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*Judgment: approved by the Court for handing down (subject to editorial corrections)**

| *Delivered:* | **5/03/2014** |
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**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE QUEEN**

**-v-**

**STEPHEN BOYD**

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**Before: Morgan LCJ, Coghlin LJ and Weir J**

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**MORGAN LCJ**

[1] This is an application for leave to appeal against a Confiscation Order in the sum of £274,516.54 to be paid by 3 January 2014 imposed by His Honour Judge Smyth QC in the Crown Court sitting at Downpatrick on 3 July 2013. Mr Ronan Lavery QC and Mr Skelt appeared for the applicant and Mr McCollum QC and Ms McCullough for the prosecution. We are grateful to all counsel for their helpful written and oral submissions.

**Background**

[2] On 14 January 2011 the applicant was committed for trial in the Crown Court on a total of 16 counts relating to the possession, transfer, removal and concealment of criminal property, namely money, contrary to the Proceeds of Crime Act 2002 ("POCA"). At his arraignment on 19 April 2011 the applicant pleaded guilty to all counts. He was sentenced by HHJ Smyth QC on 6 June 2011 to concurrent terms of imprisonment totalling 30 months. On 3 July 2013 HHJ Smyth imposed the Confiscation Order.

[3] The applicant's offences took place in the context of an investment fraud in which innocent persons were deceived into investing large sums of money in a supposed very high interest bank account. The applicant, a local businessman, claimed that he was approached by those conducting the fraud and asked to set up two bank accounts into which the fraudulently obtained monies were lodged purportedly so that he could carry out financial transactions on their behalf.

[4] The learned trial judge determined that the applicant's benefit under the POCA was no less than £776,490.77. The applicant took no issue with that figure. The judge then heard evidence in relation to the available amount under the statute. The prosecution contended that this was no less than £556,114.05. The learned trial judge found that the available amount was £447,174.05. The applicant had a priority debt under POCA in respect of earlier convictions totalling £172,657.51 as a result of which the available amount was reduced to £274,516.54. The learned trial judge determined that this was the recoverable amount and made a confiscation order in that sum. The applicant was given 6 months to pay. It was submitted that the learned trial judge had erred by including nine items in the prosecutor's schedule, totalling £281,554.05, as part of the available amount.

**The statutory scheme**

[5] Part 4 of POCA applies to Northern Ireland and establishes the machinery for the conduct of confiscation proceedings. The applicant was convicted of offences in proceedings in the Crown Court and the prosecutor asked the court to proceed under section 156 of POCA which it was, therefore, obliged to do. The court then had to determine whether the applicant had a criminal lifestyle within the meaning of POCA. Since his convictions included offences contrary to section 327 of POCA it followed as a result of section 223 and Schedule 5(2)(a) of POCA that the court was required to treat the applicant as having a criminal lifestyle and to determine what benefit he had obtained from that lifestyle. If the court determined that the applicant had so benefitted it was required to decide the recoverable amount and make a confiscation order requiring him to pay that amount. Any question on that issue was to be determined on the balance of probabilities.

[6] Section 160 of POCA sets out a number of assumptions that arise in a criminal lifestyle case.

> "160 Assumptions to be made in case of criminal lifestyle
>
> (1) If the court decides under section 156 that the defendant has a criminal lifestyle it must make the following four assumptions for the purpose of—
>
> (a) deciding whether he has benefited from his general criminal conduct, and
>
> (b) deciding his benefit from the conduct.
>
> (2) The first assumption is that any property transferred to the defendant at any time after the relevant day was obtained by him—

(a) as a result of his general criminal conduct, and

(b) at the earliest time he appears to have held it.

(3) The second assumption is that any property held by the defendant at any time after the date of conviction was obtained by him—

(a) as a result of his general criminal conduct, and

(b) at the earliest time he appears to have held it.

(4) The third assumption is that any expenditure incurred by the defendant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct.

