R v Allen **[2000] 2 All ER 142**

COURT OF APPEAL, CRIMINAL DIVISION

LAWS LJ, MOSES J AND JUDGE CRANE

Alan Newman QC and James Kessler for Allen.

Amanda Hardy and Tina Davey for Dimsey.

Peter Rook QC and Jonathan Fisher for the Crown.

11 October 1999. The following judgment of the court was delivered.

LAWS LJ.

On 7 July 1999 this court dismissed appeals brought by Brian Roger Allen and Dermot Jeremy Dimsey against their convictions, in Dimsey's case of an offence of conspiracy to cheat the public revenue, and in Allen's case of 13 substantive counts of cheating the public revenue (see [1999] STC 846). On that occasion the court also granted permission to appeal in Allen's case against a confiscation order, made in the Crown Court at Knightsbridge on 20 February 1998, in the sum of £3,137,165 with seven years' imprisonment in default. The court ordered that should the default sentence fall to be served it should be consecutive to the term of seven years' imprisonment imposed for the 13 offences of which Allen had been found guilty.

Allen's appeal relating to the confiscation order is now before this court together with his renewed application for permission to appeal against the substantive sentence of seven years. In addition, both appellants ask the court to certify a point of law of general importance, in Allen's case a series of points, said to arise out of the court's judgment of 7 July 1999 and to grant permission to appeal to the House of Lords.

The facts of these cases are described in detail in our judgment of 7 July 1999 and we do not repeat them now.

We turn first to the appeal relating to the confiscation order. In the Crown Court it was agreed between counsel that the amount of the appellant's benefit arising from his offences was £4m and that his realisable assets amounted to £3,137,195. In addition, the Crown gave an undertaking that upon a confiscation order being made it would not pursue the appellant for pre-existing tax liabilities, in effect the shortfall of £900,000, out of any income which he might acquire in the future. The judge accepted these figures and the Crown's undertaking and made the confiscation order in the sum we have stated of just over £3m.

Mr Newman QC, for the appellant Allen, submits that the confiscation order is unlawful essentially because a statutory precondition required to be met before a confiscation order can be made has not been fulfilled. He says that the appellant has not obtained a pecuniary advantage by his fraudulent failure to pay or declare tax due. At least he has certainly not obtained a pecuniary advantage to the tune of £4m; and a pecuniary advantage has to be shown if the

confiscation order is to be a lawful one.

The power to make confiscation orders was first introduced into the law by the Drug Trafficking Offences Act 1986 and extended so as to cover offences other than drug trafficking by the Criminal Justice Act 1988. The relevant provisions of that statute were amended by the Proceeds of Crime Act 1995, which, so far as material, came into effect on 1 November 1995. The appellant's offending straddled periods before and after that date. The essential change in the legislation was that, whereas under the original 1988 Act the court was empowered to make a confiscation order if certain conditions were met, under the 1995 Act it was, subject to exceptions, required to do so.

The central provisions for present purposes are s 71(4) and (5) of the 1988 Act, which were not amended in 1995 and which provide:

'(4) For the purposes of this Part of this Act 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.'

(5) Where a person derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this Part of this Act as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage.'

In the light of counsel's argument we should also note s 72(3) of the unamended statute and s 71(1C) of the amended Act which is the substitute of s 72(3). Section 72(3) provided:

'When considering whether to make a confiscation order the court may take into account any information that has been placed before it showing that a victim of an offence to which the proceedings relate has instituted, or intends to institute, civil proceedings against the defendant in respect of loss, injury or damage sustained in connection with the offence.' Section 71(1C) of the amended Act provided:

'If, in a case falling within subsection (1B) above, the court is satisfied that a victim of any relevant criminal conduct has instituted, or intends to institute, civil proceedings against the defendant in respect of loss, injury or damage sustained in connection with that conduct—(a) the court shall have a power, instead of a duty, to make an order under this section; (b) subsection (6) below shall not apply for determining the amount to be recovered in that case by virtue of this section; and (c) where the court makes an order in exercise of that power, the sum required to be paid under that order shall be of such amount, not exceeding the amount which (but for paragraph (b) above) would apply by virtue of subsection (6) below, as the court thinks fit.'

