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IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT BLACKFRIARS
(HHJ Peter Clarke QC)

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 27 February 2019

B e f o r e:
LORD JUSTICE MALES

MR JUSTICE STUART-SMITH

THE COMMON SERJEANT
HIS HONOUR JUDGE MARKS QC
(Sitting as a Judge of the CACD)

R E G I N A
v

ANDREW PANAYI

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Mr M Paget appeared on behalf of the **Appellant**

Mr A Ranatunga appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

LORD JUSTICE MALES:

1. On 26 September 2016 in the Highbury Corner Magistrates' Court, the appellant, Andrew Panayi, was convicted of breach of an Enforcement Notice, contrary to section 179 of the Town and Country Planning Act 1990. He was committed to the Crown Court for a confiscation order to be considered, pursuant to the Proceeds of Crime Act 2002, and for sentence. On 15 January 2018 in the Crown Court at Blackfriars, a confiscation order was made by His Honour Judge Peter Clarke QC in the sum of £95,920 under section 6(5)(b) of the Proceeds of Crime Act. He was also fined £25,000. The appellant now appeals against both sentence and confiscation order by leave of the single judge.

2. It is necessary to set out the background which goes back some years. The appellant is the freehold owner of 282-284 Caledonian Road, London N1 1BA, as well as being the owner of other properties. At all material times the property at 282-284 Caledonian Road was subject to an Enforcement Notice dated 22 August 2003. That Enforcement Notice was issued because the appellant had constructed a mansard roof extension on the property which materially exceeded the dimensions for which planning permission had been given by the local council as the planning authority. The extension was built taller and deeper and also nearer to the front wall of the building than had been approved. As a result it was visible from the street and was subsequently found, by reason of its poor design, to detract from the character of the conservation area in which the property was located. That was the basis for the Enforcement Notice, which was also contrary to the council's development plan.

3. The appellant appealed against that Enforcement Notice but on 12 February 2004 the appeal was dismissed by a Planning Inspector who found that the roof extension was visible from

the street, that the alterations could be seen from a considerable number of residential properties where the poor design was very obvious, and that that was harmful to the character of the conservation area. The Inspector extended the time for compliance with the Enforcement Notice until 12 February 2005. However, the appellant did not comply either before that date or at all and on 2 November 2006 the council wrote to him, noting that the Enforcement Notice had not been complied with and seeking an explanation. That led to further contact between the council and the appellant, including a site visit. Eventually on 28 March 2007 the council wrote to the appellant in the following terms:

> "Further to our site meeting yesterday and Andrew Marx's letter dated 2 November 2006, I write to confirm the Council will not this time be prosecuting for the non-compliance of the enforcement notices, relating to the construction of the roof extensions at the above addresses.
>
> I would point out that development undertaken without the necessary permission may be subject to enforcement action and any permission granted not complied with correctly may also be liable for enforcement action. Should there be any further serious breaches of planning process the authority will consider taking legal action."

4. It appears from a later report made some years later in 2014 that it was considered by the council in 2007 not to be in the public interest to prosecute the appellant at that time, hence the letter dated 28 March.
5. In view of that letter, the appellant took no steps to comply with the Enforcement Notice. He continued to use the property with the roof extension as built which was let out as two flats on which he received rent. We understand that the permission as granted was for a roof extension to a hostel which would have involved the provision of one extra room, which may or may not have been a bedroom for accommodation and a kitchen.
6. It is accepted on the appellant's behalf that his conduct remained unlawful. There was no

planning permission and the Enforcement Notice, although not to be the subject of a prosecution, was not withdrawn.

7. In 2014 the appellant sought to regularise the position by applying for a Certificate of Lawfulness, that is to say for a certificate that the existing use of the roof extension as top floor flats was lawful. That application was rejected by the council and an appeal was unsuccessful. The Planning Inspector determined, in a decision dated 18 February 2016, that the council's refusal to grant a Certificate of Lawful Use in a case where there was an extant Enforcement Notice in being was well-founded. The Inspector recorded that it was common ground at that time that the extension had not been modified to comply with the Enforcement Notice and concluded that the entire unmodified extension remained unlawful so that any use of it would be similarly unlawful.

