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IN THE COURT OF APPEAL
CRIMINAL DIVISION



NCN: [2021] EWCA
Crim 1896
No. 202100241 B3

Royal Courts of Justice

Tuesday, 2 November 2021

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE SPENCER
HIS HONOUR JUDGE KEARL QC RECORDER OF LEEDS

REGINA
V
JOHN BRUCE

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MR A. WRIGHT appeared on behalf of the Appellant.
MR J. PUZEY appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE POPPLEWELL:

- 1 Mr Bruce appeals from a confiscation order imposed by HHJ Cole on 22 December 2020 under the Proceeds of Crime Act 2002 ("POCA"). The judge found that Mr Bruce had benefited from criminal conduct in the sum of £5,071,008 and that he had available assets of £2,102,208.66. A confiscation order was therefore made in the latter sum, rounded down to the nearest pound, with a default period of seven years in prison.
- 2 Mr Bruce seeks to advance three grounds of appeal. Leave to appeal was granted on ground one by the single judge and refused on grounds two and three. Mr Bruce renews his application for leave to appeal on grounds two and three.
- 3 Mr Bruce pleaded guilty to six offences under the Environmental Permitting (England and Wales) Regulations 2010 ("EPR") and was sentenced to 26 months' imprisonment following a Newton Hearing which lasted for a week. The case concerned activity which took place at Ridgeway Park Farm, a property in rural Worcestershire, between 2011 and 2014. The farm used to be an RAF airfield, and was sold as agricultural land to Mr Bruce in June 2011 for £790,000. Mr Bruce operated a business at the site trading as UK Plant Services. As well as farming activity, involving several hundred cattle, he used the site to store a large number of commercial vehicles and plant which he bought and sold. That was a legitimate and legal business. He also used the land for waste operations, for which he did not have a permit. In the course of a number of visits to the site, officers from the Environment Agency gathered evidence of waste offending on a considerable scale. This included the illegal deposit of waste, including hazardous waste, and the construction of bunds. Much of it was demolition and construction waste, comprising metal, plastic and household goods. In addition, between July and September 2013, Mr Bruce dumped many tonnes of sand contaminated with aluminium dross at the farm. This was hazardous waste, carrying with it a real risk of explosion. Mr Bruce sought to conceal it by burying it at a shallow depth. He chose to burn such of the waste as could be burned, including construction and demolition waste, plastics

and polythene. These types of waste are not permitted to be burnt, because doing so may release harmful smoke and pollutants and pose a risk to human health. Other waste was either buried or spread on the land. The burning of waste took place throughout the indictment period, but was particularly prevalent in March and early April 2013, causing serious nuisance to neighbours and prompting numerous complaints from the public. The offences also included allowing silo effluent to leak into a water course.

- 4 While Mr Bruce had some EPR exemptions in place at the farm, they were continually breached. The waste transfer notes found during a search of the premises contained sparse details and were insufficient to comply with the legal requirements for a licensed carrier. Mr Bruce had been refused a waste carrier's licence and waste transfer notices were used which bore a number which had never been issued to Mr Bruce. The prosecution relied on 116 pollution incident reports for activity at the site between 4 July 2011 and 23 December 2014. At the Newton Hearing the judge found that for the offending covered by the indictment, a minimum of 25,000 cubic metres of waste had been unlawfully deposited at the farm. That amount to over 10,000 tonnes and represented many hundreds of lorry loads of waste.
- 5 The final confiscation hearing began on 28 October 2019. After four days of evidence, the hearing was adjourned part-heard until March 2020. The hearing on March 2020 was adjourned again. There were two further days of evidence and legal argument in September 2020, before the judge adjourned in order to consider his findings. He delivered a detailed ruling on the afternoon of 22 December 2020, in a hearing which lasted some time. Unfortunately, there is no transcript available of his judgment. We have an agreed note of it prepared by counsel who attended on that occasion by CVP and who are the same counsel who have conducted the appeal before us. We are very grateful to them for that note, but it is apparent that it is in a much more summary form than the oral judgment itself.

