Neutral Citation Number: [2019] EWHC 252 (QB)

Case No: CJA/8/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2019

Before :

THE RIGHT HONOURABLE LORD JUSTICE HADDON-CAVE
THE HONOURABLE MR JUSTICE OUSELEY

- -

Between :

RAYMOND NEVITT — **Applicant**

- and -

SERIOUS FRAUD OFFICE — **Respondent**

- -
- -

Mr Leonard Smith QC (instructed by **Carter Moore**) for the **Claimant**
Mr Stuart Trimmer QC (instructed by the **Serious Fraud Office**) for the **Defendant**

Hearing date: 22nd January 2019

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Approved Judgment

LORD JUSTICE HADDON-CAVE AND MR JUSTICE OUSELEY:

1. The Applicant applies to the Divisional Court for a Certificate of Inadequacy pursuant to s.83(1) of the Criminal Justice Act 1988 ("the 1998 Act") in respect of a Confiscation Order made on 14th October 2008 by HHJ Steiger QC in the Crown Court at Manchester (Crown Square) in the sum of £1.6 million.

2. On 14th March 2017, the Court of Appeal Criminal Division dismissed a renewed application by the Applicant for an extension of time of nearly eight years to appeal against the Confiscation Order. The Applicant contended that the Confiscation Order was unlawful *inter alia* because it had been made in his absence. Holroyde J (as he then was), giving the judgment of the Court ([2017] EWCA Crim 421]), applied *R v Spearing (Barry Charles)* [2010] EWCA Crim 2169*;* [2011] 1 Cr App R (S) 101, and held that it was lawful for the judge to proceed to hear and determine the confiscation proceedings notwithstanding the absence of the Applicant, who had absconded following his conviction in earlier criminal proceedings.

3. The Applicant now seeks to argue before this Court that he is entitled to a Certificate of Inadequacy under the Criminal Justice Act 1988 because he has spent all the money and has nothing left with which to satisfy the Confiscation Order. The effect of granting a certificate is that he could then apply to the Crown Court for the amount to be recovered under the order to be reduced. It would not have to be eliminated; but a reduction would affect the default term to be served.

4. The history of this case is as remarkable as the application itself.

The Facts

5. The following summary of the facts is largely taken from the judgment of Holroyde J (*ibid,* paras. 3-11).

The criminal proceedings

6. HHJ Steiger QC had presided over two trials in which the Applicant was an accused. In the first (the "B indictment"), the Applicant was convicted with others of conspiracy to defraud. The brief circumstances were that the Applicant was the managing director of a company which provided training in the northwest of England. Under his direction and using false documents, a group of companies called 'the Ravelle Group' was set up. These companies were controlled by the Applicant. Companies within the Ravelle Group made applications for public funds in the form of grants for training. In fact no training occurred. Various fictitious documents were created in support of these applications. In late 2000, the Engineering and Marine Training Authority ("EMTA") paid out £66,070.

7. In the second trial (the "A indictment"), the Applicant was convicted of five counts of fraudulent trading along with co-defendants. Those charges related to his involvement in the dishonest promotion and management of three of the companies within the Ravelle Group.

8. On 3rd October 2006, the Applicant was convicted on the B indictment. His sentence was adjourned. He was granted bail. He then absconded using a false passport in the name of Paul McGann and fled abroad. He was unlawfully at large throughout the subsequent proceedings. He remained on the run for nearly 10 years.

9. On 15th December 2006 he was sentenced in his absence by HHJ Steiger QC for the offence of which he had been convicted on the B indictment. The sentence imposed was one of 27 months' imprisonment, though that was later reduced on appeal, again heard in his absence, to a term of 18 months.

10. On 20th March 2008, after a trial in his absence, the Applicant was convicted of the offences on the A indictment, in relation to the Ravelle offences which had taken place between June 1999 and January 2002. On 20th May 2008, still in his absence, he was sentenced again by HHJ Steiger QC to terms of 45 months' imprisonment concurrent one with the other and also concurrent with the sentence on the B indictment.

The confiscation proceedings

11. Between 2nd and 5th May 2008, confiscation proceedings under the legislation then in force, namely ss. 71-83 of the 1988 Act, were heard against the absent defendant/Applicant and his four co-accused by HHJ Steiger QC. The Applicant was not represented, although the Judge arranged for a representative from the defendant's former solicitors to be present and to take a note of proceedings. The Prosecution contended that the benefit figure in relation to the offence on the B indictment was £77,203.32, and that in respect of the A indictment the benefit figure was £3,329,429.35. The defendant had earlier served a statement in response to the application in relation to the B indictment but had taken no action (and had served no evidence) in respect of confiscation in relation to the A indictment.