8. It appears that it was this application for a Certificate of Lawful Use and the failure of the application and the appeal which led the council to reconsider the question of prosecution. The council decided that it would institute a prosecution and did so by summons issued on 28 June 2016. The terms of the summons were as follows:

> "On or about 18 February 2016, you being the owner of 282-284 Caledonian Road, London, N1 1BA breached an Enforcement Notice issued by the London Borough of Islington on 22 August 2003 in respect of unauthorised developments at 282-284 Caledonian Road by failing to comply with the remedial action required in Schedule 4 of the Enforcement Notice, contrary to section 179(1) and (2) of the Town and Country Planning Act 1990."

9. The appellant challenged the commencement of that prosecution, contending that it was an abuse of process in view of the terms of the letter dated 28 March 2007. That application was rejected by the magistrates who declined to state a case for any question of law to be determined. That refusal to state a case was, we were told, upheld by the Divisional

Court.

10. The appellant's next move was to seek permission to bring judicial review proceedings. His application for such permission came before Patterson J who rejected it. She said:

> "The letter makes it clear that 'this time' the defendants [the council] would not be prosecuting for non-compliance of the Enforcement Notice. It was not a clear and unambiguous representation that at any other time there would not be any prosecution. Had it been the Enforcement Notice would have been withdrawn, which, at no time, has it been. The defendant is, therefore, free to prosecute the claimant [that is to say the appellant] at any other time. There was no requirement for further breaches to be shown, there was an ongoing breach for failing to comply with the Enforcement Notice.
>
> There is nothing irrational, in the circumstances, of a later prosecution of [the appellant]. Apart from rare circumstances, it is offensive not to give effect to the public interest to prosecute. The Decision Letter of 18 February 2016 provided a trigger for the defendant to reconsider prosecution. There were no exceptional circumstances for no prosecution to be brought. The other Planning Permissions that [the appellant] refers to post-date, the unauthorised development here in 2011 and 2009 respectively and were considered on their own individual merits."

11. The appellant was then convicted in the Magistrates' Court and, as we have said, was committed to the Crown Court to deal with confiscation and sentence.

12. The confiscation order which the council sought was calculated on the basis of the gross rental income from two self-contained flats occupying the unauthorised enlargement of the mansard roof space. The council accepted the figures for rental income provided by the appellant in making its calculation, resulting in a benefit figure from the date of non-compliance with the Enforcement Notice, that is 12 February 2005, to the date of conviction on 26 September 2016 of £243,817.98 including an allowance for inflation.

13. The appellant's position was that it was wrong in principle, in view of the terms of the letter of 28 March 2007, for there to be confiscation proceedings, but alternatively that any benefit should be calculated limited to the period from 2016 onwards.

14. By the time of the hearing before the judge, it was common ground that this was not a case of general criminal conduct and therefore the lifestyle presumptions in the Proceeds of Crime Act 2002 were not applicable in this case and what needed to be assessed was the benefit from the appellant's particular criminal conduct.

15. The judge referred to the case of Sangha in the Court of Appeal [2008] EWCA Crim. 2562, [2009] 2 Cr.App.R (S) 17, to which we will return, and indicated that he was guided by what was said in that case. He rejected the submission made on behalf of the appellant that the only period of time which should be considered was the period between the issue of the summons and the conviction, saying that that did not reflect the criminality of this appellant's actions, but he also said that the letter sent by the local authority on 28 March 2007 (when it said that it would not be taking any action at that time) meant that it was asserting that it was not then in the public interest to prosecute and that that also needed to be taken into account.

16. In that context, the judge considered that he needed to address the question of proportionality as required by section 6(5) of the Proceeds of Crime Act 2002 and he indicated that on the facts of this case he found that to be a difficult question. The course which he proposed to take, referring to what was said in Waya [2012] UKSC 51, [2013] 1 AC 294, about the need for resolution of such matters on a case by case basis, was that it would be appropriate to make no calculation of benefit by reference to the period from the date of compliance up until the date of the letter of 28 March 2007, to take 50 per cent of the rent obtained by the appellant thereafter and to attribute that 50 per cent sum to the appellant's criminal conduct, making no adjustment for changes in the value of money. Adopting that course, the judge assessed the benefit to be £95,920 and since there was no issue about recoverable amount, ordered that sum to be paid within the next three months, with one

year's imprisonment in default.