- 6 This was a case where it was agreed that Mr Bruce had a criminal lifestyle as defined in s.75 of POCA. The assumptions set out in s.10 of POCA therefore applied.
- 7 The judge's findings in relation to benefit were broken down into benefit from particular criminal conduct and benefit from general criminal conduct. He determined that the benefit from particular criminal conduct was £850,057.79 made up of two elements:
- (1) £348,000 as the income derived by Mr Bruce from customers for accepting the waste for deposit. This was an estimated figure, using the rates which Mr Bruce charged per tonne taken from some business records and then applying it to the estimate of 25,000 cubic metres of waste deposited. It was not based on any bank records of actual receipts.
- (2) £502,057.79 in respect of avoided liability for costs and landfill tax. This figure is the subject matter of ground one of the appeal and we will return to it hereafter.
- 8 The figure for benefit from general criminal conduct was determined to be £4,220,951 and arose from the statutory assumptions. The only detail necessary for present purposes is that it included the following two elements. The first element comprised 8.5 per cent of the sums received into three bank accounts, by far the largest of which were receipts into Mr Bruce's sole trading account. These three accounts had deposits which totalled £23,900,689.20. 8.5 per cent of that amounted to £2,031,558.58. That figure of 8.5 per cent was taken by the judge in the face of rival submissions as to the proportion of receipts which should be treated as resulting from Mr Bruce's unlawful business at the farm, it being accepted that a large part of the receipts would have come from his legitimate business activity. On this appeal, Mr Bruce recognises that the judge was entitled to adopt such a percentage and it is not challenged. In the course of the appeal it became apparent that the figures which the judge had used involved him erroneously treating the £23.9 million figure as that relating to the sole trader account, whereas in fact it was the total of all three accounts. When reaching his determination of the benefit from general criminal conduct,

the judge then added to the figure of £2,031,558.58 two further amounts representing 8.5 per cent of the receipts into the other two accounts. It is now common ground that that was an error and that the correction of that error would require the benefit figure to be reduced by the sum of £103,678.

9 The second element which the judge included in the benefit from general criminal conduct, which is relevant for the purposes of the appeal, is that it included the value of various properties, one of which was the farm itself, which was unencumbered. The judge valued this at £971,000, accepting the prosecution valuation which was based on a purchase price in 2011 of £790,000, increased by the average increase in the price of land thereafter, as identified in Savill's annual market survey of agricultural land prices.

10 There is no challenge in this appeal to the judge's determination of the available amount.

Grounds of Appeal

11 It is accepted in this case that the judge was entitled, after hearing extensive evidence both at a Newton Hearing and over the course of the confiscation hearing, to make findings on Mr Bruce's credibility (which were adverse) and on the extent of the illegal activity in which he was involved. It is submitted on his behalf, however, that the judge fell into error in the following three ways:

(1) the judge wrongly included £502,057 in respect of avoided liability for costs and landfill tax, which should be reduced by £262,894.80;

(2) the judge failed to deduct the £348,000 found to be the receipts from particular criminal conduct from the receipts into bank accounts found to be part of the general criminal conduct.

(3) the judge wrongly included the value of Ridgeway Park Farm in the figure for benefit from general criminal conduct.

Ground 1

- 12 It is necessary to say something about the taxation regime and the costs involved in waste disposal and of the development of the parties' evidence and argument on this point in order to explain the rival submissions. Landfill tax is imposed by the Finance Act 1996 on the disposal of waste by landfill at rates which depend upon the nature of the waste. For the categories which are relevant in this case, the rate is £68 per tonne. The liability falls on the operator of the site, who is the person disposing of the waste. When a customer takes waste to a lawful waste disposal operator, the operator will pass on to the customer in full the landfill tax which he, the operator, will be obliged to pay. In addition, he will charge the customer a "gate fee", which is his income to offset his capital and revenue expenses and, he hopes, to generate a profit on top.
- 13 Not all waste needs to be disposed of by landfill attracting landfill tax. Two such categories arise in this case. First, inert soils and stones, muckaway, concrete and bricks may be disposed of in landfill sites which are exempt from landfill tax, such as those, for example, operating as quarries or restoration projects. Secondly, untreated wood/timber and woodchip may be recycled, and if recycled, such material does not attract landfill tax. In either case, the recycling or landfill operator will charge the customer a gate fee in the same way as one is charged for taxable landfill. Although recyclable wood does not attract landfill tax if recycled, s.64(4) of the Finance Act 1996 makes clear that it does attract landfill tax if such recyclable material is in fact disposed of by way of landfill.
- 14 In its s.16 statement the prosecution included the following figures for avoided landfill tax and avoided costs, based on the evidence an Environment Agency Officer, Mr Roberts:
- (1) landfill tax of £376,500; this was based on a calculation by Mr Roberts of landfill tax on 14,000-odd cubic metres of waste, which the author of the s.16 statement then extrapolated to apply the appropriate rate to the full 25,000 cubic metres of waste;