12. It was submitted by the Prosecution that the Applicant had put forward no evidence to discharge the burden which lay upon him to show that his realisable assets were less than the benefit figure sought.

13. The Judge - with what Holroyde J said (at *ibid,* para. 10) was *"a very proper regard for the fairness of the proceedings"* - specifically invited prosecuting counsel to assist the court with any arguments which the Prosecution thought might have been advanced by the Applicant had he been present. The Judge further required that the figures referred to in the various statements prepared by prosecution witnesses should be confirmed by those witnesses on oath, and the Judge himself asked a number of questions of the witnesses. He sought, and received, confirmation that so far as was known to the Prosecution, the defendant was still alive, was living in Spain and appeared to be enjoying a lifestyle which would require significant resources.

14. The Judge took the view that the evidence in the trials he had heard showed the Applicant to be a profligate spender. The judge felt it would therefore be unfair to the defendant to treat the whole of his benefit as being his realisable assets. He concluded that a fair figure for confiscation would be £1.6 million, that is to say, rather less than half of the benefit figure shown in relation to A indictment. Given that the Applicant had provided at least some response in relation to the B indictment, the Judge adjourned that part of the confiscation application. In the event, he made the confiscation order in the said sum of £1.6 million and allowed the Applicant the period of six months in which to pay, in default of which the Applicant would serve a further term of 10 years.

The Applicant's evidence

15. In his witness statement and oral evidence before us, the Applicant stated that before the criminal charges were laid against him, he had already moved to Spain where he continued to live an extravagant and hedonistic lifestyle, going out every night and day, taking trips to Barcelona, Mont Blanc, Monte Carlo, San Rafael, Amsterdam, Paris and Ischgl. He said he would sometimes spend up to €3,000 in an evening entertaining friends over from England. He became something of a well-known figure in the Marbella ex-pat community, although nobody knew that he was 'on the run'. He relied upon English newspaper reports attesting to his life-style 'on the run'. He said his average monthly spend whilst in Spain was €35,000.

16. He stated that most of his money was already in Spain having been brought over by him in cash on his many trips or by way of regular cash payments into various bank accounts and transfers *via* Western Union. He subsequently would meet an associate called Colin Smith in a bar or café in Puerto Banus who would hand him approximately €35,000 in cash. Unfortunately, Colin Smith was shot in 2007 and other associates took over these arrangements.

17. He stated that by February 2008, it became clear that the Spanish were on to him and he had to make a 'very sharp exit' whilst sitting in a bar in Puerto Banus. He drove to Berlin. He says a substantial quantity of cash was taken off him at the border. He spent a few months in Berlin where he says he spent € 90,000 before moving to Thailand. He says his monthly expenses in Thailand were only £6,000. He took a job driving, including for the Lesbirel family.

18. He stated that in early 2010 he once again had to leave Thailand 'very quickly' but fortunately the Lesbirel family offered him a job driving for them in South Africa to where he then moved. In her witness statement, Samantha Lesbirel confirmed that the Applicant, whom she knew only as Paul McGann, worked for her family for a while as a driver in Cape Town. She described him as a something of 'party animal' but not somebody with any particular assets. The Applicant stated that by 'about 2014' he had run out of money.

19. On 13th May 2015, the Applicant was arrested in South Africa pursuant to an Extradition Request from the United Kingdom and was extradited to this country in February 2016, where he commenced serving his determinate sentence for the offences for which he had been convicted in 2006 and 2008. He claimed not to have known about the Confiscation Order until 2015.

20. On 14th March 2016, the Applicant's application to appeal against the Confiscation Order was dismissed by the Court of Appeal Criminal Division as aforesaid.

21. On 3rd August 2016, District Judge Lloyd sitting at Liverpool Magistrates' Court activated the default sentence of 10 years upon the Applicant pursuant to the Confiscation Order of 14th October 2008.

The Legislation

22. The relevant confiscation legislation is contained in the 1988 Act. The 1988 Act confiscation provisions were, of course, subsequently repealed and replaced by the Proceeds of Crime Act 2002, but the provisions of the 1988 Act continue to apply to offences committed before 24 March 2003.