17. The appellant's written grounds are, first, that the confiscation order was wrong in principle and manifestly excessive by reference to the planning history and in particular the terms of the letter dated 28 March 2007 to which we have referred, the effect of that letter, as it was submitted, being that the council would not prosecute for the then breaches of planning control. The second ground was that the confiscation order imposed was a breach of section 6(5) of the Proceeds of Crime Act 2002, in that it was disproportionate. Again, reference was made to the planning history, in particular the letter of 28 March 2007, and the fact that the council as the prosecuting and planning authority had decided at that time that it was not in the public interest to prosecute. The third ground related to sentence and submitted that that too was wrong in principle and manifestly excessive.In supplementary written submissions, and in oral submissions today however, counsel have focused in particular on the terms of the charge, which we have set out, as a result of a point raised by the court.

18. The appellant was charged with being in breach of the Enforcement Notice "on or about 18 February 2016", that being, as it happens, the date of the refusal of the appeal seeking a Certificate of Lawful Use. That charge, in our judgment, must be interpreted as relating to a criminal offence committed on a single day. It was submitted that the words "or about" provide a degree of latitude, so as to refer to a period, but we do not accept that submission. Those words are there to provide for the possibility that the offence in question may not have been committed on 18 February but on some other day at about that time - the precise date of the offence not being a material averment forming part of the offence. It remains, however, a charge which relates to a single day in February 2016, on or about the 18th day of that month. That is the only criminal conduct of which the

appellant has been convicted. It was for the council, as the prosecuting authority, to decide the period over which the conduct charged should extend. Section 179(6) of the 1990 Act makes that clear. It says:

> "An offence under subsection (2) or (5) may be charged by reference to any day or longer period of time and a person may be convicted of a second or subsequent offence under the subsection in question by reference to any period of time following the preceding conviction for such an offence."

19. Here the council chose to charge by reference to a single day.

20. The question arises therefore whether the calculation of benefit for the purpose of confiscation proceedings can extend over any greater period; specifically whether it can extend in respect of the whole period from 2007 onwards to the date of conviction. The prosecution says that it can. The appellant says that it is limited to the benefit obtained on a single day.

21. This point was not taken below. The case there on behalf of the appellant was that there should be no confiscation at all in view of the 2007 letter, or alternatively that the benefit should be calculated from the date of the summons in 2016 which would have resulted in a benefit of the order of about £10,000. There was reference in the course of argument to the fact that the charge covered a single day, but that was in the context of the appellant resisting the argument that this was a case of general criminal conduct so that the lifestyle assumptions should apply. That was, so far as we can see, the only context in which the point arose, which is rather different. By the time of the hearing before the judge, the prosecution had accepted that it was not a case of general criminal conduct and therefore the point was not pursued in submissions before him. Nevertheless, although the point was not taken, it is a point of law and we permit it to be taken in this court.

22. We therefore turn to the provisions of the Proceeds of Crime Act 2002. Section 6 sets out the conditions for proceeding to the making of a confiscation order. They include that a defendant is convicted of an offence or offences in proceedings before the Crown Court, or that he is committed to the Crown Court for sentence in respect of an offence or offences under various provisions of the Sentencing Act, or that he is committed in respect of an offence under section 70 with a view to confiscation being considered. The court then has to decide whether or not the defendant has a criminal lifestyle, as it is accepted in this case that he does not. Then it has to decide whether he has benefited from his particular criminal conduct and go on to decide the recoverable amount.

23. These provisions are developed further at section 76. Particular criminal conduct is defined at subsection (3):

> "Particular criminal conduct of the defendant is all his criminal conduct which falls within the following paragraphs—
>
> (a) conduct which constitutes the offence or offences concerned ... "

24. We need not set out (b) or (c). Subsection (4) provides:

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

25. It is clear that the benefit which the court needs to identify is the benefit obtained "as a result of or in connection with" the criminal conduct of which the defendant has been convicted, or in respect of which he has pleaded guilty. There is no scope for the court to find that the defendant has committed other or more extensive offences and to go on to identify the benefit which he has received from such further offending. This is apparent from the clear words of the statute but is in any event confirmed by the commentary in Blackstones Guide

to the Proceeds of Crime Act 2002 at paragraph 2-58, referring to the distinction between general and particular criminal conduct:

> "The crucial distinction is that an inquiry into particular criminal conduct is restricted to the offences which are proved or admitted in the current proceedings, including offences taken into consideration (section 76(3)). The prosecution cannot embark on a trawl through the past and the judge cannot apply the assumptions. The benefit resulting from the offences must be proved on the balance of probabilities by evidence and necessary inference from the circumstances."

