



Neutral Citation Number: [2022] EWHC 3176 (Admin)

Case No: CO/4511/2020

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**DIVISIONAL COURT**

Cardiff Civil Justice Centre,  
CF10 1ET

Date: 12<sup>th</sup> December 2022

**Before :**

**THE PRESIDENT OF THE KING'S BENCH DIVISION**

**MR JUSTICE HILLIARD**

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**Between :**

**Matthew Hargreaves**

**Appellant**

**- and -**

**Powys County Council**

**Respondent**

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**Simon Farrell KC and Ellis Sareen** (instructed by **Cunninghams Solicitors**) for the  
**Appellant**

**Jonathan Rees KC** (instructed by **Powys County Council**) for the **Respondent**

Hearing date: 7<sup>th</sup> December 2022

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**Approved Judgment**

This judgment was handed down remotely at 2pm on 12<sup>th</sup> December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Mr Justice Hilliard:**

Introduction

1. This is a Case Stated by District Judge (Magistrates' Courts) Gwyn Jones in respect of his adjudication at Llandudno Magistrates' Court on 23<sup>rd</sup> September 2020 that the appellant should serve a term of imprisonment in default of payment of a confiscation order. Although he spent some time in custody, he was granted unconditional bail by the Administrative Court on 21<sup>st</sup> December 2020, pending the outcome of these proceedings.
2. The questions for the Court are whether the lower court was entitled a) to find that the failure to pay had been due to wilful refusal, b) to find that all alternative means of enforcement were inappropriate, and c) to exercise its discretion to activate the default term.
3. This is the judgment of the court.

Procedural history

4. On 14<sup>th</sup> June 2016, the appellant pleaded guilty in the Crown Court at Caernarfon to participating in a fraudulent business, contrary to section 9 of the Fraud Act 2006. He had sold tooth whitening products which contained an unlawful level of hydrogen peroxide. His parents and his wife, Holly Hargreaves, were also prosecuted. His parents pleaded guilty. Mrs Hargreaves pleaded not guilty and no evidence was offered against her. The prosecutions were all brought by Powys County Council (PCC).
5. On 16<sup>th</sup> September 2016, the appellant was sentenced to 18 months' imprisonment.
6. On 24<sup>th</sup> May 2018, confiscation orders were made in the Crown Court against the appellant and his parents. The orders in respect of his parents have since been met in full. The amount certified to be available to the appellant was £1,096,500 and consisted of interests in five properties. Four of these were and are jointly owned by the appellant and his wife, including the matrimonial home where they live with their two children. His wife's shares in three of the other properties were included in the available amount because the judge concluded that they were tainted gifts. The fifth property is jointly owned by the appellant and a friend, Mr Cormack. Again, the full value net of mortgage was included within the available amount because the court ruled that Mr Cormack's beneficial interest represented a tainted gift from the appellant. The appellant's beneficial interest in each property was accepted to be 50 per cent. The judge did not make determinations under section 10A of the Proceeds of Crime Act 2002 (POCA) which would have been conclusive as to the extent of the defendant's interests in the properties, but the extent of them was not in dispute.
7. The appellant was given three months to pay the sum due under the confiscation order, with a term of 7 years' imprisonment in default of payment.
8. On 24<sup>th</sup> May 2018, an order was also made against the appellant pursuant to section 13 of POCA, requiring him to provide information to PCC concerning the marketing and sale of the properties in question.

