**Neutral Citation: [2016] NICA 27** | *Ref:* **MOR10007**

*Judgment: approved by the Court for handing down*
*(subject to editorial corrections)** | *Delivered:* **17/6/2016**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

_____

**THE QUEEN**

**-v-**

**PAUL MAHONEY**

_____

**Before: Morgan LCJ, Gillen LJ and Keegan J**

_____

**MORGAN LCJ (giving the judgment of the court)**

[1] This is an appeal against a 4 year Determinate Custodial Sentence, comprising 2 years custody and 2 years on licence, imposed by the Recorder of Londonderry at the Crown Court on 8 September 2015 following the appellant's plea of guilty to two counts conspiracy to defraud, namely the operating of websites permitting the viewing of films in breach of copyright, contrary to common law; one count of acquiring criminal property, namely £280,000 advertising revenue generated by the said websites and £12,500 unemployment benefit to him during the relevant period, contrary to section 329 of the Proceeds of Crime Act 2002; and one count of concealing criminal property, namely £82,390 cash, contrary to section 327(1)(a) of the Proceeds of Crime Act 2002. The offences related to the setting up and operation of websites which permitted the viewing of films in breach of copyright and the advertising revenue he acquired from same. Mr Rodgers QC and Mr Talbot appeared for the appellant and Mr Groom BL and Mr Ari Alibhai BL for the prosecution. We are grateful to all counsel for their helpful oral and written submissions.

**Background**

[2] The background was helpfully set out in the trial judge's sentencing remarks. Between April 2008 and April 2013 the appellant created and operated a series of websites which enabled people to view films and television programmes for free by

logging on to them. The film or TV programme was then streamed via the internet to their computer for viewing at no charge to the person involved. The loss to the industry was the revenue it might otherwise have achieved from the viewing of the film.

[3] The appellant conspired with persons both known and unknown to defraud those having an interest in films by the operation of these websites which allowed the viewing of copies of films and television programmes. The victims were those involved in the film, TV and general entertainment industry. This was because the appellant's operation specialised in making available to his viewers those films or movies which were on their cinema run, in other words those that had just been released, and indeed those that had not been released. Prior to release the makers of both films and television programmes produce promotional copies and it was well known that copies of these promotional copies could be obtained in particular through a website called Usenet. That particular website was a legal website.

[4] The appellant created a website known as Bedroommedia which later became known as Fastpasstv. These websites contained within them alphabetical and searchable lists of material that were available for viewing. All that the potential viewer had to do was click on the link to the particular film that they wished to watch when they had selected it. A count indicated at one time 12,139 films were made available on the site. The links were provided by the appellant and it is the provision of them that allowed users to view the illicit copies of the films. These links had been acquired in three ways. Firstly, they had been developed by users who had submitted the links which were then approved by the appellant and/or his staff. Secondly, the appellant had developed what was known as Scrapper software which searched other sites for material and automatically recorded the links to the other sites of particular films. Thirdly, the defendant developed a new software to trawl other sites, in particular Usenet, for unreleased films which he then downloaded to a website called Wootly. A link could then be put to the film on his own website. Wootly advertised itself as a free video hosting service.

[5] Most of the material was contained within third party sites which were unlawful in themselves and were largely based overseas, quite deliberately, so as to frustrate any legal action against them. The appellant employed and paid staff, two of whom are named on the indictment. It is not suggested that he met these people. He dealt with them over the internet and paid them for their services. One was probably based in the United States and was paid by him to maintain his websites, as well as being involved in the development and improvement of the sites. He also had a second category of employees who were moderators or administrators who assisted him in running his sites. Subsequent analysis of his computers which had been seized revealed chat logs which contained, among other matters, online discussions between him and his employees. The discussions concerned the Scrapper software, already referred to, and the Wootly uploads. There were also comments made that he was making over £1,000 per day from advertising. It was

established that 40% of the links in relation to Wootly had been created by the appellant and that in the six months prior to February 2011 films on the appellant's site had been viewed on over one million occasions.

[6] At the heart of this case is the fact that the appellant infringed the copyright of the film studios that made the films. The maker of the film is the person or body who decides where, when and how that material is released to the public and no one else is permitted to do this without the permission of the maker or creator. Bedroommedia.com was registered on 1st of January 2007 by the appellant using his own name. That website had an associated forum in which users could discuss site related matters which was accessed at Bedroommedia.co.uk. The film industry, through its trade association, the Federation Against Copyright Theft ("FACT") became aware of this site and on 10 August 2008 served a Cease and Desist notice on Bedroommedia.com which warned that the operation of the sites involved the commission of civil and criminal wrongs. That notice was ignored.

[7] In August 2009 the Bedroomedia site started redirecting users to another website called Fastpasstv.com which provided an identical service. That website had also been created by the appellant in 2008 but had remained unused. The Fastpasstv site was similar to the Bedroommedia site. On 6th of February 2011 he registered a new website called Fastpasstv.eu and later that month users of Bedroommedia.com and Fastpasstv.com were redirected to this new site. On 25th of May 2011 a search warrant was executed at the appellant's home address and although he was not immediately present he came to the house and was arrested. Computer equipment that he brought with him was also seized. He was interviewed, but declined to answer questions. He disclaimed his interest in Fastpasstv.eu by signing it over to FACT.