23. Section 83 of the 1988 Act provided as follows:

> *"83.— Variation of confiscation orders.*
>
> *(1) If, on an application made in respect of a confiscation order—*
>
> *(a) by the defendant, or*
>
> *(b) by a receiver appointed under section 77 or 80 above, or in pursuance of a charging order,*
>
> *the High Court is satisfied that the realisable property is inadequate for the payment of any amount remaining to be recovered under the order the court shall issue a certificate to that effect, giving the court's reasons.*
>
> *(2) For the purposes of subsection (1) above—*
>
> *(a) in the case of realisable property held by a person who has been adjudged bankrupt or whose estate has been sequestrated the court shall take into account the extent to which any property held by him may be distributed among creditors; and*
>
> *(b) the court may disregard any inadequacy in the realisable property which appears to the court to be attributable wholly or partly to anything done by the defendant for the purpose of preserving any property held by a person to whom the defendant had directly or indirectly made a gift caught by this Part of this Act from any risk of realisation under this Part of this Act.*
>
> *(3) Where a certificate has been issued under subsection (1) above, the [person who applied for it] may apply—*
>
> *(a) where the confiscation order was made by the Crown Court, to that court; and*
>
> *(b) where the confiscation order was made by a magistrates' court, to a magistrates' court for the same area,*
>
> *for the amount to be recovered under the order to be reduced.*
>
> *(4) The Crown Court shall, on an application under subsection (3) above—*
>
> *(a) substitute for the amount to be recovered under the order such lesser amount as the court thinks just in all the circumstances of the case; and*
>
> *(b) substitute for the term of imprisonment or of detention fixed under [section 139 of the Powers of Criminal Courts (Sentencing) Act 2000] in respect of the amount to be recovered under the order a shorter term determined in accordance with that section in respect of the lesser amount.*

> *(5) A magistrates' court shall, on an application under subsection (3) above, substitute for the amount to be recovered under the order such lesser amount as the court thinks just in all the circumstances of the case.*
>
> *(6) Rules of court may make provision—*
>
> *(a) for the giving of notice of any application under this section and*
>
> *(b) for any person appearing to the court to be likely to be affected by any exercise of its powers under this section to be given an opportunity to make representations to the court."*

24. It is necessary also to cite s. 71 of the 1988 Act which provides as follows:

> *"71.— Confiscation orders.*
>
> *(1) The Crown Court and a magistrates' court shall each have power, in addition to dealing with an offender in any other way, to make an order under this section requiring him to pay such sum as the court thinks fit.*
>
> *(2) The Crown Court may make such an order against an offender where—*
>
> *(a) he is found guilty of any offence to which this Part of this Act applies; and*
>
> *(b) it is satisfied—*
>
> *(i) that he has benefited from that offence or from that offence taken together with some other offence of which he is convicted in the same proceedings, or which the court takes into consideration in determining his sentence, and which is not a drug trafficking offence; and*
>
> *(ii) that his benefit is at least the minimum amount.*
>
> *...*
>
> *(6) The sum which an order made by a court under this section requires an offender to pay must be at least the minimum amount, but must not exceed—*
>
> *(a) the benefit in respect of which it is made; or*
>
> *(b) the amount appearing to the court to be the amount that might be realised at the time the order is made,*
>
> *whichever is the less. ..."*

The Principles

25. The applicable principles were usefully and succinctly summarised by Mr David Holgate QC (as he then was) sitting as a Deputy High Court Judge in *In the matter of B and the Criminal Justice Act 1988* [2008] EWHC 3217, at para. 74 as follows:

> "(1) The burden lies on the applicant to prove, on the balance of probabilities, that his realisable property is inadequate for the payment of the confiscation order (see *Re O'Donoghue (2004) EWCA Civ 1800*, per Laws LJ at para. 3).
>
> (2) The reference to realisable property must be to "whatever are his realisable assets as a whole at the time he applies for the certificate of inadequacy. If they include assets he did not have when the confiscation order was made, that is by no means a reason for leaving such fresh assets out of consideration." (*ibid* and see also *Re Phillips* [2006] EWHC 623 (Admin)).
>
> (3) A section 83 application cannot be used to go behind a finding made at the confiscation hearing or embodied in the confiscation order as to the amount of the defendant's realisable assets. Such a finding can only be challenged by way of an appeal against the confiscation order. (See *Gokal v. Serious Fraud Office (2001) EWCA Civ 368*, *per* Keene LJ at paras. 17 and 24).
>
> (4) It is insufficient for a defendant to say under section 83 "that his assets are inadequate to meet the confiscation order, unless at the same time he condescends to demonstrate what has happened since the making of the order to the realisable property found by the trial Judge to have existed when the order was made" (see *Gokal* at para. 24 and *Re O'Donoghue* at para. 3).
>
> (5) The confiscation hearing provided an opportunity for the Defendant to show that his realisable property was worth less than the Prosecution alleged. It also enabled the Defendant to identify any specific assets which he contended should be treated as the only realisable property. The section 83 procedure, however, is intended to be used only where there has been a genuine change in the Defendant's financial circumstances. It is a safety net intended to provide for post-confiscation order events. (See *McKinsley v. Crown Prosecution Service (2006) EWCA Civ 1092* per Scott Baker LJ at paras. 9, 21-24, 31 and 35).
>
> (6) A section 83 application is not to be used as a "second bite of the cherry". It is not an opportunity to adduce evidence or to present arguments which could have been put before the Crown Court Judge at the confiscation hearing (para. 38 of *Gokal* and paras. 23, 24 and 37 of *McKinsley*).