9. On 1<sup>st</sup> October 2018, the case was listed in the Crown Court because PCC had applied to enforce the compliance order. Counsel for PCC said that they intended to apply for the appointment of an enforcement receiver pursuant to section 50 of POCA. Mrs Hargreaves was represented by leading counsel at the hearing. It was said on her behalf that an agreement had been reached at the original plea hearing to the effect that PCC would not, as regards her, go after any tainted gifts. There was, however, no written agreement as to this and the terms of the discussions which had taken place were disputed.
10. Attempts were made to resolve the dispute at a hearing in the Crown Court at Newport in March 2019. However, the judge realised that he might be a witness to discussions which had happened in chambers and the matter was transferred to the Crown Court at Liverpool to be dealt with by another judge.
11. On 9<sup>th</sup> March 2020, a hearing took place before His Honour Judge Aubrey QC in the Crown Court at Liverpool. At this hearing, it was confirmed that no application for an enforcement receiver had in fact been made. In those circumstances, it was agreed that the court did not have jurisdiction to entertain any applications from the appellant's wife - although section 51 of POCA requires the court to give persons holding interests in property with which a receiver is concerned the opportunity to make representations, that requirement only arises if a receiver has actually been appointed.

#### The enforcement hearing

12. The appellant's case was listed for enforcement at the Llandudno magistrates' court on 23<sup>rd</sup> September 2020. The effect of section 35(2) of POCA is that the amount due under a confiscation order is to be enforced as if it were a fine imposed upon the offender. And a collecting magistrates' court treats a fine imposed by the Crown Court as a fine it has itself imposed – see section 132(1) of the Sentencing Act 2020. Section 82(4)(b) of the Magistrates' Courts Act 1980 provides that a magistrates' court may not issue a warrant of commitment in default of payment unless the court i) is satisfied that the default is due to the offender's wilful refusal or culpable neglect; and ii) has considered or tried all other methods of enforcing payment of the sum and it appears to the court that they are inappropriate or unsuccessful. Under section 77 of the Magistrates' Courts Act 1980, a magistrates' court can postpone the issue of a warrant of commitment until such time and on such conditions as it thinks just.
13. The District Judge has recorded a number of findings in the Case Stated. He noted that no payments had been made under the confiscation order. He considered the correspondence in detail before concluding that numerous approaches had been made to PCC to try and resolve matters, but no serious and genuine attempts had been made to satisfy the sum due. Numerous approaches had been made to negotiate lesser sums that could be paid but, in the absence of any variation, the sum ordered to be paid was non-negotiable. Since 2016, numerous solicitors had been instructed to make proposals to settle but they had failed to provide documentary evidence in support and had not transferred appropriate funds. There were no credible or genuine attempts to pay the sums due, despite there being available assets. On 29<sup>th</sup> January 2020, Abacus Law indicated that Holly Hargreaves was able to draw down on a loan and offer £729,500 but no money materialised. On 23<sup>rd</sup> March 2020, Abacus Law advised PCC that the sum of £729,500 was ready to be drawn down but no money materialised. On

29<sup>th</sup> June 2020, ET Law Solicitors, now acting for Holly Hargreaves, contacted PCC regarding the sale of one of the properties, but no concrete proposals followed. On 1<sup>st</sup> July 2020, Cobleys Solicitors acting on behalf of the appellant, claimed that they had been instructed to get monies paid as soon as possible and that “all agreements are in place with the lending company.” However, no documentation in support had been produced and no monies transferred.