(2) £856,000 as the cost of infrastructure which Mr Bruce would have had to incur in order to operate the waste disposal at the site lawfully; and

(3) the application fee and annual permit charge for operating the site lawfully, totalling £73,296.

15 Following criticism from one of the defence experts, Ms Lovell, the second and third elements of this were not pursued by the prosecution.

16 Another defence expert, Mr Muia, produced an analysis which split the nature of the waste involved into three categories and identified the gate charges and landfill tax which would payable on each. This purported to calculate the cost which Mr Bruce would have incurred had he taken the 25,000 cubic metres of waste to be disposed of elsewhere than at Ridgeway Park Farm. There was, as it happens, a large licensed landfill site nearby. His calculation was as follows:

Waste type	A: Weight (tonnes) based on 25,000 m3	B: Gate Fee per tonne	C: Landfill tax rate	D: Total Gate Fee (A x B)	E: Landfill tax total (A x C)	F: Total avoided costs (D + E)
Inert soils & stones muckaway, concrete and bricks (INERT)	13,059.58	£2.50	£0.00	£32,648.95	£ -	£ 32,648.95
Wood/timber and wood chip (WOOD)	3866.10	£26.00	£0.00	£100,518.60	£ -	£100,518.60
Shredded/Trommel, fines mixed wastes (NON-HAZARDOUS)	1190.96	£21.00	£68.00	£25,010.16	£80,985.28	£ 105,995.44
	18,116.64			158,177.71	£80,985.28	£239,162.99

17 By the time of the final confiscation hearing before the judge, these figures were accepted by the prosecution, subject to an important qualification. The prosecution contended that

since the wood category had in fact been disposed of as landfill, Mr Bruce was liable for landfill tax on it, which he had not paid. This amounted to a further £262,894.80 of landfill tax, which it was submitted fell to be added to Mr Muia's total of £239,162.99. The judge accepted this argument in concluding that the avoided costs of landfill tax totalled £502,057.79.

18 On behalf of Mr Bruce, it is pointed out that this was higher than the figure originally put forward by the prosecution of £376,500. Mr Wright, on behalf of Mr Bruce, argues that the figure is erroneous because it includes both gate fees and landfill tax on the wood and non-hazardous categories. Mr Muia's view, accepted by the prosecution experts in discussion between them, was that any commercial operator would have taken the wood category for recycling. Indeed regulation 12(1) of the Waste (England and Wales) Regulations 2011 sets out a hierarchy which imposes a duty to take all such measures as are reasonable in the circumstances to (a) prevent waste, (b) reuse waste, (c) recycle waste or (d) dispose of waste in that order. A commercial operator would, therefore, recycle rather than dispose of a wood category waste so as to fulfil that duty. If the wood had been taken for recycling, it would not have attracted landfill tax. If, on the other hand, the position is governed by what Mr Bruce actually did with the waste, namely the disposal of all the material as landfill at the farm, there would have been no gate fees and, therefore, there were no avoided gate fees. In Mr Wright's submission, the judge had applied part of each hypothesis so as to arrive at what was said to be a disproportionate figure, contrary to the principles set out in *R v Wya* [2012] UKSC 51; [2013] 1 AC 294.

19 In our view these criticisms have force. By s.76(5) of POCA, if a person retains a pecuniary advantage "as a result of or in connection with" conduct, he is to be taken to obtain a sum of money equal to the value of such pecuniary advantage. The starting point for any determination of what pecuniary advantage may be comprised in avoided costs and taxes is to identify the counterfactual. There are two possibilities. One is that adopted by Mr Muia,

which was that in order to operate lawfully, Mr Bruce would have incurred expenses in disposing of the waste offsite: that would have involved gate fees and, in the case of the non-hazardous material, landfill tax passed on by the landfill site operator.

