

NIIFA CONFISCATION - BACK TO BASICS?

The House of Lords has recently pronounced on three important confiscation cases. To summarise in a sentence one could say:

'Establish the facts then apply the words of the statutes and the long established principles of English law to those facts'.

If you like, it is 'Back to Basics'.

There is a considerable amount of useful detail in these judgments.

R v May

In the first case, ***R v May [2008] UKHL 28***, the Lords had to consider the confiscation order to be made following a conviction for VAT 'carousel' fraud. This particular fraudulent conspiracy involved four phases of activity in which different individual members of the conspiracy played different roles.

Mr May only took part in the third and fourth phases, but was found to be a driving force in those phases. The 'benefit' obtained via bogus companies, in relation to the last two phases was £3,264,277. Mr May's 'available amount' was found to be £3.8 million and so a confiscation order was made against Mr May for the 'benefit' figure.

However Mr May was by no means the only person involved in these phases of the conspiracy. In total 16 individuals had been charged.

Mr May argued that the benefit should have been apportioned between the conspirators.

The House of Lords held that as various conspirators had obtained joint control of the benefit of the conspiracy each was jointly liable for the whole of that benefit. Any attempt by the courts to apportion the liability between the parties would be "contrary to principle and unauthorised by statute".

The case confirms the principle that when Defendants obtain joint control of property they each, in law, obtain the whole of the amount jointly obtained. Each person's 'benefit' for confiscation purposes is therefore the whole of the amount jointly obtained.

CRIME SPECIAL

ALSO IN THIS ISSUE:

Drug trafficking



Cases involving NIFA



Counterfeit BBC videos



NIIFA CONFISCATION - BACK TO BASICS? continued

CROWN PROSECUTION SERVICE v JENNINGS

The second case, *CPS v Jennings [2008] UKHL 29*, concerned exactly what is involved in 'obtaining'.

Mr Jennings had been an employee of a company which had engaged in an 'advance fee fraud'. Another Defendant was the sole director and controlling shareholder of the company.

The Prosecution considered Mr Jennings to be a prime mover in the fraud along with the director of the company. Mr Jennings received a salary from the company but held no shares in it.

The Crown contended that Mr Jennings had 'obtained' the whole of the amount generated by the fraud, amounting to £584,637. Mr Jennings argued that he had obtained only his salary and certain other payments amounting to no more than £50,000.

The Court of Appeal had said that in order to 'obtain' an asset, "All that is required is that the Defendant's acts should have contributed, to a non-trivial (that is, not *de minimis*) extent, to the getting of the property".

In his role as an employee Mr Jennings had therefore 'obtained' the entire benefit of the fraud.

The House of Lords did not endorse the approach of the Court of Appeal on this point, finding it "not . . . to be helpful or entirely accurate".

Rather the House of Lords found, "A person's acts may contribute significantly to property (as defined in the Act) being obtained without his obtaining it. But under section 71 (4) [Criminal Justice Act 1988] a person benefits from an offence if he obtains property as a result of or in connection with its commission, and his benefit is the value of the property so obtained, which must be read as meaning "obtained by him"."

This is, in our view at least, a significant shift in the legal position in relation to the meaning of "obtain" in confiscation cases.

R v GREEN

The third case was *R v Green [2008] UKHL 30*.

This concerned a drug trafficking conspiracy and, again, centred on the amount properly to be regarded as having been 'obtained' by the Defendant.

It was contended on behalf of Mr Green that the appropriate measure of benefit is the total value of the property actually received by the particular Defendant. In particular, sums retained by Mr Green's co-Defendants ought, it was argued, to be deducted from the 'benefit' attributable to Mr Green.

The prosecution argued, on the other hand, that Mr Green had obtained the whole amount from the conspiracy.

The House of Lords noted the decision of the judge in the Crown Court on the relevant facts, and that, "Whether the proceeds of sale received by [the Appellant's associates] in the present case were initially received on their own personal behalf or on behalf of the conspirators as a whole was a matter for the judge to decide on the evidence before him. In fact, there was evidence on which he could find that the Appellant was the ringleader and controller of the conspiracy and in those circumstances he was entitled to infer that the others were acting in accordance with his instructions, receiving proceeds of sale on behalf of the conspirators as a whole before retaining for themselves such amounts as had been agreed with the Appellant."

Since the sums received by the other conspirators were received on behalf of the conspirators as a whole, they did form part of the benefit obtained by Mr Green. The findings of fact were decisive.