> (7) The clarification of a third party's interest in property may be a post-confiscation order event. The extent of any such interest may have to be decided by a civil court. (*Re Norris (2001) UKHL 34* and *McKinsley* at para. 39).
>
> (8) In a section 83 application the definition of realisable property includes a chose in action or a right to a sum of money which the applicant is entitled to recover, irrespective of any difficulty in its actual recovery, unless the applicant proves on the balance of probabilities that it is impossible to recover that sum (*R v. Liverpool Magistrates' Court ex parte Ansen [1998] 1 All ER 692* at page 701d-e and *Re Houssan Ali* [2002] EWCA Civ 1450 at para. 1.11)."

26. David Holgate QC's enunciation of the relevant principles has been approved *inter alia* by the Court of Appeal in *Glaves v. Crown Prosecution Service* [2011] EWCA Civ 69.

The Submissions

27. Mr Leonard Smith QC, who appeared for the Applicant on this application, submitted in summary as follows: (i) A defendant, in respect of whom a Confiscation Order had been made, was entitled under s.83 of the 1988 Act to claim his realisable property was inadequate to pay the remaining amount due to be recovered under that order. (ii) The fact that a defendant had spent or dissipated his assets on an extravagant lifestyle was no legal bar to the making of such an application. (iii) If, on the evidence, the court was satisfied that a defendant no longer had the financial means to meet the compensation order, the court was bound to grant a Certificate of Inadequacy. (iv) Once a Certificate of Inadequacy was issued, a defendant could apply to the Crown Court under s.83(3) of the 1988 Act for a reduction in the Confiscation Order. (v) There was cogent evidence in the present case from the Applicant that he no longer had any money to pay the Compensation Order because, as he explained in his written and oral evidence, he had an extravagant lifestyle and life 'on the run' was not inexpensive. Mr Smith QC accepted that the application was 'unattractive' but submitted that it should nevertheless be granted and the Applicant was entitled in law to a Certificate of Inadequacy.

28. Mr Stuart Trimmer QC, who appeared for the Respondent (and appeared for the Prosecution in the original trials), opposed the application on grounds which can be summarised as follows: (i) First, the application was an attempt to go behind the original order of HHJ Steiger QC and amounted to an abuse of the process of the Court. (ii) Second, the Applicant was not entitled to a Certificate of Inadequacy because of (a) the original finding of 'hidden assets' and (b) his lack of disclosure of his original assets and any history of his dealing with them. (iii) Third, in any event, s.83 does not permit a Certificate of Inadequacy in circumstances where (a) assets have been deliberately squandered by a defendant, (b) the intrinsic value of the £1.6 million cash has not reduced but simply been spent or dissipated and (c) there has been no 'genuine' change in circumstance of the defendant but merely deliberate disobedience to the order. (iv) Fourth, the Applicant could not, in any event, discharge the evidentiary burden on him on the basis of the material and evidence provided.

Analysis

29. In our judgement, this application must plainly be dismissed for the following reasons, both legal and evidential. On the applicant's case, he would be entitled to a Certificate of Inadequacy if the realisable assets were made available to satisfy the confiscation order but were inadequate in value when realised, and equally entitled to a certificate if he realised their value and spent the proceeds, as fast and furiously as he could, before the authorities caught up with him. It could not have been the intention of Parliament that criminals should be able to defeat the purpose of confiscation legislation and frustrate a Confiscation Order by simply squandering the money; let alone by supporting life "on the run". There is nothing in the 1988 Act which supports such an absurd and obviously unintended conclusion. Indeed, the statutory structure and language is wholly inconsistent with such an approach.

