrary to Section 179 (2) and (9) of the Town and Country Planning Act 1990 to a fine of £20,000, with 12 months' imprisonment in default of payment, and ordered to pay £38,422 towards the costs of the prosecution.

3. On the same date he was made subject to a confiscation order under the Proceeds of Crime Act 2002 ("POCA") in the sum of £494,314.30, with three years' imprisonment in default.

4. He appeals against sentence and the confiscation order by leave of the single judge.

The Facts

5. On the 9 July 2003 the respondent London Borough of Brent issued a Planning Enforcement Notice in respect of a property at 219 Church Road London NW10. The existing planning use of that property was stated as being "for retail and one flat". The notice required the following action to be taken within six months:

> "Cease the use of the premises as two or more flats and its occupation by more than one household and remove all fixtures and fittings associated with that use"

6. That notice was served on, among others, the then owner and occupier of the property, a limited company Tusculum Investments NV ("Tusculum") which was the registered proprietor of the land and of which the appellant was a director and part owner. Its registered office was in the Bahamas. He held three of the issued shares and his wife one. However on 11 October 2007 the appellant and his wife and co-accused, Maha Ali, purchased the property in their capacity as individuals, and were registered as proprietors. Mrs Ali was convicted with her husband, but received a modest fine to reflect her relative lack of involvement and no confiscation proceedings were launched against her. The reality was that from October 2007 the appellant was and acted as the owner of the house.

7. Notwithstanding that it had sold its legal interest in the property Tusculum continued after the sale to the appellant to receive rents as they came in, either from the tenants or from the respondent in the form of housing benefits. It instructed and paid sub-agents to carry out the collections, rewarding them with a percentage commission. Tusculum was a separate legal entity. In due course the appellant's two sons were appointed directors and the shareholdings changed so that all four family members held three of the issued shares in the company. There was no formal contract between the appellant as owner of the house and Tusculum as to the terms on which it received the rents. Mr Khalil QC accepted that the relationship was contractual and that it was

open to the appellant at any time had he so wished to take the collection and receipt of rents into his own hands and dispense with the services of Tusculum and its various sub-agents. We will have to return to consider the import of this relationship.

8. Between September 2009 and the issue of the summons in this case on 24 August 2011 there were a number of visits by the respondent's planning officers to the premises which revealed on each occasion multiple lettings, of the order of eight or nine separate contracts. On these occasions the effect of the enforcement notice was pointed out to the appellant. Following the final visit a warning letter was issued stating that a prosecution was being considered. Throughout this period the properties continued to be let.

Confiscation Proceedings

9. Although they contended that the provisions of Section 75 (2) (c) could be said to be engaged by the facts of the case, the offence having been committed over a period of more than six months and more than £5,000 having been obtained, the Crown limited its claim in the confiscation proceedings to the rental income received during the period covered by the information levelled against the appellant namely 11 October 2007 to 12 August 2011, for all of which time the appellant was himself owner of the property.

10. The rental income received in this period was calculated by reference to the housing benefit that the respondent had paid out to the tenants, which for the period covered by the charge was some £347,410. However the property had continued to be used in breach of the requirements of the notice throughout the confiscation proceedings until the date of the final hearing, by which time the sum concerned has risen to £514,314.30. These figures were not in the end disputed, nor was there any issue as to whether the appellant had assets available which equalled or exceeded that amount. There were a large number of hearings in relation to the confiscation proceedings but by the time of the final hearing the appellant was raising the arguments which are now his grounds of appeal, to which we now turn.

The Grounds of Appeal

11. As is well known Section 76 (4) of POCA reads:-

> "A person benefits from [particular criminal] conduct if he obtains property as a result of or in connection with the conduct"

The appellant's first argument is that he has not benefited from his criminal conduct, namely his refusal to comply with the enforcement notice, and his actions in continuing to allow the premises to be occupied by numerous tenants in breach of planning control, i.e. the criminal offence of which he stands convicted. He says that these rents were "obtained" by Tusculum and he received no benefit, or at most the benefit he could be said to have obtained was the director's remuneration he received over the relevant period.

