Judicial Communications Office

11 December 2019

COURT DIRECTS REHEARING OF PROCEEDINGS FOR CONFISCATION ORDER

Summary of Judgment

The Court of Appeal[1] today held that a Crown Court judge had erred in law in the approach he took in determining the amount of a confiscation order in a case where a person was convicted of depositing and keeping controlled waste. The Court quashed the trial judge's finding and directed that a new hearing is required in which the judge should determine the issues in dispute before making a confiscation order.

Background

William Robert Thompson Morrow ("the appellant") pleaded guilty on 17 April 2018 to two offences of depositing and treating controlled waste and one of keeping controlled waste. The charges related to waste on lands owned by the appellant at Ballydrain Road, Comber which are near Castle Espie and adjacent to the Strangford Lough Area of Special Scientific Interest. The appellant was sentenced to 180 hours of community service in respect of each charge and the Crown Court made a confiscation order in the sum of £325,609.20. The appellant appealed against the confiscation order.

On 19 November 2015, officers from the Northern Ireland Environment Agency (NIEA) carried out an inspection of premises adjoining the appellant's land and noted that a shed was being built on his property on top of an area of landfill. The NIEA conducted an inspection of the appellant's property and observed a large area of waste infill consisting of clay, building rubble, wood, glass, tarmac, plastic piping and a variety of other household waste. The infill had been flattened and covered with a layer of gravel to a depth of 0.2 to 0.5 metres. On 5 April 2016, a survey estimated that the infilled area was 1,223 cubic metres in volume and the overall amount of material was estimated to weigh approximately 3,942 tonnes.

The appellant was interviewed by the NIEA on 25 May 2016 and initially stated that the materials had been taken from buildings onsite as well as from his other properties in Comber. He later accepted that the majority of the materials were brought onto the site from sites other than his own but contended that the materials emanating from the sites owned by him were always intended for the purposes of building a construction platform and accordingly should not be classified as waste.

In preparing for trial, the appellant retained the services of Dr Craig Fannin of TerraConsult Limited who carried out test excavations and provided expert reports for the Crown Court. In pleading guilty to the three counts the appellant put forward a basis of plea to the effect that although the majority of the material in the platform was brought from sites other than those owned by him, and was therefore rightly classified as waste, a significant amount of the material in the platform (49%)

[1] The Court of Appeal panel was the LCJ, McCloskey LJ and McAlinden J. Judgment was delivered by McAlinden J.

was building rubble and similar material originating from the demolition of buildings on his land that had been demolished to provide such material and as such this was not waste.

The prosecution did not accept this assertion. Consideration was given as to whether this disputed issue should be resolved by way of a *Newton* hearing or as part of the confiscation order process (the Crown and the defence both accepted that the resolution of this issue would have a direct bearing on the amount of any confiscation order). On 2 May 2018, the prosecution invited the Court to consider whether a *Newton* hearing was necessary. The trial judge referred to case law which said this decision is one for the court and which also stated that there is no obligation to hold a *Newton* hearing:

- if the difference between the two versions of fact is immaterial to sentence;
- where the defence version can be described as "manifestly false" or "wholly implausible"; or
- where the matters put forward by the defendant do not contradict the prosecution case but constitute extraneous mitigation where the court is not bound to accept the truth of the matters put forward whether or not they are challenged by the prosecution.

If the court determines that the matter should be resolved by way of a *Newton* hearing, then the case of R v *Newton*[2] gives clear guidance as to how such a hearing should proceed.

The Court of Appeal ("the Court") heard that there was no agreed basis of plea placed before the trial judge at the hearing on 2 May 2018. The trial judge had received the appellant's draft basis of plea document endorsed with some manuscript insertions from Crown counsel but there was no final agreed document. The Court reviewed the transcript of the hearing and said it was difficult to ascertain what task the trial judge was asked to perform by the parties but it appeared that the Crown was urging him to accept that a *Newton* hearing was not necessary while the appellant was arguing that if the court intended to conduct a *Newton* hearing then it had to accept the appellant's version of events and, if it did, it could not find beyond reasonable doubt that the material in the platform which emanated from his properties was waste.

The trial judge gave his decision on 22 May 2018. He said he was satisfied that, on the evidence before him the prosecution had established beyond reasonable doubt that the material fell within the definition of waste. The Court commented, however, that no express consideration was given as to whether evidence should be heard and it was clear that without hearing any evidence from the appellant or Dr Fannin, but grounding his determination on his consideration of the submissions of Counsel and the papers in the case, the trial judge concluded that all the material in the platform was waste. The Court said the trial judge appeared to have made a determination on the central issue which was in dispute following a hearing which consisted of him considering written and oral submissions but in doing so he had not expressly indicated his acceptance of the appellant's case as contained in the basis of plea. The Court doubted whether the task of holding a *Newton* hearing was actually performed by the trial judge.

Following the decision of 22 May 2018, it was agreed that for the purposes of the confiscation order proceedings, the benefit accruing to the appellant from his criminal activity was the avoidance of landfill tax on the amount of material in the platform and that the confiscation order which should be made should equal the amount of landfill tax which ought to have been paid on 3,942 tonnes of

[2] R v Newton (1982) Cr App R 13

waste and, on that basis, a confiscation order was made on 21 March 2019 by consent in the sum of £325,609.20.