30. First s.71(1) provides that the effect of a Confiscation Order is to require an offender "*to pay such sum as the court thinks fit*". A Confiscation Order operates *in personam*. The Confiscation Order in this case states in the usual terms that "*The defendant is ordered to pay…£1,600,000*". The unequivocal order "*to pay*" the sum in question does not admit of an option to spend it and then to claim a Certificate of Inadequacy**.**

31. Second, the wording of s.83(1), permitting the variation of Confiscation Orders (only) where the High Court "*…is satisfied that the realisable property is inadequate to meet the amount remaining to be recovered*", is suggestive of matters intrinsic to the realisable property itself and not acts done deliberately by the offender to ensure, or which result in, inadequacy. By s.71 (6)(b), the amount is that which might be realised *"at the time the order is made".* By s.83(2)(b), the court is to disregard any inadequacy brought about by attempts to preserve realisable property gifted but caught by the Act in the hands of a donee. The fact that Parliament thought it necessary to make express provision for a specific potential problem, reinforces the point that Parliament cannot have intended that dissipation generally was a basis for a Certificate of Inadequacy.

32. Third, the situation in the present case of large 'hidden assets' and deliberate dissipation by the offender is distinguishable from that discussed in *Glaves v. Crown Prosecution Service* [2011] EWCA 69. *Glaves* accepts that an application for a Certificate of Inadequacy is not always, and inevitably, completely answered where the confiscation order is based on, or includes, hidden assets. It saw the force in - but rejected the logic of - the argument that, if an order was based on hidden assets, it would always be impossible for an applicant to satisfy the Court that he had disposed of that which he denied having. The Court drew attention to the problem of an applicant who had known and hidden assets, and the known assets realised less than had been attributed to them. But, in acknowledging the severe evidential problems that such a person might face, it accepted that the individual should be allowed to attempt to prove his case. It said nothing, however, to support the notion that the applicant could say that the hidden assets were now no more because he had simply spent them, which is altogether a very different point. It follows that, even if we had accepted all that the applicant told us in his evidence, we would have still have refused this application: his claim that the money had all been spent on the run is not a permissible basis in law for a Certificate of Inadequacy.

33. Fourth, in any event, we are not satisfied as to the veracity of any of the Applicant's evidence to the effect that he spent all his ill-gotten gains. He is a person with a long history of dishonesty and deceit. His evidence was vague, self-serving and lacking in any proper detail or supporting documentation. In our view, the Applicant has not condescended to demonstrate to any satisfactory standard what has happened to the realisable assets found by the Judge to have existed when the order was made (*c.f.* Keen LJ in *Gokal*, *supra*). Further, it is clear from the cross-examination by Mr Trimmer QC that the Applicant was regularly in contact with numerous criminal associates who held money for him and may well have continued to do so. We find his assertion that he did not know of the Confiscation Order until 2015 incredible, not least because of his averment that he regularly entertained 'numerous friends from England'. In short, we find that the Applicant has not begun to discharge his burden of proof.

34. Fifth, in any event, the Applicant is impermissibly seeking to go behind the Confiscation Order and using this s.83 application to have a 'second bite of the cherry' to seek to adduce evidence which could have been put before the original confiscation judge, HHJ Steiger QC (contrary to *McKinsey*, *supra*). Even if some of what the Applicant says about his profligacy is true, it largely relates to his sojourn in Spain *prior* to the imposition of the Confiscation Order. His statement makes a virtue of his extravagant life-style and spending habits whilst in Spain where he says his monthly expenditure was in the region of €35,000, *i.e.* €420,000 *per annum*. However, by his own admission he left Spain for Berlin in February 2008, *i.e.* before the imposition of the Confiscation Order in October 2008. He states that he was 'slightly' more extravagant whilst living in Spain than subsequently. However, this would appear to be an understatement. In fact, his expenditure in Thailand between 2008 and 2010 was on his own account far more modest, approximately £6,000 per month and he gives no figure for South Africa where he was employed as a driver from 2010 (see above).

35. Sixth, even if the Applicant was entitled in law to mount an application for a Certificate of Inadequacy on the basis of his own deliberate conduct (which in our view he cannot), the evidentiary mountain which the Applicant would have to have climbed in this case would be near impossible. Whilst an offender is stuck with the findings of the original confiscation judge as to the amount of 'benefit' and 'realisable assets', the same is not case for the Criminal Prosecution Service who are entitled to resist a Certificate of Inadequacy on the basis that an offender has been found to have 'hidden assets' (see *Re Adams* [2017] EWCA Civ 185). In this case, the amount of 'realisable assets' found by the Judge was very large (£1.6 million) and the total 'benefit' figure even larger (£3.2 million).

Conclusion

36. For the above reasons, the Applicant's application for a Certificate of Inadequacy is dismissed.