12. As it seems to us the relationship between the appellant and Tusculum is clear, and no piercing of the corporate veil is required. They stood in the position of principal and agent, and Tusculum as the agent was instructed and engaged to gather in the rents which at all times were the property of the appellant. Tusculum had no interest in the land nor any right to gather retain or dispose of the money it received from the agents who did the collecting. All rights of disposition and control of the proceeds remained with the appellant, and he was free to do as he wished with them. It appears to have served some purpose of his to have left the funds with the family company Tusculum, but that in no way undermines the obvious conclusion that they were from first to last his money which he was free to dispose of as he did. No reason for this arrangement was explored before the judge or before this court.

13. The appellant therefore did "obtain" the rents within the meaning of s.76 (4).

14. The appellant's next argument is that, even if he is taken as having obtained the rents, there is no sufficient causal link established between the criminal conduct which has been proved and the property obtained, as this was not "as a result of or in connection with" his criminal conduct.

15. He relies on this court's decision in Sumal and Sons (Properties) Ltd v The Crown (London Borough of Newham) [2012] ECWA Crim 1840; 2013 1 WLR 2078. In that case the defendant had let residential properties, lying within a "selected area", without the necessary licence in circumstances where the Housing Act 2004 Section 95 (1) made it a criminal offence to do so. The particular provisions of that statute were closely examined by this court. These were set out by Davis LJ, giving the judgment of the court, at paragraphs 40-43. These provisions were:

(1) Section 96 (3) which stated

> "No rule of law relating to the validity or enforceability of contracts in circumstances involving illegality is to affect the validity or enforceability of
>
> a) Any provision requiring the payment of rent…or
>
> b) Any other provision of such a tenancy or licence.

(2) The 2004 Act also contained a statutory code by which "rent repayment orders" could be made against a person letting premises without a licence in contravention of the Statute by a tribunal on the application of the local authority – Section 96 (5) (b).

As Davis LJ pointed out (paragraph 37) the existence of that code necessarily contemplates that the landlord has in the interim lawfully received the rent or housing benefit.

16. Other distinguishing features of the facts in Sumal, as we see them, were (a) that the particular property concerned had been tenanted prior to the commencement of the

licensing regime introduced by the 2004 Act and (b) it was common ground that the defendant would have been granted the necessary license had he ever applied for it.

17. In the present case the judge found more assistance from the earlier decision of this court in R v Luigi Del Basso [2010] EWCA Crim 1119: 2011 1 Cr App R (S) 41.

18. That case, like the present appeal, concerned a failure to comply with an enforcement notice relating to the use of land. The owner had made an unsuccessful application for planning permission to operate a "park and ride" facility in connection with a local airport. Notwithstanding his lack of success he continued in the face of repeated warnings to operate the proposed scheme. The trial judge had found that more than £1.8m had been received as a result of that activity and made a confiscation order for £760,000 in view of the available amount on the evidence before him. He found that this benefit had been obtained by the appellants who had embarked on and continued to run this operation in knowing defiance of the enforcement notice.

19. The appellant in that case had sought to focus on the lack of profit to him from these activities, saying among other things that virtually all the income from the scheme had been spent on necessary running expenses and significant financial contributions to the local football club which had a lease which covered the relevant land. The judge had found that the appellant had derived a benefit from his conduct and this court had the advantage of three well known decisions of the House of Lords, heard consecutively on this issue, namely R v May [2008] UKHL 28: [2008] 1 AC 1025: Jennings v CPS [2008] UKHL 29; 2008 1 AC 1046; and R v Green [2008] UKHL 30; 2009 1 Cr App R (S) (32).

20. In his analysis of the case law, Leveson LJ, as he then was, stated that it was necessary to go back to the words of the statute as had been explained by the House of Lords, particularly in May, and concluded (at paragraph 38) as follows:-

> "Thus it is clear that the legislation looks at the property coming to an offender which is his and not what happens to it subsequently; the court is concerned with what he has obtained "so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control"; whatever disposition of that property is made …is irrelevant. If it was otherwise the court would be called upon to make a series of almost impossible value judgments: profit is not the test and the use of the words "true" or "real" to qualify "benefit" does not suggest to the contrary"

On that basis the court dismissed the appeal, and it is plain from the judgment of Davis LJ in Sumal that he accepted and did not dissent from this analysis of this position. It was binding on him as it is on us. He reached his conclusion, as we have set out above, influenced by the particular facts of the case that was before him.