[8] On 28th May 2011, three days after his release from police custody and whilst on bail, the appellant created a new website called Fastpasstv.ms which took over the operation of his website. This further website was identical to Fastpasstv.eu except that the video is played through an embedded player although a sign did come on screen notifying users that the film was actually hosted and being streamed by a third party site. Fastpasstv.eu had a Facebook page and on 30th of May 2011 an announcement appeared in the following terms:

> "Due to recent circumstances most of you already know we have switched our Facebook page and domain name to www.Fastpasstv.ms."

[9] It is therefore clear that within days of being released on bail the appellant recreated his website with a different domain name using false details. On 19 December 2011 he surrendered to his bail and was arrested in connection with operating Fastpasstv.ms. He was interviewed for the second time and again declined to answer questions, except to say that he was not responsible for Fastpasstv.ms. He

was then readmitted to further police bail. Despite being readmitted to bail advertising revenues from this further version of his website were still being paid to the appellant until 2 April 2013 when that website was finally closed down.

**Pre-Sentence Reports**

[10] Dr Hanley, Consultant Psychologist, examined the appellant on 21 April 2015. He noted him to be a very withdrawn individual who failed to make effective eye contact in conversation and had marked communication difficulties. He suffered from ocular albinism with nystagmus and was 'statemented' for special educational needs at the age of 8. His mother claimed that the special arrangements at school, including a teaching assistant, had the effect of isolating him rather than encouraging integration. He had behavioural problems and, during family counselling it was discovered that he was angry with his mother as he blamed her for his visual impairment and the breakup of the marriage with his father. He left school at the age of 14.

[11] He claimed that he set up the website for something to do and that it was not about the money. He said that he only spent the money on buying a new computer. Having conducted standardised tests Dr Hanley concluded that the appellant was of normal intellectual ability and had an IQ in the lower half of the average range. He further assessed him as suffering from anxiety at a level worthy of treatment but the assessment for depression fell within the normal range. The appellant had episodes of what appeared to be obsessive compulsive disorder and his involvement in the website became a preoccupation for him. Following the Cease and Desist order served on the appellant in 2009 he would have been fully aware that he was acting unlawfully. Dr Hanley considered that a prison sentence may have an impact on the appellant's mental health. He feared contact with strangers and would have marked difficulties in adjusting to the social interactions that are a necessary part of the prison environment.

[12] In the pre-sentence report he said that his school did not understand his visual needs and, after leaving school, he did not seek employment. He says he became socially isolated, staying in his bedroom playing computer games and streaming videos. The enterprise was not motivated by money and he only spent the money to maintain the servers (£1,000-£2,000 per month) and on adult websites. The Probation Officer assessed the appellant as being of a medium risk of reoffending but not posing a significant risk of harm to others.

**Previous Convictions**

[13] In September 2002 the appellant was made the subject of a 6 month Probation Order by Londonderry Youth Court for offences of disorderly behaviour, two assaults on police and resisting police. In August 2003 he was before Londonderry Magistrates' Court where he was sentenced to 1 month's detention in the Young

Offender's Centre suspended for 12 months for disorderly behaviour, obstructing police and resisting police. Conditional discharges were imposed on three further counts of disorderly behaviour. Those suspended sentences were activated in April 2004 when the applicant was again before the court for disorderly behaviour. Finally, in October 2005 the applicant was sentenced to 4 months detention suspended for 2 years on each of two counts of disorderly behaviour. All of that offending appears to have been related to difficulties at home with his mother.

**Judge's Sentencing Remarks**

[14] The Recorder noted the prosecution's claim that the websites had put at risk an estimated £120 million, while the actual loss was estimated to be in the region of £12 million. These figures involved some degree of speculation but the judge was satisfied that the appellant's offending had put at risk several million pounds and that the actual loss also ran into several millions pounds. While he accepted the appellant was entitled to credit for his pleas of guilty, such credit must be reduced by his attitude during police interview which caused police and FACT to embark on a long and complex investigation. The learned judge rejected the appellant's assertion that he did not know that what he was doing was illegal especially after the Cease and Desist order was served and after the first police interview.

[15] He noted, however, that while the appellant had received about £280,000 in advertising revenue, and £80,000 cash was found in the house, he did not lead a lavish lifestyle. The Recorder considered that his culpability was high as it was obvious he was the main person involved in setting up and maintaining the sites, the enterprise was sophisticated and it involved significant planning. The offending took place over a six year period. There were a large number of victims including the public who have to pay higher charges to offset the film industry's losses. The offending was further aggravated by the fact Count 2 was committed while the appellant was on police bail following his interview by police and there was also an international element to the offending.