26. The reference to offences which are admitted refers to admission by a guilty plea.

27. Mr Ranatunga for the council accepted this position in his clear and helpful submissions, but he submitted nevertheless that the words "in connection with" in section 76(4) were wide words which were capable of extending the scope of the relevant benefit, and did extend it in this case, with the effect that the benefit received by the appellant over the whole period since 2007 was obtained in connection with the conduct of which he was convicted, that is to say in connection with the offence committed on or about 18 February 2016. He pointed out that the offence of failing to comply with the Enforcement Notice was a continuing offence which occurred at any time after the end of the period for compliance: see the terms of section 179(1) and (2) of the 1990 Act. He pointed out also that there was no doubt, indeed it was agreed and was recorded as being agreed in the Planning Inspector's appeal decision dated 18 February 2016, that the roof extension had not been reduced in size, as required by the Enforcement Notice, and that no modification had taken place since the date of 18 February 2005, by which the appellant had been required to comply with the Enforcement Notice. It was therefore, he submitted, a case where there was clear and uncontested evidence of criminal conduct over a lengthy period from 2005.

28. In support of this submission as to the wide effect of the words "in connection with", he

relied on R v Sangha which, as we have already mentioned, was also relied on by the judge. This was a case of carousel fraud, as is clear from the summary at paragraph 1 of the judgment of Richards LJ and the terms of the indictment which are set out at paragraph 12. The fraud involved a number of different stages, as arises in a case of carousel fraud, but the defendants in that case were only alleged to be involved at one of the stages of the fraud in question. Thus although the terms of the indictment described the entirety of the fraud, the defendants in the case were only alleged to have been involved in stage 3 of what was described in the indictment - that was the only case advanced against them at the criminal trial. A confiscation order was however made which extended to the benefit obtained as a result of the commission of the fraud as a whole and that result was challenged on appeal. At paragraph 26, Richards LJ said this:

> "By virtue of s.71(1A) and (1D) of the 1988 Act, a defendant's benefit is confined to benefit from 'relevant criminal conduct', which means for present purposes the offence of which he has been convicted. Those provisions accord both with first principles, namely that an offender should only be sentenced in respect of matters that have been alleged and proved against him before the appropriate forum, and with the line of sentencing authorities deriving from R v Canavan, Kidd and Shaw [1998] 1 WLR 604 [and other cases] ... "

29. Sangha was a case under the 1988 Act, but that makes no material difference for present puroses.

30. Thus, Richards LJ affirmed what he described as first principles, that an offender could only be sentenced in respect of matters alleged and proved. The passage on which Mr Ranatunga particularly relies is paragraph 30:

> "Where there has been a contested trial, the jury's verdict and the factual basis upon which it was reached (to the extent that this can be determined from what happened at the trial) will of course have an important part to play in

> setting the parameters of the confiscation proceedings, and it will not be open to the judge to act inconsistently with the verdict or its factual basis when dealing with matters of confiscation. In our judgment, however, Mr Tedd's submissions seek to place unwarranted limitations upon the confiscation proceedings by reference to the verdict and its factual basis. The questions that have to be determined in the confiscation proceedings (whether the defendant has benefited from the relevant criminal conduct, the amount of any such benefit, and the amount recoverable from him) are distinct from those falling for determination during the trial process itself. The standard of proof is different, namely that applicable in civil proceedings. There will normally be evidence additional to that led at the trial. The court responsible for making the relevant determinations is the judge, not the jury. Whilst the judge must act consistently with the jury's verdict and its factual basis, it is open to him, in the light of the evidence as a whole, to make additional and more extensive findings of fact than those upon which the verdict was based."

31. Mr Ranatunga derived three points from this passage. First he submitted that the case shows that the judge in the confiscation proceedings must not act inconsistently with the jury's verdict. He submitted that a finding that the appellant's benefit from criminal conduct covered the whole period from 2007 was not inconsistent with the commission of an offence on 18 February 2016. Second, he relied on the differences identified in this paragraph between the procedure, evidence and standard of proof which apply respectively in criminal and in confiscation proceedings. Third, he relied in particular on the concluding sentence, submitting that the judge in confiscation proceedings is entitled to make additional and more extensive findings of fact than those upon which the conviction is based and that the confiscation court is entitled to take into account all of the evidence it has heard in the confiscation proceedings, provided only that it acts consistently with the verdict and the factual basis for the verdict.

