



Neutral Citation Number: [2020] EWCA Crim 1111

Case No: 202001610 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM READING CROWN COURT
HIS HONOUR JUDGE PETER CLARKE QC
S20200031

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/08/2020

Before :

LORD JUSTICE DAVIS
MR JUSTICE SWEENEY
and
HIS HONOUR JUDGE KATZ QC

Between :

REGINA
(London Borough of Islington)
- and -
ARUN BAJAJ

Applicant

Respondent

Mr Gordon Menzies (instructed by **Islington Borough Council**) for the **Applicant**
Mr Richard Atkins QC and **Mr Ben Close** (instructed by **Hasan Solicitors**) for the
Respondent

Hearing date: 30th July 2020

Approved Judgment

LORD JUSTICE DAVIS:

Introduction

1. This is a most unusual case. The prosecutor, Islington Borough Council, applies for leave to appeal under s.31 and s.89 (1) of the Proceeds of Crime Act 2002 (“the 2002 Act”) against a confiscation order made by HH Judge Peter Clarke QC, sitting in the Reading Crown Court, on 18 May 2020. The amount of the confiscation order was £200. The underlying criminal context was breaches of various regulations relating to the management of Houses in Multiple Occupancy.
2. The essential point sought to be raised is that the judge misappraised the benefit obtained by the respondent, Arun Bajaj. It is said that there should have been included in the benefit an amount, said to run to several hundreds of thousands of pounds, equal to the value of the pecuniary advantage said to have been obtained by reason of the respondent not properly housing the affected occupants of his property.
3. We heard the matter on 30 July 2020. We were told that sentence is due to take place in the Reading Crown Court on 20 August 2020. It was clearly desirable that the outcome of this application should, if possible, be known before that date; and as all three members of the court were, following argument, of the clear view that the application should be refused, we announced our decision to that effect at the conclusion of the hearing. We also said that we would give our reasons later. These are those reasons.
4. The prosecutor was represented before us by Mr Gordon Menzies. The respondent was represented by Mr Richard Atkins QC and Mr Ben Close. All counsel had appeared in the Crown Court proceedings below.

Background Facts

5. The respondent and a co-accused, Antonio Ferraiulo, were connected with two properties in North London, 190 Seven Sisters Road and 147 Grosvenor Avenue.
6. The respondent, who lives in Coventry, is concerned in a family business renting out properties, of which the family owns a considerable number. 190 Seven Sisters Road was bought in 2010. Significant sums were spent by the family on refurbishing it. It comprised flats on the first, second and third floors (known as 190A) and a garage converted into a flat (known as 190B). The ground floor comprised shop premises, rented by Mr Ferraiulo.
7. 147 Grosvenor Avenue was bought by the family in 2014. It is a house on four floors. The top floor was retained by the Bajaj family for renting out and the lower floors were the subject of a planning application to convert into flats for rent.
8. An arrangement appears to have been reached whereby Mr Ferraiulo was either to rent or to manage the properties for rental purposes. The case of the respondent was that he had let the lower three floors of Grosvenor Avenue to Mr Ferraiulo under a written lease. Whatever Mr Ferraiulo then did in terms of sub-letting was without his knowledge. As to 190 Seven Sisters Road, a lease was granted to Mr Ferraiulo in

respect of 190B. As to 190A, the arrangement developed whereby Mr Ferraiulo was to find tenants and pass on (with a fee for himself) the rents to the Bajaj family.