14. The District Judge found that “evidence from Matthew Hargreaves was lacking in credibility. Whilst he maintained that he wished for these proceedings to be concluded, he was not able to provide any documentary evidence in support of any steps taken to market the available properties or to provide any loan documentation to raise monies towards the sums owed. Holly Hargreaves did not attend court and did not give evidence.” The District Judge found that none of the assets had been marketed and that the appellant had consistently pursued a course of conduct which hindered the realisation of the available assets and sought to find any available option to avoid payment of the sum due. He found that “Holly Hargreaves would not be prepared to countenance the selling of any assets, as she still claimed to have an interest in them, despite the finding of the Crown Court that they were tainted gifts. She would not sell without her day in court, which flies in the face of the Crown Court determination.”
15. The District Judge recorded his conclusions that there were assets available to the appellant to satisfy all or part of the confiscation order; that there had been a course of conduct adopted by the appellant and others to avoid satisfying the sum due; no genuine steps had been taken to market any of the properties and the discussions with PCC were deliberately conducted to thwart any progress to satisfy the confiscation order. He was sure that there had been a wilful refusal on the part of the appellant to satisfy the terms of the order.
16. The District Judge considered alternative ways of satisfying the sum that was due, including the appointment of an enforcement receiver. It was not within his power to make such an appointment. That could only be done by the Crown Court upon application by the prosecutor. In the District Judge’s view, it was a disproportionately costly method of enforcement which was not necessary and would dissipate the amount available to satisfy the order. Two years had passed since the order was made, without progress. In his view, there was no likelihood of any payment being made if the court postponed the hearing and it was not in the interests of justice to order a postponement.
17. Three questions are posed for the opinion of the High Court –
  - a) Was the District Judge entitled to find that the appellant’s failure to satisfy his confiscation order had been due to wilful refusal or culpable neglect?
  - b) Was the District Judge entitled to find that all alternative means of enforcing the confiscation order were inappropriate?
  - c) Did the District Judge fail properly to consider the court’s discretion not to activate the default term of imprisonment and to adjourn or grant a postponement under section 77 of the Magistrates’ Courts Act 1980?

### Competing submissions

18. Helpful submissions have been made on both sides. On behalf of the appellant, it is submitted that his failure to pay the confiscation order was not due to wilful refusal or culpable neglect, and that there was no sufficient evidential basis for so finding. The appellant had taken steps to try and market the properties but was unable to sell them because his wife and Mr Cormack had not consented. Correspondence showed that he had tried unsuccessfully to take out loans secured against the properties. It had been suggested that a receiver would be appointed. That provided the best means of resolving the interests of third parties and the appellant had been entitled to wait for that to happen. Furthermore, the District Judge should have concluded that the appointment of an enforcement receiver was still the best way of resolving the interests of third parties and he should have postponed the imposition of the default term until this had happened and taken effect. It is argued that *R v Hilton* [2020] UKSC 29 at para 29 establishes that third party rights may continue to be considered at the enforcement stage if a person with an interest in property was not afforded the opportunity to make representations when the original determination was made; and that if subsequent enquiry establishes that particular property does not represent a tainted gift and thus “realisable property”, this may justify an application under section 23 of POCA to reduce the amount payable – see *In Re McKinsley* [2006] 1 WLR 3420 at para 39.
19. On behalf of the respondent, it is submitted that the District Judge was entitled to conclude that the appellant’s failure to meet the order was due to his wilful refusal. No money had been paid at all. It was open to the appellant to have raised loans, whether secured or unsecured, or to have generated income to meet the order. There had been no real attempts to market the properties. The appellant had not sought to appeal against the confiscation order or to have the available amount varied. Third party interests were being used as a cover to avoid making any payment. The appointment of an enforcement receiver would have reduced the amount recoverable. Even if a third party was not required to make a payment in respect of their interest in a tainted gift, that would not entitle the offender to reduce the amount he was due to pay under the confiscation order. A failure to recover the value of a tainted gift is not a basis for an application to vary the available amount – see *R v Johnson* [2016] 2 Cr.App.R(S) 38 at paras 18 and 35.

### Discussion and conclusions

20. The appellant had agreed the available amount that was certified at his confiscation hearing. It is his obligation to meet the sum due. It is a striking feature of this case that nothing at all has been paid to meet the order which was made on the 24<sup>th</sup> May 2018, even after the hearing at Liverpool Crown Court when the appellant knew that a receiver had not been appointed.
21. It is plain that rental income from at least some of the properties had been generated but none of it was applied to meet the order. There was no explanation for this.
22. On 29<sup>th</sup> January 2020, solicitors acting on behalf of Mrs Hargreaves had contacted PCC, saying that she was then in a position to draw down a loan of £729,500. This was before the hearing at Liverpool Crown Court. On 23<sup>rd</sup> March 2020, after that hearing, solicitors acting on her behalf repeated that she had a loan offer of £729,500

which had been approved and was ready to be drawn down. There was reference to the potential of considerable fees coming with the appointment of a receiver. PCC responded that they were not sure what was preventing the loan arrangement from being finalised.