The alternative counterfactual is that had Mr Bruce been operating lawfully, he would have had permits to dispose of the material at the farm; the avoided tax liabilities on that hypothesis are the landfill tax liabilities which he would have incurred if lawfully disposing of the material at the farm, and which he has not paid; the avoided costs are those which he would have had to incur to operate the farm lawfully as a waste disposal site, but which he did not incur. This was the approach adopted in the original prosecution s.16 statement, although the costs element was not pursued.

20 Helpful guidance is given in this respect by the decision of this court in *R v Morgan* [2013] EWCA Crim 1307; [2014] 1 WLR 3450. In that case the appellant sought to appeal a confiscation order made in relation to environmental offences arising from his operation of an unlicensed landfill site. The basis for the benefit figure was a calculation of the evaded liabilities including both landfill tax and the other costs to which the appellant would have been subject had he been operating a legitimate landfill site. The court held that the inclusion of such liabilities within the benefit figure was correct and appropriate. At para.47 Aikens LJ said:

"There is no doubt that the appellant did not pay any of the fees, taxes or costs identified and agreed by the experts. In our judgment the judge was correct to conclude that the appellant therefore evaded liabilities for which, if he had acted lawfully, he would have been personally responsible. Thus, basing ourselves on Lord Bingham's statement in *May*, the appellant thereby obtained 'a pecuniary advantage'. By section 76(5) of POCA 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."

21 Mr Bruce's pecuniary advantage in this case is to be measured by reference to the landfill tax he would have been liable to pay as a lawful landfill site operator. That would have included landfill tax on the wood, because he chose to dispose of it in that way. It would have included also landfill tax on the non-hazardous waste. It would not, however, have included any gate fees. The sum determined by the judge to constitute general criminal conduct under this heading must, therefore, be reduced by the amount of the gate fees, namely £158,177.71. To include these as well as landfill tax on the wood and non-hazardous categories is it to adopt neither one counterfactual nor the other and, by combining parts of both, involves a false assessment of the pecuniary advantage in fact obtained by Mr Bruce as a result of or in connection with his criminal conduct, and is disproportionate in its consequences.

Ground 2

22 The prosecution s.16 statement deducted the £348,000 from the amount in the bank accounts, the net sum then being used to calculate the income from general criminal conduct based on the proportion of the income to be attributed to the unlawful waste business, which the judge assessed at 8.5 per cent. The author specified this to be in order to avoid double counting. The hypothesis was that although the income of £348,000 from customers for accepting 25,000 cubic metres of waste was not based on bank records of identified receipts, nevertheless, it would have been paid into one of the three identified accounts, probably the sole trading account, and so it was within the totals used for the general criminal benefit calculation.

23 On behalf of Mr Bruce, Mr Wright submits that the sum did indeed have to be deducted in order to avoid double counting, but that it should have been deducted after the 8.5 per cent had been applied, not before. The difference was illustrated in the calculation set out in his skeleton argument. If the figure is deducted at the outset, the total figure in the accounts after that deduction was £23,980,689.20. 8 per cent of that is £2,031,558.58. If, however,

the £348,000 is deducted at the end of the exercise, the figures are these. The total figure in the three accounts, without any deduction of the £348,000, was £24,248,689.20. 8.5 per cent of that is £2,061,138.50. If the £348,000 is then deducted, the resulting figure is £1,713,138.50.

