

House of Lords

A

Jennings v Crown Prosecution Service

[2008] UKHL 29

2008 March 11, 12;
May 14Lord Bingham of Cornhill,
Lord Phillips of Worth Matravers CJ,
Baroness Hale of Richmond, Lord Carswell and
Lord Brown of Eaton-under-Heywood

B

Crime — Restraint order — Application without notice — Use of company by conspirators — Defendant instrumental in getting property for company through criminal activity — Whether “obtaining” property — Whether benefit from offence to be attributed to defendant — Whether grounds for making restraint order against defendant — Criminal Justice Act 1988 (c 33), ss 71(4), 77

C

When assessing the value of property obtained by a defendant’s criminal activity for the purpose of confiscation order proceedings under the Criminal Justice Act 1988, as amended¹, the Drug Trafficking Act 1994 or the Proceeds of Crime Act 2002, the requirement of those Acts that the defendant is to be deprived only of what he has gained, or its equivalent, which would ordinarily mean property over which he has either alone or jointly a power of disposition or control, precludes the inclusion in the valuation of property which the defendant merely helped others to obtain (post, paras 8, 13–14).

D

R v May [2008] 2 WLR 1131, HL(E) applied.

Where, therefore, a restraint order, made against the defendant under section 77(1) of the Criminal Justice Act 1988 to prevent dissipation of assets prior to his trial for conspiracy to defraud, had been upheld by the Court of Appeal on the ground that, although the defendant was only an employee of the company which was the vehicle for the fraud, he had “obtained” its property within the meaning of section 71(4) of the Act if he had been instrumental in getting the property out of the crime for the company, and the defendant appealed—

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Held, dismissing the appeal, that the Court of Appeal had erred as to the true construction of section 71(4) of the 1988 Act but, since there had in any event been sufficient material to support the making of the restraint order, that error had not invalidated the order (post, paras 14, 18).

F

Decision of the Court of Appeal (Criminal Division) [2005] EWCA Civ 746; [2006] 1 WLR 182; [2005] 4 All ER 391 affirmed on different grounds.

The following cases are referred to in the opinion of the committee:

R v Gokal (unreported) 7 May 1997, Crown Ct (Buxton J)

R v May [2005] EWCA Crim 97; [2005] 1 WLR 2902; [2005] 3 All ER 523, CA; [2008] UKHL 28; [2008] 2 WLR 1131, HL(E)

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The following additional cases were cited in argument:

H, In re (Restraint Order: Realisable Property) [1996] 2 All ER 391, CA

K, In re (unreported) 6 July 1990, McCullough J

R v Ahmed [2004] EWCA Crim 2599; [2005] 1 WLR 122; [2005] 1 All ER 128, CA

H

R v Ascroft [2003] EWCA Crim 2365; [2004] 1 Cr App R (S) 326, CA

¹ Criminal Justice Act 1988, s 71(4): “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.”

- A *R v Benjafield* [2002] UKHL 2; [2003] 1 AC 1099; [2002] 2 WLR 235; [2002] 1 All ER 815; [2002] 2 Cr App R 72, HL(E)
R v Glatt [2006] EWCA Crim 605, CA
R v Layode (unreported) 12 March 1993, CA
R v Mahmood [2005] EWCA Crim 2168; [2006] 1 Cr App R (S) 570, CA
R v Martens (unreported) 20 April 1999, Crown Ct
R v Metcalfe [2001] EWCA Crim 1343, CA
- B *R v Mitchell* [2001] 2 Cr App R (S) 141, CA
R v Morphy [2006] EWCA Crim 2698, CA
R v Olubitan [2003] EWCA Crim 2940; [2004] 2 Cr App R (S) 70, CA
R v Rees (unreported) 19 July 1990, Crown Ct (Auld J)
R v Simons (1993) 98 Cr App R 100, CA
R v Simpson (David) [1998] 2 Cr App R (S) 111, CA
R v Tahir [2006] EWCA Crim 792, CA
- C *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90, HL(Sc)

APPEAL from the Court of Appeal

- This was an appeal, by leave of the House of Lords (Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Carswell), by the defendant, Paul Ian Jennings, from the order of the Court of Appeal (Criminal Division) (Laws, Longmore and Lloyd LJ) dismissing his appeal against the refusal of Leveson J on 24 November 2004 to set aside a restraint order under section 77(1) of the Criminal Justice Act 1988 made against him without notice as a defendant in criminal proceedings by Forbes J on 2 November 2004.

The facts are stated in the opinion of the committee.

- E *Anthony Elleray QC* and *Scott Redpath* for the defendant.
Andrew Mitchell QC and *Stephen Hellman* for the Crown.

The committee took time for consideration.