(5) The fourth assumption is that, for the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, he obtained it free of any other interests in it.

(6) But the court must not make a required assumption in relation to particular property or expenditure if—

(a) the assumption is shown to be incorrect, or

(b) there would be a serious risk of injustice if the assumption were made.

(7) If the court does not make one or more of the required assumptions it must state its reasons.

(8) The relevant day is the first day of the period of six years ending with—

(a) the day when proceedings for the offence concerned were started against the defendant, or

(b) if there are two or more offences and proceedings for them were started on different days, the earliest of those days."

[7] The recoverable amount is defined in sections 157 and 159 of POCA.

> "157 Recoverable amount
>
> (1) The recoverable amount for the purposes of section 156 is an amount equal to the defendant's benefit from the conduct concerned.
>
> (2) But if the defendant shows that the available amount is less than that benefit the recoverable amount is—
>
> (a) the available amount, or
>
> (b) a nominal amount, if the available amount is nil."

It is accepted that the onus lies on the applicant to show on the balance of probabilities that the available amount is less than the benefit. Section 159 provides:

> "(1) For the purposes of deciding the recoverable amount, the available amount is the aggregate of—
>
> (a) the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and
>
> (b) the total of the values (at that time) of all tainted gifts."

[8] Tainted gifts are dealt with in sections 225 and 226 of POCA.

> "225. - (1) Subsections (2) and (3) apply if-
>
> …(b) a court has decided that the defendant has a criminal lifestyle.
>
> (2) A gift is tainted if it was made by the defendant at any time after the relevant day.
>
> (3) A gift is also tainted if it was made by the defendant at any time and was of property-

> (a) which was obtained by the defendant as a result of or in connection with his general criminal conduct, or
>
> (b) which (in whole or part and whether directly or indirectly) represented in the defendant's hands property obtained by him as a result of or in connection with his general criminal conduct…
>
> 226. - (1) If the defendant transfers property to another person for a consideration whose value is significantly less than the value of the property at the time of the transfer, he is to be treated as making a gift."

**The disputed items**

[9] The first issue concerned the ownership of Unit 5, Princess Ann Road, The Harbour, Portavogie. These were premises from which a business called Choice Seafoods was conducted. The premises were registered in the name of the applicant's wife on 4 October 2007 for a consideration of £50,000. Enquiries by the prosecution revealed that the applicant's wife had little or no declared income which would have enabled her to purchase property. In addition the solicitor's file showed that the fees in connection with the purchase of the unit including the land registry fees were paid out of the applicant's litigation account.

[10] The applicant accepted that he conducted the business known as Choice Seafoods from those premises but maintained that the property had been purchased by his wife. There was no documentation of any kind to support this assertion other than the property being placed in her name although the applicant maintained that documentation had been gathered by police and not returned to him. He was, however, unable to identify particular documents from the schedule of police papers relevant to this transaction. The payment of the land registry fees was inconsistent with his assertion.

[11] The learned trial judge concluded that the applicant held a 50% share in the premises valued at £25,000. In the absence of evidence indicating the basis upon which the applicant's wife could have financed the purchase of this property that was in our view a generous allowance since the thrust of the evidence tended to support the view that the applicant had been the sole provider of the funds.

[12] There is a related issue concerning the purchase of Unit 1, Princess Ann Road, The Harbour, Portavogie. On 30 January 2008 a transfer of £17,000 was made from the First Trust Bank Account Number 34343046 (the First Trust Account) in the name

of the applicant and his wife to purchase this unit in which they were registered on 31 January 2008 as tenants in common in equal shares. The First Trust Account had been financed by transfers from Ulster Bank Account Numbers 77287001 (the Ulster Bank Account) which was a business account in the name of the applicant into which the proceeds of criminality were transferred.