9. In the event, Mr Ferraiulo made a number of very substantial, and unauthorised, alterations to 190A, including creating partitions so as to increase the number of rooms. He did the same for 190B and also for the lower three floors of 147 Grosvenor Avenue. This led to gross overcrowding at the properties.
10. Issues of overcrowding and squalid living conditions came to the attention of Islington Borough Council. For example, there were, as it was established after investigation, 20 occupants at 190A/B Seven Sisters Road when the lawful maximum would have been 8. Significant want of repair and other defects and defaults were also noted. The situation was similar at 147 Grosvenor Avenue.
11. It was not disputed that, for the purposes of s.234 and s.263 of the Housing Act 2004, the respondent was to be considered a manager of the properties and subject to the duties set out in the Management of Houses in Multiple Occupation (England) Regulations 2006 and the Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007. His case, in a nutshell, was that everything was left to Mr Ferraiulo to manage at the properties and he, the respondent, was not responsible for the state of the properties. By s.234 of the Housing Act 2004, a person commits an offence if he fails to comply with a regulation made under that section. However, by s.234 (4) it is provided that it is a defence if the person had a reasonable excuse for not complying with the regulation. The respondent thus sought to avail himself of that defence.
12. The respondent and Mr Ferraiulo were charged with numerous offences under the 2006 and 2007 Regulations in relation to 147 Grosvenor Avenue and 190A/190B Seven Sisters Road. It is not necessary for present purposes to set out the details of either the charges or the applicable Regulations. They included charges relating to multiple occupation, failure to maintain service supplies in proper condition, failure to maintain the common parts and internal structure in safe condition or good repair, lack of proper fire precautions, failure to take reasonably practical measures to prevent injury and so on. Detailed evidence was put in by those who had inspected the properties on behalf of Islington Borough Council as to the appalling condition of the premises and the dangerous level of overcrowding.
13. Both accused pleaded not guilty.
14. There was a trial before District Judge Williams in the Highbury Corner Magistrates Court. By a conspicuously detailed and thorough judgment dated 27 July 2018, she found all charges proved as against Mr Ferraiulo. She found the charges not proved against the respondent with regard to 147 Grosvenor Avenue: the responsibility was that of Mr Ferraiulo. But so far as 190A/190B Seven Sisters Road were concerned, she found the charges, 16 in number, together with 2 further charges to which he had pleaded guilty as to the failure to provide information, proved against the respondent.
15. In this regard, there had been no dispute that 190A and 190B were to be regarded as Houses in Multiple Occupation. The District Judge found, on ample evidence, that there was “serious overcrowding” and that the partitions and other alterations had been undertaken by Mr Ferraiulo. By May 2016, the respondent had, as she found,

become aware of what was happening at 147 Grosvenor Avenue. The District Judge found that she would have expected him thereafter to keep a “very close eye” on what Mr Ferraiulo was doing at 190A/190B Seven Sisters Road. She concluded that he in effect turned a blind eye to the situation, being content to accept the rents. She thus rejected the defence of reasonable excuse for the failure to comply with the relevant Regulations.

16. The matter was then committed to the Crown Court for confiscation and sentence. We were told that the prosecution has elected not to pursue confiscation proceedings against Mr Ferraiulo.

The Proceedings in the Crown Court

17. In the confiscation proceedings, it is notable that the prosecution did not seek a confiscation order in the amount of the rents received during the period of the overcrowding and the breaches of the Regulations. Instead, they sought confiscation in the amount said to have represented the saving to the respondent in properly and lawfully housing the 12 (if not all 20) occupants at 190A/B Seven Sisters Road – 8 being the maximum number permitted. It was said that such saving constituted a pecuniary advantage to the respondent and arose out of or in connection with his conduct. The prosecution further sought to invoke the criminal life style provisions under s.75 of the 2002 Act.

18. Subsections (4) - (7) of s.76 of the 2002 Act provide as follows:

“(4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.

(5) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.

(6) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and some other.

(7) If a person benefits from conduct his benefit is the value of the property obtained.”

19. This approach of the prosecution was, on any view, a highly complex (as well as indirect) approach. It acquired even greater complexity when the prosecution advanced, with differing and extensive valuation evidence, several alternative hypotheses by reference to the asserted obligation of the respondent to provide suitable and safe accommodation for the 12 occupants who had exceeded the permitted number – whether by constructing an extension at the property, by acquisition of a new property or by lease of a new property, or by building a new property. The cost of providing temporary hotel or hostel accommodation for the occupants seems not to have featured as part of the prosecution’s thinking.