- 24 The result, therefore, in Mr Wright's submission, is to inflate the general criminal conduct figure by the amount of £318,420.08 (i.e. £2,031,558.88 minus £1,713,138.50).
- 25 We agree that the judge fell into error in this way. To deduct the £348,000 from the amount in the bank accounts before applying the 8.5 per cent is not to give credit for that sum in order to avoid double counting: it is only to give credit for 8.5 per cent of it. Put another way, only 8.5 per cent of the total amounts received into the bank accounts were to be treated as the proceeds of general criminal conducted; the remainder was to be treated as lawfully received, in respect of which the statutory assumptions were rebutted. If the whole of the £348,000 is to be treated as proceeds of particular criminal conduct, as it was as part of the particular criminal benefit element in the judge's total, and if, as was the prosecution hypothesis, it all went into the identified accounts, it must be deducted from the criminal component of the bank receipts, namely 8.5 per cent of their total. It was only that 8.5 per cent which the judge held constituted criminal receipts, but it was the whole of the £348,000 which the judge treated as also constituting criminal receipts by way of particular criminal benefit.
- 26 On behalf of the crown, Mr Puzey argued that there was no evidence that the £348,000 had ever been paid into the identified accounts and, therefore, no evidence of double counting. He submitted that £348,000 should not have been deducted at all, whether before or after application of the 8.5 per cent. We do not think that this point is open to the crown. The s.16 statement clearly conceded that the £348,000 should be deducted on the footing that it would have been paid into the identified accounts. That was no doubt the obvious inference from the largest of those being the sole trader account, into which business

receipts were paid. Mr Bruce cannot in those circumstances have been expected to adduce evidence specifically to that effect; and for this court to accept an argument that by failing to do so he has failed to rebut the statutory assumptions, would in our view patently be unfair to him.

Ground 3

27 It was contended by Mr Wright that the judge wrongly included in the benefits from criminal conduct the value of Ridgeway Park Farm, because it had been bought with the benefit of a mortgage and the mortgage payments had been paid from the accounts which had already been taken into account in the 8.5% calculation. The original response from the crown in a Respondent's Notice was not to challenge that this would be the correct approach if the factual premise were sound, but rather to argue that it was merely a matter of submission that the mortgage payments were made from the identified bank accounts; that Mr Bruce had given no evidence to that effect; and that in the absence of evidence, mere submissions from counsel were insufficient to rebut the statutory assumptions. It is apparent, however, as Mr Puzey conceded in oral argument before us, that there was evidence that the mortgage repayments were indeed made from the sole trader account in the s.16 statement: the prosecution identified that the property was bought for £790,000 on 4 July 2011 with the benefit of a business mortgage of £434,000 taken out on 21 June 2011. The statement identified that monthly repayments of that mortgage of £4,313 per month were made from the sole trading account. The statement also identified that that account was the source of a payment of £233,133.91 which was paid to clear off the mortgage on 29 July 2016 so as to leave the property unencumbered. The total of those monthly payments and the final payment is £491,917.15. The source of the initial equity in the property of £356,000 was not identified in the s.16 statement. Mr Wright concedes that in respect of that part of the purchase price and, therefore, value of the farm, Mr Bruce has

not rebutted the statutory assumption of showing that it was not funded by the proceeds of criminal conduct.

- 28 The judge valued the property at £971,700 and included the value in full. The property had been bought in part with £491,917.15 worth of payments from the sole trading account. That sum had been included in the total income into the accounts used to calculate the proportion at 8.5 per cent, which constituted criminal proceeds. The finding, therefore, was essentially that the remaining 91.5 per cent had been treated as coming from the proceeds of legitimate trading. The full £491,917.15 therefore falls to be deducted from the value of the property, because 8.5 per cent of it double counts what had already been taken into account and 91.5 per cent of it was treated as coming from lawful trading so as to rebut the assumptions in relation to its funding.

Conclusion

- 29 For these reasons, we allow the appeal on ground 1, and give leave to appeal and allow the appeal on grounds 2 and 3, in each case to the extent indicated. That gives rise to the following deductions which have to be made from the benefit figure determined by the judge:

Ground 1: £158,177.71.

Ground 2: £318,420.08.

Ground 3: £491,917.15.

- 30 To these must be added the further reduction of £103,678 to reflect the judge's error which has come to light in treating the total sum in the three accounts as that relating to the sole trade account alone.

31 These four adjustments total £1,072,192.94. The benefit figure of £5,071,008 therefore falls to be reduced by that amount so as to become £3,998,815.06. The confiscation order will therefore be amended by recording the benefit figure as £3,998,815.06 in place of the figure of £5,071,008. That will not result in any change to the amount which the confiscation order requires to be paid, which is dependent on the lower figure of the available amount. It may, however, assume significance should the prosecution apply for reconsideration of the available amount pursuant to s.22 of POCA.

CERTIFICATE

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