[13] The applicant's case was that this purchase was made by his wife using money that she had been given by her parents. There was no documentary evidence to support that proposition and the applicant could not understand why the property was in joint names. The learned trial judge rejected the evidence that the purchase monies represented monies contributed by the applicant's wife. He concluded that he should treat this as a tainted gift on the basis that it was money advanced by the applicant to his wife for no consideration since he denied any interest in the property. We can see no possible criticism of that decision.

[14] On 14 February 2007 a transfer of £35,000 was made from the Ulster Bank Account, into which criminal monies had been lodged, to a Northern Bank account held by the applicant's wife trading as Pizza Man. The applicant's case was that his wife had purchased Unit 5, Princess Ann Road for £50,000 and that he then paid her £35,000 for the purchase of the business known as Choice Seafoods which was located there. In cross-examination he indicated that he paid her rent of £100 per week. There was no documentary evidence to support such rental payments. There were no business records in relation to the conduct of such a business. The learned trial judge accepted that this was a tainted gift and was entitled to do so.

[15] The next two items referred to transfers of £25,000 each. The first was made on 6 March 2007 from the Ulster Bank Account and the second on 3 April 2007 from the same account. In each case the transferee was the Bank of Ireland Bank Account of Equity Design Finance. The prosecution case was that these were tainted gifts for which there was no consideration. The applicant contended that these were loans made by him to Ron Murray who was the proprietor of Equity Design Finance. The claimed purpose of the loans was to assist Mr Murray in establishing his mortgage business.

[16] There was no documentation in relation to the loans. The applicant indicated in cross-examination that no rate of interest was agreed nor was there a defined period for repayment. There were, apparently, other smaller sums which were also loaned to Mr Murray. The applicant referred to a transfer into his account from JW McNinch solicitors in the sum of £58,217.50 which he contended was repayment of the loan. No evidence was produced from the solicitor who made the transfer as to the basis for it. It was accepted that the onus of proof lay on the applicant on the balance of probabilities. The learned trial judge was not satisfied that any of these transactions related to Mr Murray and in light of the unsupported bare assertion by the applicant that was an entirely proper conclusion.

[17] The next item relates to a transfer of £2500 made from the Ulster Bank Account to the Pizza Man account of his wife on 29 March 2007. The appellant claimed that this was a transfer to repay his wife for monies which he had borrowed. He claimed that if he needed cash he would have asked for small sums of £100 or £200. The assertion that he was short of cash sits uneasily with his evidence that he was paying £100 per week in rent. Since there is no documentary evidence of transfer or cheque payments in relation to the rents those amounts could only have been paid in cash. The learned trial judge was perfectly entitled to conclude that this was an invention by the applicant and to reject his evidence.

[18] The last issue concerned payments allegedly made by the applicant to his co-accused, Mr Hanna. The applicant maintained that the circumstances of the offences were that Mr Hanna encouraged clients to provide funds into accounts held by him on the fraudulent misrepresentation that they were high interest-bearing accounts. The applicant never met any of those who invested. It was the prosecution case that the applicant was not the principal instigator of the offence and he was sentenced before his co-accused was tried. Mr Hanna was subsequently acquitted.

[19] The prosecution identified four separate items which they contended were tainted gifts. The first was a series of withdrawals in cash made between 8 February 2007 and 18 January 2008 from the Ulster Bank Account. The money was withdrawn on a reasonably regular basis and the sums involved ranged from £750-£7000. In total the withdrawals amounted to £27,590. In the course of the hearing the learned trial judge observed that given the regularity of the payments, the period over which they were paid and the size of the sums these appeared to be payments by way of commission or a wage. The applicant contended that they were payments made to Mr Hanna at his request.

[20] There were three further items in respect of which the applicant made a similar case. On 29 March 2007 a transfer of £17,234.60 was made from the Ulster Bank Account to a Madrid Bank Account. The applicant maintained that this was at the request of Mr Hanna although there was no evidence to indicate that Hanna had any connection with the account. On 3 April 2007 a transfer of £12,806.19 was made from the Ulster Bank Account to an account in the name of the Happy Hands Group Limited in a Singapore bank. The applicant again stated that this had been at the direction of Hanna but there was no evidence to indicate that Hanna was connected to any such account. Finally on 29 January 2008 a transfer of £97,013.26 was made from the Ulster Bank Account to an account in the name of P & E Developments in Cavan. The appellant claimed that the transfer was made at Hanna's direction. There was again no evidence to indicate any connection between Hanna and that account.