20. The legal team for the respondent were concerned at the approach being taken. They also, for obvious reasons, were anxious to avoid, if possible, a conclusion that the lifestyle provisions should apply.
21. Now arises a further complexity. The defence team had taken the technical point that, by reference to the way in which the charges had been drafted, the relevant criminality as charged had taken place on a single occasion. Reliance was placed on the decision of a constitution of this court in *Panayi* [2019] EWCA Crim 413, [2019] 2 Cr. App. R (S) 21 (albeit in fact that was a case on a charge brought under s.179 of the Town and Country Planning Act 1990). The point was conceded by the prosecution. The point having been conceded, and the proceedings having been conducted below accordingly, this court has not appraised for itself the validity of that technical point or of the concession.
22. A yet further complexity arises. The defence was anxious to establish whether the criminal lifestyle provisions could apply. It was taking the position that no pecuniary advantage had been obtained as alleged by the prosecution. The parties sought, and obtained, a hearing by way of a preliminary issue on the point.
23. This proved to be most unfortunate. As made clear by a constitution of this court in *Parveaz* [2017] EWCA Crim 873, a preliminary issue, as such, in confiscation proceedings should be regarded as an exceptional step. The present case illustrates the dangers involved. For example, given the *Panayi* point taken and conceded, it must have been obvious that the issue of disproportionality would in due course potentially feature: especially where, on one evidential basis, the prosecution was putting forward a figure of over £917,000 as benefit: so also there was likely to feature the question of disapplication of the assumptions, on such a scenario, if the lifestyle provisions otherwise applied. It is true that the defence were trying to avoid getting to that stage at all and both parties wanted to know where they stood on the issue of benefit. But the reality is that in evidential terms there was potential overlap: as illustrated by the respondent's own written submissions for the preliminary issue hearing (which had been notionally designed to deal with the question of pecuniary advantage). These ranged far and wide and, for example, introduced and discussed at length concepts of disproportionality and oppression. Indeed the written argument of the respondent on the application to this court continues to dwell on such issues.
24. In the event, at the hearing the judge was faced with a mountain of prosecution evidence. Oral evidence by prosecution witnesses was given over a lengthy period. This was a procedurally sorry position to have been permitted to have arisen on a preliminary issue. At that hearing, the prosecution among other things put forward a table which included an indication that the cost of bringing 190A/190B Seven Sisters Road up to standard for 8 tenants – that is, the lawful maximum – was £14,305. The cost of provision of extra accommodation for the other 12 occupants, as set out in the table, was (assuming land did not have to be purchased) assessed as some £345,840, or, if leased, up to £431,000. The cost of provision of extra accommodation (if land had to be purchased for that purpose) was assessed as some £917,000. The prosecution approach was that such “saving” constituted a pecuniary advantage obtained by the respondent. The defence strongly disputed both the approach and the figures.

Ruling of the Judge

25. In his written ruling dated 13 March 2020, the judge, confronted as he was with rather unfocused arguments, made clear – and rightly so – that, although he had been addressed on proportionality, that should be left to a later date.
26. The judge ruled, on the issue of benefit, that the purported savings could not properly be regarded as benefit within the reach of the 2002 Act. He made clear his unhappiness at the various estimates of the prosecution witnesses, by reference to the differing prosecution hypotheses being advanced, being put forward as being “definitive of the proceeds of crime” (as he put it): noting that the two prosecution witnesses who gave evidence before him had between themselves differed very considerably on valuation. Whilst some of the judge’s expressed reasoning was, with respect, perhaps not entirely in point for the purpose of the issue before him, perhaps his core reason was this:
- “(b) In the course of argument prosecution counsel described the quantum of savings as being a sum that the defendant saved “by not complying with his duty”. The description is useful in defining the prosecution’s approach to the issue. I have considerable reservations about the description of a “duty” to house tenants to particular standards as being capable of giving rise to criminal proceeds or benefit. Surely the proceeds or benefit are the rents taken from the tenants.”
27. In the light of that ruling, the parties thereafter agreed that the amount of the benefit for the purposes of the confiscation order should be £200 (representing the amount of rents received for one day). A confiscation order in the amount of £200 was made to that effect on 18 May 2020.

Disposal

28. That being the background, we can dispose of this application quite shortly.
29. We did have some initial anxieties. The first point is that aspects of the prosecution’s evidence and arguments in the confiscation proceedings perhaps revealed an approach to the effect that people like the respondent (and the prosecution constantly stressed that he is a man of considerable financial substance) should be hit very hard when engaging in conduct, and permitting squalid overcrowding, of this kind. That may sometimes well be true. But that is ordinarily the function of the punishment (as the judge appreciated): it should be no part of the confiscation process itself, which is designed to require criminals to disgorge the proceeds of their criminality. That does not, of course, of itself invalidate the confiscation process in this case: but it may to some extent help explain the seemingly entrenched views held.
30. The second point is that we were rather puzzled as to why this case had been conducted without any reference to the planning legislation. It is to be assumed that what occurred here was without any planning consent. If so, an Enforcement Notice, for example, could have been served and, if not complied with, a criminal offence under s.179 of the Town and Country Planning Act 1990 would potentially have arisen. On that scenario, moreover, confiscation proceedings would then be available which might potentially extend to the entirety of the gross rents receivable over the period of breach from all 20 occupants, including the 8 who otherwise could lawfully

have been there: see *Hussain* [2014] EWCA Crim 2344; *Boruch Roth* [2020] EWCA Crim 967. However, as we were told by Mr Menzies, the matter was first referred to the housing standards department within Islington Borough Council, and thereafter, it seems, was retained by it without consultation with the planning department.