32. Initially Mr Ranatunga was inclined to advance reliance on what was said in Sangha as an additional and alternative point to his submission as to the meaning of "in connection with", but on reflection he accepted that its relevance is essentially to support that

submission rather than to provide an alternative if that submission is not accepted. With respect that must be right. The court can only proceed in accordance with the terms of the statute and if the conduct in question is not obtained in connection with the criminal conduct in question there is no scope for including it in the calculation of benefit for confiscation purposes.

33. We cast no doubt on what Sangha decides or what was said by Richards LJ in paragraph 30. However, there is nothing there, in our judgment, which entitles a court to extend the meaning of particular criminal conduct beyond the conduct of which a defendant has been convicted or in respect of which he has pleaded guilty. The benefit obtained as a result of or in connection with such conduct must be referable to the offence with which the defendant is charged and of which he is convicted. It is not open to a court in confiscation proceedings to find that benefits obtained over an extended period were obtained in connection with the commission of an offence on a single day - at any rate on the facts of this case. The rent obtained by the appellant letting out the flats in question from 2005 or 2007 onwards cannot be regarded as having been obtained in connection with the criminal conduct of which he was convicted, which consisted only of being in breach of the Enforcement Notice on a day on or about 18 February 2016.

34. This conclusion means that the appeal against the confiscation order must be allowed. The benefit which the appellant obtained was limited to a single day's rent which we were told amounts to £58. Accordingly, we quash the confiscation order made by the judge and instead make an order in the sum of £58. It is therefore unnecessary to deal with the other grounds of challenge to the judge's order in the appellant's written grounds. We will briefly explain why that is.

35. The first ground, that it was wrong in principle to make a confiscation order at all, was

dependent on the appellant's submission as to the effect of the 2007 letter. It was accepted however, in the light of the decision of Patterson J, that this letter did not prevent subsequent prosecution provided that reasonable notice was given. Once it is appreciated that the offence with which the appellant was charged and the benefit which can be confiscated from him is limited to a benefit obtained on a single day in 2016 this ground falls away. Similarly, ground 2 contended that it was disproportionate to make a confiscation order in respect of the period from 2007, when the council as the prosecuting authority had decided that it was not in the public interest to prosecute at that time. Again, therefore, in the light of our decision, this ground falls away and we need not address it.

36. We turn to the appeal against sentence. The judge imposed a fine of £25,000, but it is fair to say did not give reasons for selecting a fine at this level. Mr Paget for the appellant submitted that the principal object of sentencing in planning cases was coercion, that is to say to coerce a defendant into compliance with an Enforcement Notice, and that this aspect did not arise here as by the time the appellant came to be sentenced the position had been regularised by the grant of planning permission for a different roof extension which has now been constructed. However, although coercion may be a factor, and sometimes an important factor in sentencing in such cases, we would not accept that it is the only or even that it is necessarily the principal object of sentencing in such cases.

37. This was a case where even though the conviction relates to conduct on a single day, it is accepted that the appellant had acted unlawfully from 2005 onwards by failing to comply with the Enforcement Notice. It is clear that he did so deliberately and with a view to financial gain. Moreover, as we have indicated, the extension as he built it was not only visible from the street, but was found by reason of its poor design to detract from the

character and appearance of the conservation area.

38. The appellant has a number of material convictions for planning offences involving other properties he owned in the Council's administrative area. On 10 November 2007 he pleaded guilty to breaching an Enforcement Notice in respect of a property at 303-311 Caledonian Road and was fined £5,000. On 7 May 2015, in respect of a property at 280-282 Holloway Road, he pleaded guilty to failing to respond to a planning contravention notice in time and was fined £250. On 22 June 2015 in respect of 374 Caledonian Road, he pleaded guilty to breaching an Enforcement Notice relating to the unauthorised use of a basement flat. He was fined £2,000 and a confiscation order was made in the sum of £70,000, covering the rent received.

39. This history indicates a continuing willingness to disregard planning requirements, no doubt for financial gain, and the history in our view fully justified the level of fine imposed. The judge rightly considered that the letter dated 28 March 2007 acted as a warning and could not be relied upon indefinitely, but nevertheless the appellant chose to continue with what is accepted as being his unlawful conduct, albeit conduct which was not the subject of the prosecution. Nevertheless that is a matter which we are entitled to take into account for the purpose of sentence.

40. The sentence imposed by the judge, in our judgment, reasonably related to and reflected the defendant's criminality. It was neither wrong in principle nor manifestly excessive and the appeal against sentence is therefore dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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