[21] The learned trial judge concluded that the series of cash withdrawals between 8 February 2007 and 18 January 2008 were amounts of money given to Hanna as part of his share in the proceeds of the fraud and he was not satisfied that in the circumstances those amounts were tainted gifts. In respect of the remaining three

matters he concluded that he was not satisfied that these transfers were made at the request of Hanna and he concluded that these were tainted gifts within the meaning of POCA.

[22] The approach which the court should take in this sort of case where the offender adduces little supportive evidence has been addressed in two recent cases. In R v Waya [2012] UKSC 51 the Supreme Court looked at the approach to the calculation of benefit at paragraph 26.

> " …To embark upon an accounting exercise in which the defendant is entitled to set off the cost of committing his crime would be to treat the criminal enterprise as if it were a legitimate business and confiscation as a form of business taxation. To treat (for example) a bribe paid to an official, whether at home or abroad, as reducing the proceeds of crime would be offensive, as well as frequently impossible of accurate determination. To attempt to inquire into the financial dealings of criminals as between themselves would usually be equally impractical and would lay the process of confiscation wide open to simple avoidance. Although these propositions involve the possibility of removing from the defendant by way of confiscation a sum larger than may in fact represent his net proceeds of crime, they are consistent with the statute's objective and represent proportionate means of achieving it."

The point about this passage is that it recognises the difficulty faced by an offender who cannot support his bare assertions in discharging the onus on him.

[23] There is, however, no rule of law or practice that a generalised assertion is insufficient of itself to satisfy the civil burden. The position in our view was properly summarised by Toulson LJ in Alan Glaves v CPS [2011] EWCA Civ 69. That was a case in which the offender sought a certificate of inadequacy. The prosecution submitted that he could not succeed in circumstances where he had not explained the whereabouts of money which the original court found he had secreted. The Court of Appeal rejected the argument that the other circumstances need not be considered and looked at the approach to the evaluation of evidence.

> "As the prosecutor's statements in the present case illustrate, courts are routinely reminded of the dictum in Walbrook and Glasgow that the defendant must produce clear and cogent evidence, and that generalised assertions will rarely be sufficient to

> discharge the burden. The truth is that there is a balance of judgment to be struck. The courts are right to treat with some scepticism generalised assertions by someone whose credibility may be deeply suspect by reason of the facts of the offence. Absence of independent credible evidence to corroborate a defendant's account is not fatal as a proposition of law, but it may well be fatal as a matter of fact. That, as I have said, is a matter for the judgment of the court considering the confiscation application. The fact that a defendant may end up with a confiscation order for more than he can pay, because he has been unable to produce sufficient evidence to satisfy the court of his true means, rather than because he has been deceitful or evasive, is hard but not unjust. It is not unjust, because it is right that the burden of proof should be on him."

[24] In this case the learned trial judge examined the evidence and concluded that the manner of payment of the sums amounting to £27590 was supportive of the account given by the applicant. He concluded, however, that in the absence of any evidence to support the contention that Hanna was the recipient of the other funds that he should reject that assertion. We are satisfied that he has approached his task in a careful manner. The basis for his conclusions can be readily divined from his interventions in the argument and his closing remarks.

[25] We do not have to decide in this case whether the making of a payment to a co-accused for no consideration falls to be dealt with as a tainted gift although we are inclined to think that it should be so treated. There may be an issue of proportionality in circumstances where there was a possibility of double counting where an order was also being made against the co-accused. We consider that this point would benefit from full adversarial argument in another case.

**Conclusion**

[26] For the reasons given we dismiss the appeal.