31. The third point is that in view of the rather surprising way in which the benefit was sought to be formulated and in view of the vigorous pursuit of that formulation and in view of the very large figures being put forward, this court had some initial concerns that Islington Borough Council (which, as investigator and prosecutor, stood to retain for itself a substantial percentage of the amount of any confiscation order) might have its own separate motivation for pursuing the confiscation proceedings in this particular way. But it is right to record that, when the court alluded to this, Mr Menzies firmly reassured us that that was certainly not the case.
32. Leaving aside the very troubling variations in the prosecution's own evidence, both as to the hypotheses and as to the valuation of the pecuniary advantage in the forms advanced, we do not think it a sustainable proposition that the (notional) costs of providing appropriate, regulation compliant, alternative accommodation for the 12 occupants is to be treated as a saving constituting a pecuniary advantage within the reach of s.76 of the 2002 Act. It is far too broad, indeed speculative, an approach to have sufficient connection with the conduct alleged.
33. Of course avoiding or deferring payment of costs which a defendant otherwise may be lawfully obliged to pay is capable, in an appropriate case, of being a pecuniary advantage within the ambit of s.76: see, by way of example, *Morgan* [2013] EWCA Crim 1307, [2014] 1 WLR 145. But in the present case the short point is that the respondent was under no lawful obligation to house these 12 occupants at all. On the contrary, he was under a lawful obligation not to house them at 190A/190B Seven Sisters Road at all. It is, in our judgment, wholly artificial, in such circumstances, to attribute to him as a pecuniary advantage the notional capital cost of acquiring or building a property with a view to properly housing those 12 occupants, when he had no obligation to house them. This case, on its facts, thus does not come within the ambit of s.76 of the 2002 Act.
34. This, indeed, illustrates why, as the judge himself held, one would have thought that the proper target would have been the rents received during the period of the infringement of the Regulations (it was not suggested to us that complications of the kind featuring in *Sumal and Sons Properties Ltd* [2012] EWCA Crim 1840, [2013] 1 WLR 2078 would arise in this case). But in the result the way in which the charges were framed and the confiscation proceedings then pursued precluded that.
35. However, it did occur to this court that benefit could at least also extend to the cost of putting the premises into the requisite state of condition and repair and so on for the 8 occupants who could lawfully be housed at the premises: to which the prosecutor had ascribed the figure of £14,305. That at least, at all events on the face of it, was a cost which, ex hypothesi, was one which there was an obligation to pay but which the respondent had avoided paying: and thus that saving could constitute a pecuniary advantage within the ambit of s.76. Mr Atkins QC was prepared to concede that may be so, when the point was put to him in argument.
36. However, even then there are difficulties.

- (1) First, although the figure of £14,305 was included in the papers before the judge, it is by no means clear that the prosecution was in terms advancing that as a fall-back position. Certainly it was not explicitly so spelled out in the skeleton argument provided to the judge, who made no mention of the point. One can all too easily see the forensic difficulties in positively advancing a case of benefit by asserting a figure of £917,000, alternatively £354,000, alternatively £14,305.
- (2) In any event, the figure of £14,305 was never agreed and is not agreed. This being an application for permission to appeal on the part of the prosecution, this court, under s.32 (1) of the 2002 Act, can only on appeal confirm, quash or vary the confiscation order. It cannot, as was agreed before us, remit to the Crown Court for further consideration. Since this court itself has no sufficient evidential basis for making the valuation, and cannot just pluck a figure out of the air, this point also has to fall away.

Conclusion

37. In the result, and as previously announced, this application for leave to appeal is refused.
38. One cannot view such a result with any satisfaction. It means that the respondent has a confiscation order fixed by reference to one day's rental receipts. But it is not open to this court to put right the incorrect drafting (as conceded) of the charges. Nor should this court permit an artificial approach as to benefit to prevail over the correct approach simply in order to mark disapproval of the respondent's conduct.
39. We are not aware if any other Local Authorities have been contemplating pursuing confiscation proceedings, in this particular context, in the way in which they were pursued in this case. Mr Menzies said that he thought that one such case had been in a Crown Court on a previous occasion. At all events, this case seems to have been viewed as a sort of test case. We therefore certify this judgment as one which may be cited: so that other Local Authorities are aware of the prospective limitations on pursuing confiscation proceedings, in this particular context, in the way which occurred here. This case also operates as a reminder of the necessity for drafting the relevant charges appropriately and as a salutary warning as to the potential consequences if they are not.