14 May. LORD BINGHAM OF CORNHILL

- 1 This is the considered opinion of the committee.
- F 2 Mr Jennings (the appellant) appeals from the order of the Court of Appeal of 24 June 2005 [2006] 1 WLR 182, dismissing his appeal from the refusal of Leveson J to discharge a restraint order made without notice by Forbes J under section 77(1) of the Criminal Justice Act 1988. The order prohibited him from removing any of his assets from England and Wales and disposing of or diminishing the value of any of his assets. There were the usual exceptions for ordinary living expenses and legal advice.
- G 3 When the order was made, the appellant was awaiting trial with three others on a charge of conspiracy to defraud. The conspiracy was described by the prosecution as “an advance fee fraud”. It was carried on through a company, UK Finance (Europe) Ltd, which had originally been in legitimate business selling second hand cars and arranging finance for the purchasers. The fraud charged took place between December 2000 and August 2001.
- H The company advertised itself as a lender, targeting people with poor credit ratings. Applications for loans were made over the telephone. An administration fee of £70 was required in return for arranging a loan. But in fact the company had no money to lend, and no arrangements with any other source of finance to make loans, and no loans were ever made.

4 Some of the fees were paid into the company bank account and some were paid in postal orders which were cashed at a local post office. The sole director and controlling shareholder of the company was a co-defendant, Mr Russell Phillips, who pleaded guilty to the fraud. The appellant was neither a director nor a shareholder. Throughout the period of the conspiracy, he was an employee of the company and received a salary and other payments, but the prosecution case was that he too was a prime mover in the conspiracy.

5 The prosecution alleged that each of the conspirators had benefited to the tune of the total amount of moneys obtained from the fraud, calculated by the financial analyst employed by the police at £584,637.64. This sum was made up of £460,809.40, which had gone through the company's books, and £123,828.24, which was the value of postal orders cashed at a local post office. The appellant's argument was that, over the period of the conspiracy, he and his wife could not have received more than, say, £50,000, made up of salary, a payment from the company's loan account, and the postal orders which he had cashed "on several occasions" when Mr Phillips was away.

6 The other conspirators pleaded guilty. The appellant was tried between April and June 2005. He was convicted on 6 June 2005. His appeal against the restraint order was argued in April 2005 while the criminal trial was in progress. The Court of Appeal handed down judgment on 24 June 2005, after his conviction. He was sentenced to five years' imprisonment. Mr Phillips was sentenced to three years and four months' imprisonment, the equivalent of a five year sentence with the appropriate discount for a guilty plea. The trial judge must therefore have taken the view that their shares of responsibility for the fraud were roughly equivalent.

7 Since the appellant's conviction, the Crown has pursued the confiscation proceedings, still based on the original total figure but adjusted for inflation, in accordance with section 74(5)(a) of the 1988 Act. Those proceedings have been postponed pending the outcome of this appeal.

8 For purposes of this appeal the committee will treat so much of its opinion in *R v May* [2008] 2 WLR 1131 as bears on this appeal as if it were incorporated in this opinion.

Restraint orders

9 The Hodgson Committee devoted Chapter 9 of its report on the Profits of Crime and their Recovery (1984), to pre-trial restraint and recommended (p 154, recommendation 29) that

"On the application of the police or prosecuting authority a high court judge should have the power to grant, on appropriate terms, an order freezing specific assets or the defendant's assets generally, if there is a prima facie case that he has committed an indictable offence and it appears to the court likely that on conviction the court of trial would impose a fine and or a compensation order totalling £10,000 or more."

Effect was given to this recommendation in sections 7–8 of the Drug Trafficking Offences Act 1986, and then in sections 25–26 of the Drug Trafficking Act 1994. Effect was also given in sections 76–77 of the Criminal Justice Act 1988, which added in section 82(2), *ex abundanti cautela*, that the power to make a restraint order should be exercised "with a

- A view to making available for satisfying . . . any confiscation order that may be made in the defendant's case the value for the time being of realisable property held by any person by the realisation of such property". Thus a prospective confiscation order was not to be anticipated by dissipation of assets. Section 76 of the 1988 Act was amended by section 8(2) of the Proceeds of Crime Act 1995 so as to permit a restraint order to be made
- B where, relevantly, proceedings had been instituted and the court was satisfied that there was reason to believe "that the proceedings may result or have resulted in, or that the application is made by reference to, a conviction of the defendant for an offence of a relevant description from which he may be, or has been, shown to have benefited". The provisions of both the 1994 and the 1988 Acts as amended relating to restraint orders have now been
- C replaced by sections 40–42 of the Proceeds of Crime Act 2002, and the jurisdiction under that Act is exercisable in the Crown Court. No issue arises in this appeal on the detail of any of these provisions. It is, however, clear, and an important feature of this appeal, that at the restraint order stage the court is required to make a preliminary and provisional judgment on the answers that may, at a full confiscation order hearing, be given to each of the three questions considered in *R v May*. That duty is somewhat, but only
- D slightly, eased in the present case by the appellant's acceptance that he benefited from the conduct which led to his conviction, since the extent of his benefit remains a very live issue.