We should add that s 71(1B) and sub-s (6) require the court to make an order in a sum equal to the benefit derived by the offender from his offence or his realisable assets whichever is the less. Those provisions are thus modified in a case to which s 71(1C) applies.

Section 72(7), which was not amended in 1995, is also to be borne in mind:

> 'Where—(a) a court makes both a confiscation order and an order for the payment of compensation under section 35 of the Powers of Criminal Courts Act 1973 against the same person in the same proceedings; and (b) it appears to the court that he will not have sufficient means to satisfy both the orders in full, it shall direct that so much of the compensation as will not in its opinion be recoverable because of the insufficiency of his means shall be paid out of any sums recovered under the confiscation order.'

Mr Newman in essence advances two arguments. (1) The appellant's failure to pay or declare tax due did not, on the facts of the case, offer him any pecuniary advantage because the tax remains due and payable. Had he, perhaps between the commission of the offence or one of the offences and its coming to light, gained interest on the money withheld, that might have been a pecuniary advantage, but the principal sum of tax due, says Mr Newman, cannot amount to a pecuniary advantage. It remains due and payable to the Revenue. (2) As regards the corporation tax liability evaded by the appellant, counts 1 to 7 in the indictment, the tax liability was that of the offshore companies in the case. The only pecuniary advantage which the appellant might have gained would have been an increase in the value of the shares by virtue of the non-payment of corporation tax, but, Mr Newman submits by his skeleton argument, the evasion scheme reduced the value of the shares.

We turn to the first of these arguments. Pecuniary advantage is not defined in the 1988 Act and should, in our judgment, be accorded its ordinary meaning. In *US Government v Montgomery* [1999] 1 All ER 84 at 96 Stuart-Smith LJ indicated that there was no reason to accord a restricted meaning to the expression in s 71(5) of the 1988 Act. So much, I think, would not be disputed by Mr Newman. The ordinary and natural meaning of pecuniary advantage must surely include the case where a debt is evaded or deferred. The sense of the expression matches, in our judgment, with that accorded to the same phrase in another statutory setting, namely s 16(2)(a), now repealed, of the Theft Act 1968 under which a pecuniary advantage arose where: 'Any debt or charge for which he makes himself liable or is or may be liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred'. Discussing this subsection Lord Reid said in *DPP v Turner* [1973] 3 All ER 124 at 127, [1974] AC 357 at 365: 'An obligation is evaded if by some contrivance the debtor avoids or gets out of fulfilling or performing his obligation'. In short, the fact that the tax remains due does not mean that its evasion did not confer a pecuniary advantage, nor indeed that that pecuniary advantage consisted of the whole of the tax withheld, the value of the liability that was evaded. By his crime the appellant evaded payment of £4m tax. That sum constituted the proceeds of the offence. On the agreed figures, as we have indicated, he had realisable assets of £3ÿ1m. The fact that he remained in law liable to pay the tax, the fact even, were it so, that the Revenue might later recover it, does not, in our judgment, yield the proposition that the proceeds of his crime were one penny less than the whole of the tax evaded.

It is of interest to note what was also said in Turner's case, to which we have briefly referred. Lord Reid said:

'An obligation is reduced if the creditor agrees with the debtor that the amount owed shall be reduced. An obligation is deferred if creditor and debtor agree that the date of performance shall be postponed. An obligation is evaded if by some contrivance the debtor avoids or gets out of fulfilling or performing his obligation. In the days when such things happened, a welshing

bookmaker not only evaded his pursuers, he also evaded his obligations. Evasion does not necessarily mean permanent escape. If the bookmaker evaded his pursuers on Monday, the fact that he is caught and made to pay up on Tuesday does not alter the fact that he evaded his obligations on Monday. Unlike reducing and deferring an obligation, evading an obligation is a unilateral operation. It leaves the obligation untouched and does not connote any activity on the part of the creditor. When the evasion ceases he can seek to recover the debt in any way open to him.' (See [1973] 3 All ER 124 at 127, [1974] AC 357 at 365–366.)