21. Returning then to the present appeal and applying a familiar and straight forward test where issues of causation are in play in order to consider Section 76 (4) in this connection, the position can in our judgment simply be said to be this : if the appellant had obeyed the enforcement notice when he became owner with his wife of the premises the lettings would not have been allowed to continue, no new lettings

would have been allowed, and therefore but for his criminal conduct in ignoring the notice the rents in the relevant period covered by the charge would not have come into his hands or within his disposition or control as they did.

Proportionality

22. This court in Del Basso held that this legislation looked at what the offender had obtained, in the words of May, "so as to own it, whether alone or jointly, which would ordinarily connote a power of disposition or control" whatever disposition of that property is made. Leveson LJ said at 40;-

> "In the circumstances we reject the argument that the language of the statute permits the court to look at what Mr del Basso "actually made" net of all expenses: the reverse is the case as the first paragraph of the Endnote to May ("benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after the deduction of expenses") makes abundantly clear"

23. The appellant sought to re-visit the question of proportionality in the light of the House of Lords' decision in R v Waya [2013] 1 AC 294, where the impact of Article 1 Protocol 1 of the Human Rights Convention concerning the offender's right to property was considered. The House considered cases where goods or money had been appropriated but rapidly restored in their entirety to the loser, such as the burglar who returns all the stolen goods with minimal delay. But it widened its consideration at paragraph 34 in these terms:

> "There may be other cases of disproportion analogous to that of goods or money entirely restored to the loser. That will have to be resolved case by case as the need arises. Such a case might include, for example, the defendant who, by deception, induces someone else to trade with him in a manner otherwise lawful, and who gives full value for goods or services obtained. … whether a confiscation order is proportionate for any sum beyond profit made may need careful consideration".

24. As an example of such a difficult case is this court's decision in R v Sale [2014] 1 WLR 663, a case of a corruptly awarded contract, where in the absence of complete evidence and any proper analysis of the pecuniary advantage accruing to the offender the court declined to approve a confiscation order which included the additional turnover resulting from the offender's criminal acts and allowed only the offender's company's profits. The court acknowledged that this was a generous outcome for the offender but it was necessitated by an absence of any evidence on the basis of which it could value the other pecuniary advantage obtained, which probably existed but had not been explored in evidence in the lower court.

25. In the present case the trial judge did apply his mind to this problem in his ruling of 12 December 2012 in the light of the Waya decision. Having reminded himself of paragraph 34, which we have cited above, he considered arguments that the appellant had given good value to the tenants in the form of tenancies of these properties, had expended money on the premises and on remuneration to agents collecting the rents.

With one exception he saw no disproportion in making the gross sum of money obtained the subject of the confiscation order rather than deducting from it the cost of those items.

26. The judge said in that ruling:-

> "To think that …would make the mistake of equating Mr Hussain's breach of the enforcement notice as being a failure to provide proper accommodation of tenants – but that is not the point in this case – it was against the law to provide the accommodation at all in breach of an enforcement notice, however good it [sc. the accommodation] was… The reasons for issuing the enforcement notice referred to planning detriment that had nothing to do with the standard of the flats but had to do with matters such as noise, disturbance of residential amenities and effect on the character of the area."

27. He continued:-

> "I do however note the point in paragraph 34 [of Waya] as I have already indicated that while bearing in mind that the whole purpose of the legislation, and bearing in mind what Waya said is that what they say does not entitle a judge to simply take a lenient view as to what he thought "proportionate" would amount to and simply leave it to his discretion. The judge has to be very careful to bear in mind the purpose of the legislation and proportion is a different matter from just general feelings of fairness. But nonetheless it is, it seems to me, important for the judge at the end of the day to step back when he has got the figures in front of him and consider whether or not a confiscation order that goes beyond a profit is still proportionate".