Benefit

- E 10 The central issue between the appellant and the Crown Prosecution Service ("CPS") concerns the interpretation of section 71(4) of the 1988 Act and in particular the words "a person benefits from an offence if he obtains property as a result of or in connection with its commission". The CPS, as noted in para 5 above, contends that the appellant obtained property amounting to over £584,000 before adjustment for inflation. The appellant contends that he "obtained" his salary and a few minor payments amounting to £50,000 at most.

- F 11 The appellant's contention before the House and, it seems, below is that "obtains" in the context of a benefit from a relevant offence means that at some point the defendant has come into possession or in some way controlled the property in question in connection with the offence. He has had his hands on it. The appellant treats "obtains" as equivalent to "receives" but does not contend that it is necessary to retain the property. He
- G criticises the gloss put on the section by the Court of Appeal in this case. The CPS by contrast supports the Court of Appeal's interpretation.

- H 12 The leading judgment in the Court of Appeal (Laws, Longmore and Lloyd LJ) [2006] 1 WLR 182 was given by Laws LJ. He turned to consider the cases on "benefit" at para 28 of his judgment, correctly observing in para 36: "It is in my judgment plain that the essence of what is meant by 'benefit' in section 71(4) is given by the verb 'obtain'; and whether in any given case a person has obtained any particular property must involve issues of fact." Having reviewed several authorities, including the Court of Appeal decision in *R v May* [2005] 1 WLR 2902, he was prepared to hold (para 37) that the observations of Buxton J in *R v Gokal* (unreported) 7 May 1997 were out of line with the general run of authority. Then, in para 38, he said:

“What remains to be said about the meaning of the word ‘obtain’ in section 71(4)? Clearly it does not mean ‘retain’ or ‘keep’. But no less clearly, in my judgment, it contemplates that the defendant in question should have been instrumental in getting the property out of the crime. His acts must have been a cause of that being done. Not necessarily the only cause: there may, plainly, be other actors playing their parts. 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. This is no more than an instance of the common law’s conventional approach to questions of causation.”

Laws LJ did not believe that there was a separate requirement that the defendant should be shown to have control over the property, although in reality, if he had been instrumental in getting it, he would no doubt, in some sense (and at some stage), have had control over it.

13 In its opinion in *R v May* the committee endeavoured to explore the meaning of section 71(4). It refers, without repetition, to what it there said. The parties to this appeal have referred to some additional authority, but none, it is thought, which illuminates the interpretation of the subsection. The focus must be and remain on the language of the subsection. The committee regards the meaning of the subsection as in substance the same as the equivalent provisions of the drug trafficking legislation. There is a real danger in judicial exegesis of an expression with a plain English meaning, since the exegesis may be substituted for the language of the legislation. It is, however, relevant to remember that the object of the legislation is to deprive the defendant of the product of his crime or its equivalent, not to operate by way of fine. The rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent. He cannot, and should not, be deprived of what he has never obtained or its equivalent, because that is a fine. This must ordinarily mean that he has obtained property so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else.

14 The committee does not, with respect, find the formulation of Laws LJ in his para 38, quoted above, to be helpful or entirely accurate. 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) 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”. While the committee would not adopt the appellant’s submission *ipsisssimis verbis* (the defendant need not have had his hands on the property) it accepts the broad thrust of the appellant’s criticism of the Court of Appeal’s formulation. Whether the appellant obtained the benefit of the fraud jointly with his co-defendant remains to be decided, but there was clearly sufficient material to support the making of a restraint order.

Piercing the corporate veil

15 The appellant contended, as it was understood, that the Crown’s application for a restraint order had illegitimately sought to pierce the corporate veil of UK Finance (Europe) Ltd. The Court of Appeal rejected the

A argument, pointing out (para 47) that the application made to Forbes J and the order made by him did not seek to restrain the appellant from dealing with anything which belonged, nominally or actually, to the company on the footing that nevertheless it fell to be treated as the appellant's realisable property. That, in the committee's opinion, is a sufficient answer to the point. But there are other answers.

B 16 In the ordinary way acts done in the name of and on behalf of a limited company are treated in law as the acts of the company, not of the individuals who do them. That is the veil which incorporation confers. But here the acts done by the appellant and his associate Mr Phillips in the name of the company have led to the conviction of one and a plea of guilty by the other. Thus the veil of incorporation has been not so much pierced as rudely torn away. The crux of the appellant's case, moreover, is that the prime mover in the company was Mr Phillips, not himself, a case which can only be explored by examining the internal management of the company, an examination inconsistent with the treatment of the relevant acts as those of the company. There is no merit in this point.

C 17 The appellant sought to raise an issue about fresh evidence, but this was scarcely pursued and raises no question of law of general public importance.

D 18 The appellant has achieved a measure of success in criticising the Court of Appeal's construction of section 71(4) of the 1988 Act. But his appeal against the Court of Appeal's dismissal of his appeal against the refusal of Leveson J to discharge the order made by Forbes J has wholly failed. The appeal must therefore be dismissed. The parties are invited to make written submissions on costs within 14 days.

E *Appeal dismissed.*

Solicitors: Hanman Associates, Manchester; Crown Prosecution Service, Special Crime Division.

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