[16] In mitigation the appellant had no previous convictions of the same type. He had medical and possibly psychological problems. Following the approach advocated in R v Rymacki [2013] NICC 20, the Recorder of Londonderry adopted the English Sentencing Council guidelines and imposed a determinate custodial sentence of 4 years on Counts 1 and 2, and a determinate custodial sentence of 1 year on Counts 3 and 4. He made the sentences concurrent. The Recorder further indicated that if the appellant had not pleaded guilty he would have received a sentence of 5 years.

**Consideration**

[17] There is no guideline case in this jurisdiction dealing with conspiracy to defraud in these circumstances but there is assistance to be obtained from the

decision of the Recorder of Belfast in R v Rymacki. That was a case involving the selling of goods bearing an unauthorised trademark and trading in counterfeit products. The items at issue in that case were pairs of underwear bearing the Calvin Klein logo. He noted the relevant features in cases of this type identified by Moore Bick LJ in R v Khan [2013] EWCA Crim 802, another clothing case:

(1) offences of this type are difficult, time consuming and expensive to detect;

(2) they undermine reputable companies who are entitled to be protected;

(3) the court should consider how professional the offending was;

(4) there should be an estimation of the likely or actual profit;

(5) the need for an element of deterrence must be borne in mind.

[18] He recognised that the need for deterrence meant that only in exceptional circumstances should a custodial sentence be suspended. He then considered the appropriate starting points:

> "As to the length of such a sentence much will depend on the circumstances of the case. Offences of this nature are essentially confidence frauds, so the seriousness of the offence will depend largely on the amount of loss to the trademark owner or profit generated by the offenders whichever figure is the more accurate in determining the correct level of culpability. Sums up to £20,000 should attract sentences, after a contest, with a starting point of between 1 and 3 years, sums up to £100,000 should have a starting point of between 3 and 4 years, sums up to £500,000 should have a starting point of 4 and 5 years, and for sums over £500,000 the starting point should be between 5 and 6 years."

[19] We have also derived some assistance from the decision of the English Court of Appeal in R v Bennett [2007] EWCA Crim 2371. That was a case in which the appellant had established an internet site designed to assist in the provision of a market for sale and swapping of counterfeit material. The structure provided a market for traders but the appellant did not make any material profit. He had previous convictions for similar sharing activities. The scale of the activities was thought to run into millions of pounds. The appellant entered a late plea and his appeal against a sentence of four years imprisonment was dismissed.

[20] The Sentencing Guidelines Council of England and Wales issued guidance with effect from 1 October 2014 in relation to offences of fraud, bribery and money-laundering. The Guidelines accordingly included the offences of conspiracy to defraud which appear in counts 1 and 2 on this indictment. The structure of the Guidelines is to recognise that culpability and harm are the driving factors for determining the sentence. We agree that the factors identified as contributing to culpability and harm in the Guidelines are appropriate and should be taken into consideration in this jurisdiction. We also agree that the aggravating and mitigating factors identified in the Guidelines are of assistance.

[21] Much will depend on the circumstances of each case in determining the appropriate sentence. We consider that the factors set out at [17] above are helpful considerations in determining the appropriate sentence but in a case involving conspiracy to defraud we also consider that it is necessary to take into account an estimate of the likely or actual loss. The culpability of the offender will depend very much on his role in the offending. Starting points should not be determined by reference to harm only. We note that the Recorder of Belfast was careful to ensure that there was a wide range of starting points to reflect the varying culpability of the offenders. Even so these should not be seen as sealed compartments. In cases involving amounts over £500,000 and high culpability we consider that starting points of 7 or 8 years are appropriate. On the other hand where the harm is small and the culpability low a community sentence may be appropriate.

[22] Applying those principles to this case we are satisfied that this was a case of high culpability. The provision of access to the films was technically competent. The appellant actively sought out the available sources of such materials. The website was clearly professionally structured and he retained staff to assist him with this. He was the driving force behind the criminal behaviour. The first count related to the period between the service of the cease and desist notice and his first interview with police. The second count concerned his continued activity after release on bail until the website was closed on 2 April 2013. This showed a persistence in his offending over a period of 5 years and a complete disregard for the consequences of his unlawful conduct. Mr Rodgers sought to argue that the providers of the films outside the jurisdiction and the advertisers were more culpable. We cannot come to a view about that without knowing all of the circumstances but that does not diminish the high culpability of this appellant.

[23] It was conceded at the time of the plea that although it was not possible to determine the precise loss it ran into millions of pounds. On any view, therefore, this was a case of very significant harm. In the absence of aggravating or mitigating factors we consider that a starting point after a contest of 7 or 8 years would have been appropriate. We accept that the appellant's medical and psychological issues were important mitigating factors but consider that those were properly recognised by the Recorder in selecting a starting point of 5 years. The appellant did not co-operate at interview and pleaded not guilty at arraignment. If he had done so he

might have obtained a sentence close to 3 years but in the circumstances we see no error in the determinate custodial sentence of 4 years imposed by the Recorder.

**Conclusion**

[24] For the reasons given the appeal is dismissed.