23. The appellant himself wrote to PCC on 28<sup>th</sup> April 2020, saying that solicitors would be providing an updated copy of a draft loan agreement. On 20<sup>th</sup> May 2020, PCC asked after the offer letter and pointed out that the appellant had still made no payments towards the confiscation order. On 11<sup>th</sup> June 2020, a different firm of solicitors acting on behalf of Mrs Hargreaves wrote to PCC to say that they were instructed in the sale of one of the properties.
24. On 25<sup>th</sup> June 2020, a firm of solicitors acting on behalf of the appellant contacted PCC. On 2<sup>nd</sup> July 2020, the solicitor wrote to PCC that he was instructed to get money paid into court before the next date of hearing. This would have been in August 2020. He referred to “the nonsense” that had gone on before and said that with sense and focus, there was no reason why significant progress could not be made in the next four weeks. PCC noted in their response the complexity which had resulted with correspondence coming from different firms of solicitors.
25. On 8<sup>th</sup> July 2020, solicitors from Mrs Hargreaves provided a letter from the Express Loan Corporation in Monaco which said that she had the benefit of a credit facility in the sum of £725,000, to be secured by way of a first legal charge over four of the properties concerned, conditional upon each of them being transferred into her sole name and the removal of the restriction in favour of PCC. PCC responded that they would not agree to the conditions. Of course, any variation of the restraining order would ultimately be a matter for the Crown Court which had made it. PCC asked a number of questions, for example, as to the loan application and the loan agreement, the loan payments, and how they would be met and from which account. No response was received.
26. On 29<sup>th</sup> July 2020, a solicitor acting for the appellant said that a buyer had been found for one of the properties and “we have a way forward.” It was said that a price had been agreed and that they were pushing for an exchange of contracts as soon as possible. Without explanation, this came to nothing.
27. The appellant of course had the opportunity to explain matters when he gave evidence. The District Judge had the advantage of hearing that evidence which he found was lacking in credibility. He gave careful consideration to the material before him, including the correspondence. His conclusions included that no serious and genuine attempts had been made to satisfy the sum due. Instead, attempts had been made to negotiate lesser sums. It is to be noted that correspondence from Mrs Hargreaves’ solicitors supported rather than undermined the Crown Court’s finding in 2018, when the confiscation order was originally made, that her shares in three of the properties were properly included in the available amount.
28. We are satisfied that the material before the District Judge did entitle him to conclude that the appellant’s failure to meet any of the order was the result of his wilful refusal to do so.

29. In this particular case, the finding of a wilful refusal and the circumstances surrounding it were of significance when it came to considering other possible methods of enforcement. In the absence of any appeal by the appellant against the finding of a tainted gift or of any application under section 23 of POCA, the amount that the appellant had to pay was clear. There was no such appeal or application. In our judgment, when nothing had been paid at all, the District Judge was entitled to conclude that the appointment of an enforcement receiver with its associated costs was not an appropriate step. Instead, the appellant needed to make proper efforts himself to meet the order which the District Judge concluded he had thus far wilfully refused to do.
30. We are also satisfied that the District Judge was entitled to conclude that no useful purpose would have been served by postponing the appellant's committal to custody. On the material before him, there was no prospect as matters then stood that the position would change if a postponement was granted.
31. The issue before us is a narrow one. Was the District Judge entitled to come to the conclusions he did on the evidence before him? We consider he was. Accordingly, our answer to the three questions posed in the Case Stated are as follows -
  - a) Was the District Judge entitled to find that the appellant's failure to satisfy his confiscation order had been due to wilful refusal or culpable neglect? Yes.
  - b) Was the District Judge entitled to find that all alternative means of enforcing the confiscation order were inappropriate? Yes.
  - c) Did the District Judge fail properly to consider the court's discretion not to activate the default term of imprisonment and to adjourn or grant a postponement under section 77 of the Magistrates' Courts Act 1980? No.