SUMMARY

In our experience Prosecutors often appear to place too much emphasis upon the statutory assumptions and have too little regard for the factual evidence. These House of Lords decisions redirect our attention to the factual evidence. As a result, there may now be a fresh emphasis on the role of the forensic accountant in establishing the relevant facts in each case.

RECENT CRIMINAL CASES INVOLVING NIFA MEMBERS

Confiscation Order - Drugs Dealing

A NIFA member acted on behalf of the Defendant who had been assessed by the Prosecution as having had a benefit of £1.9 million from his drug dealing activities. It was established by our NIFA member that a large proportion of the unidentified cash came from his legitimate tyre sales business and other identifiable sources. In addition, the value of the drugs were over stated at their street value as opposed to their wholesale value. A confiscation order of less than £100,000 was made.

An Irish Solution to Proceeds of Crime

Even though Ireland has a Proceeds of Crime Act, the Criminal Assets Bureau (CAB) uses this avenue infrequently. It prefers to use the much more draconian powers contained in the Taxes Acts to target suspected criminals and grab their assets before they can wake up to the sting!

Take Joe for example. He was employed in an industry not known for its high wages and had come to the attention of the Special Branch. In a relatively short period from 2000 to 2004, he managed to buy and sell no less than 5 residential properties making a tidy profit on each one in a rising market. He kept bad company and was arrested in possession of a large sum of cash. CAB pounced later in the year, on 8th December to be precise, issuing Assessments to Capital Gains Tax and Income Tax with 30 days to appeal over the Christmas holidays.

The suspect did not wake up to the danger until the week before Christmas. The assessments exceeded €200,000 before interest, surcharges and penalties which had the potential to treble this sum if they were not appealed. By carefully following the document and money trail in the book of evidence used by CAB, tax returns for all outstanding years were prepared and filed with payment of the true liability of €18000 before the appeal period expired on 7th January.

Confiscation Order - Drugs Dealing

A member acted on behalf of the Prosecution assisting in identifying the sources of illegitimate income and how drug dealers had laundered money through a property investment company. A confiscation order for £1 million was made – the largest ever in the North East of England.

Criminal - Theft and Arson

Our NIFA member acted for the Defendant, a sub-Post Mistress, who was alleged to have stolen almost £50,000 from the Post Office. In an attempt to cover her actions, she committed arson at the Post Office, using the remaining cash notes to start the fire.

Following the submission of our member's report, stating that only £12,000 could be shown as missing, this was accepted by the Prosecution and a reduced sentence was passed down due to the lower value.

Tax Fraud

Acting on behalf of a Defendant facing allegations from HMRC in respect of £250,000 of unpaid tax our NIFA member identified a number of mistakes within the Prosecution's Expert report and produced evidence demonstrating a lower tax liability, amounting to less than £100,000. This was accepted by the Prosecution at the trial and a suspended sentence was received as a result of the tax evasion being below £100,000.

Insurance Fraud

A company selling insurance lost its main underwriter after September 2001 and was unsuccessful in finding a replacement. Meanwhile, it continued to sell policies and pay any claims itself from advances of premiums. Eventually a disenchanted director blew the whistle on the company and the FSA closed it down.

The managing director was convicted of fraud, and the Crown alleged that the managing director and his family had benefited by almost £600,000 in the two years of trading illegally. The first report challenged this as part of the plea to mitigate the sentence. The second report was for the purpose of the subsequent PoCA proceedings.

Both reports highlighted the omission from Crown calculations of any company liability that the director may have settled personally and any losses he suffered in connection with the continued illegal trading of the company. Goodwill, personal guarantees to the bank, capital introduced, and a loan account already in credit were ignored by the Crown. The PoCA proceedings settled for £200,000.

Trading Standards – Sale of Counterfeit BBC Videos on eBay Confiscation reduced by £84,000

In late 2007, Trading Standards received a complaint from the BBC that Bert was selling counterfeit videos of a popular TV series on eBay. Trading Standards undertook a test purchase and Bert was subsequently charged with multiple offences under the Trade Marks Act 1994.

The Prosecution commenced confiscation proceedings under S6 POCA 2002 and calculated the benefit at over £105,000 in respect of monies deposited into numerous bank and credit card accounts.

Following an examination of Bert's financial and business affairs for the 6 years prior to 2007, our member was able to demonstrate that of the benefit figure, £84,000 was from legitimate sources, including (legitimate) sales on eBay, employment income, parental loans and gifts and double counting of transfers between accounts.

Due to the difficulty of tracing the purchases and sales through eBay (Bert was buying and selling his own goods to boost his eBay rating), the remaining cash deposits of £21,000 were accepted as being the benefit subject to confiscation.



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