We bear in mind, as was emphasised by Mr Newman, that s 16(2)(a) of the 1968 Act was regarded by the House of Lords as a deeming provision, and it bears no analogue in the 1988 Act. But Lord Reid's remarks about the nature of the evasion of a debt, with great respect, seem to us to be wholly apposite to a case of the present kind. Had these very grave frauds succeeded then, in crude terms, Mr Allen would have been better off to the tune of £4m. That represents, in our judgment, the measure of his pecuniary advantage.

We also consider that there is force in the Crown's submission that a confiscation order falls to be clearly distinguished from a compensation order which may be made under s 35 of the Powers of Criminal Courts Act 1973. The amount of a confiscation order is referrable to the applicant's benefit arising from the commission of his crime, not the loss suffered by the victim. As the Revenue's skeleton argument, para 28, puts it: 'The confiscation order is made to deprive the offender of the proceeds of his crime. A compensation order is made to compensate the victim of the crime'.

Section 72(3) of the 1988 Act in its original form, s 71(1C), which was its substitute in 1995, and also s 72(7)—all of which we have set out—demonstrate to our mind that the legislator intended that confiscation orders should, or at any rate, might be made in cases where the sum confiscated in reality represented a debt or part of a debt which was not forgiven and remained outstanding.

Mr Newman has urged upon us the proposition that if the Crown's arguments are accepted the way is open, in theory at least, to double recovery on the part of the Revenue against a person in Mr Allen's position in relation to the sum of money due. He has referred us to some authorities of the European Court of Human Rights which—we hope without injustice—we may fairly summarise as indicating the emphasis placed by that court on the need for certainty in the law.

In our judgment, whether or not the Revenue may hereafter seek to recover tax against the appellant which forms all or part of the tax due represented by the confiscation order simply does not go to the scope of s 71(5) of the 1988 Act. Questions that may arise if the Revenue were to seek to take such action hereafter would fall to be decided in different proceedings in a different court. We bear in mind the fact of the Revenue's undertaking, to which we have already referred, given on 20 February 1998.

Accordingly, as it seems to us, Mr Newman's complaint as to the possibility of double recovery, his reference to the well-known passage in Walton J's judgment in *Vestey v IRC* [1977] 3 All ER 1073 at 1098, 'One should be taxed by law, and not be untaxed by concession' are not here in point.

In short, there is, in our judgment, nothing in Mr Newman's first argument.

Moreover, it is to be noted that there are a number of cases where the Court of Appeal has upheld confiscation orders in relation to Revenue offences where payment of tax has been dishonestly withheld. They are referred towards the close of the Crown's skeleton argument where there are cited, *R v Tighe* [1996] 1 Cr App R(S) 314, *R v Travers* [1998] Crim LR 655, 9 July 1997 and *R v Martin, R v White* [1998] 2 Cr App R 385.

The second point taken by Mr Newman in his skeleton argument was, as we have indicated, that the corporation tax liability, which in fact formed the greater part of the sum of more than £4m, was a liability of the offshore companies in the case, so that any pecuniary advantage arising from its withholding would be their advantage and not the appellant's. However, it is plain from authorities cited by the Crown that the corporate veil may fall to be lifted where companies are used as a vehicle for fraud. Here the companies in question were the appellant's alter ego: we refer to our judgment of 7 July 1999 for the full facts.

On this part of the case it seems to us that the Crown's position is simply incontestable. In those circumstances the appeal against the making of the confiscation order will be dismissed.