28. The argument developed before us was that in the first place substantial sums had been spent by the appellant complying with an abatement notice in August 2004 with a schedule of works to be carried out, two notices, one to execute works and another to execute repairs, both served in March 2005 and a further abatement notice at a date which was unclear. It is argued that compliance with these had led to legitimate expenditure of "considerable sums" which should be deducted, though there was no evidence in the event to the court or before us as to what these amounted to, even in broad terms. Mr Khalil was suggesting that if his argument was seen in a favourable light by us then it would be for the parties to agree figures and to that end to adjourn this appeal until the outcome of their negotiations. We would be most reluctant to accede to such a course given the length of time these proceedings have already taken, something the trial judge emphasised in his final remarks. We note that in Waya Lord Walker rejected the submission that all costs and expenses incurred in realising the gain should be excluded and that only the net benefit should be made the subject of an order. He stated that a proportionate order could have the effect of requiring "…a defendant to pay the whole sum which he has obtained by crime without enabling him to set off the expenses "(ibid paragraph 26). Everything therefore turns upon the facts.

29. At the heart of the appellant's argument lies the proposition that the agreements between the appellant and his tenants were not themselves unlawful. Whether the contract is illegal as performed, and, if so, the consequences, does not fall for decision. Whether the proper analysis of the respective rights and duties of the parties might be, no conclusion stops the continued receipt of rent by the appellant from being criminal conduct, as found by the magistrates, for the reason the judge gave, namely that the whole purpose for the enforcement notice regime was the public interest in adherence to planning controls

30. The appellant before us referred to the arguments which had been advanced unsuccessfully before the trial judge when he declined to stay the proceedings as an abuse of process, against which decision there is no appeal. But the grounds of that application were in general terms namely the length of delay in bringing the proceedings to court and the incentivisation of the respondent by virtue of the fact that it retains a percentage of the confiscation order when recovered. Mr Khalil asked us to consider these matters when addressing proportionality. We have done so and in our judgment they have little or no influence on the outcome of this case.

31. The judge also declined to deduct the commissions paid to the sub-agents who collected the rent from the tenants. He regarded this as a benefit to the appellant because he did not then have to go to the trouble of collecting it himself and so obtained a very real benefit for himself. We agree with that analysis.

32. The judge, however, did consider the question of unpaid rent. He heard evidence from a number of witnesses about that, none of whom seem to have been clear or conclusive in his eyes, but nevertheless he did not dismiss this argument out of hand. He agreed that where a tenant simply did not hand over the housing benefit which he had received in respect of his premises then the landlord did not "obtain that property". That proposition in principle seemed to him perfectly clear as it does to us. The problem was one of quantification. But the judge did not shrink from that, and he made an estimate having heard the evidence that was put before him. He addressed the question properly and did the best he could with the material before him, deducting £20,000 from the notional gross receipts as representing housing benefit given direct to tenants who then kept it for themselves and did not pass it on to the landlord. We cannot accept that he was wrong in any way in his approach to this or to issues of proportionality generally.

33. It seems to us in the post Waya climate all such cases require to be carefully considered in the light of that decision. This judge in our view did just that and we do not propose to interfere with his order on the ground of lack of proportionality.

Sentence

34. The judge did not accept the appellant's protestations of ignorance as to the existence of the enforcement notice, certainly not from 2007 when he became owner. He had been written to in 2009 and twice in 2011 in addition to the site visits by planning officers to which we have referred above and he had every opportunity to stop the breach.

35. The ground of appeal against the sentence is that it was manifestly excessive because it was the maximum amount of fine that could have been imposed and made no

allowances for any mitigation such as the previous good character of the appellant and the fact that, whatever his criminality was, he provided decent accommodation for his tenants over this period.

36. The magistrates were content to retain jurisdiction over this matter and must be assumed to have been aware that their sentencing powers following conviction were a fine not exceeding £20,000. They committed the appellant for sentence solely because the prosecution sought to launch confiscation proceedings. Had the appellant been convicted at the Crown Court the power to fine would have been unlimited, but as it was the judge was restricted to the magistrates' maximum figure.

37. In his sentencing remarks the judge found that the appellant had neglected his duties as a landlord by failing to comply with these notices and stressed again the reasons for issuing the notices were to protect the rights and enjoyment of others living in that area. He had not ceased his letting activities even when notified of an intended prosecution. The judge could see no mitigation. He had a very good view of this case having spent some ten days hearing the various applications relating to it. With a continuing offence such as this, committed over a period of years, the effect of a previous good character is significantly diminished.

38. This sentence was in our judgment severe but justifiably so and we decline to quash it as being manifestly excessive.

39. It follows therefore that both of these appeals must be dismissed.