The appellant challenged the manner in which the *Newton* hearing was conducted. The grounds of appeal were that:

- The trial judge's ruling on 22 May 2018 was wrong in law;
- The trial judge failed to appreciate the nature of the ruling which was sought;
- The appellant was entitled to call evidence on the origin and condition of the materials which he alleged emanated from demolition work carried out on his lands and his intentions in respect of the use to which those materials would be put;
- The trial judge, without hearing evidence from the appellant or Dr Fannin, wrongly ruled that the materials on the site that were derived from the appellant's own demolished buildings were, as a matter of law, waste. The trial judge was wrong to draw such a conclusion without first hearing evidence from the appellant and Dr Fannin on the issues of origin, volume and intention;
- The effect of the trial judge's ruling was to tie the hands of the appellant on the calculation of benefit from criminal conduct; and
- The making of the confiscation order, specifically the finding in respect of benefit from criminal activity, was entirely contingent upon the outcome of an issue identified to the court in advance of a proposed *Newton* hearing.

The Court said it was clear from its analysis of the law relating to "waste" that the intention of the appellant in relation to the use of the material which emanated from his properties was clearly relevant to the determination of whether the material was waste. It was also clear that any analysis of the composition of the material has to be carried out at the time of its removal from the original site. In the context of this case this meant that the composition of the material created by the demolition of the buildings on the appellant's sites had to be assessed at the time of the original deposit prior to it being mixed with other materials which were used in the platform. The Court said this meant that it was incumbent on the court of trial to make the necessary findings of fact in accordance with a procedurally fair process.

The question for the Court to answer, bearing in mind the disputes that existed between the Crown and the appellant in relation to what material did and did not constitute waste, was whether the trial judge fell into error by determining the disputed material was waste without hearing evidence from the appellant and Dr Fannin and making his determination on the basis of his consideration of the written and oral submissions of Counsel and the depositions and reports: "Fundamentally was the appellant deprived of his right to a fair trial".

The Crown argued that hearing oral evidence in the context of the dispute was not necessary. It submitted that even if the court accepted the appellant's case that a number of buildings were demolished on his properties to provide material for the construction of a platform on one of those properties and that the appellant always intended to use the materials resulting from the demolition of the buildings in this manner, the material so produced was still waste and, in effect, nothing the appellant or Dr Fannin could have said in evidence could have altered the Judge's determination. The Court, however, said this submission failed to recognise the assessment of the material for the purpose of ascertaining whether it is waste is to be performed at the time of its removal from the original site or prior to it being mixed with other materials which were used in the platform.

Counsel for the Crown was therefore forced to concede that the trial judge had no evidence before him as to the sequence in which the various loads of material were deposited on the site in order to construct the platform. The Court said it was possible that material created by the demolition of buildings on other sites owned by the appellant was brought to the site and added to the material already present in the excavation, but asked whether that material would be waste bearing in mind that such material has to be assessed at the time of its removal from the original site. The Court noted that there was no evidence of this nature before the trial judge and, in the circumstances, by virtue of the decision to determine the issue on the basis of submissions, the appellant was deprived of the opportunity to place crucial evidence before the trial judge which would have enabled him to properly address the issue of the nature of the material which was disputed in this case. The Court concluded that the trial judge, having identified that there was a dispute about whether or not 49% of the material in the platform was or was not waste, should have conducted a hearing to resolve this dispute and that hearing should have included giving the appellant the opportunity to give oral evidence and to adduce oral evidence from an expert Dr Fannin.

The Court commented that the transcript of the demonstrated that the trial judge had not conducted a *Newton* hearing and had not "heard" evidence. Furthermore, he made no ruling on the *Newton* hearing issue. The Court concluded that the procedure adopted by the trial judge to determine the issue of whether all the material found in the site was waste did not afford the appellant the opportunity to adduce evidence in relation to intention and other matters such as the timing and sequencing of the deposit of materials used to construct the platform or indeed to adduce evidence from an expert who could have given evidence about the nature and extent of the material which was alleged by the Crown to constitute waste. By proceeding to determine the issue of whether the disputed material was waste on the basis of submissions when significant issues of fact were either disputed or unknown, the trial judge erred in law. This fundamental error of law is that the appellant was deprived of his right to a procedurally fair hearing in the sentencing process which unfolded following his pleas of guilty.

Having found that the trial judge erred in law the Court held that it must allow the appellant's appeal and quash the finding of the trial judge that all the material in the platform constituted waste and the resulting confiscation order. It went on to give guidance as to how this matter should have been approached. Sections 164 and 165 in Part 4 of the Proceeds of Crime Act 2002 ("the 2002 Act") provide a specific power to postpone confiscation order proceedings until after sentencing. The existence of such a power supports the proposition that in certain circumstances, the confiscation aspect can be detached from the remainder of the sentencing process. The Court considered that a *Newton* hearing is now required in this case in which the judge should determine the issues in dispute. Such a hearing should include the opportunity for the appellant and Dr Fannin to give evidence on the matters outlined above. It said that any subsequent assessment of the appellant's benefit from criminal conduct under section 158 of 2002 Act will in all likelihood be dependent upon the prior assessment of the quantity of waste for which landfill tax at the rate applicable at the time of the offending was not paid. The Court did not consider that it would be necessary or appropriate to revisit the other aspects of the sentencing exercise.

Finally, the Court made the following observations:

- The prosecution and the defence in this and other cases need to use their best efforts to agree the factual basis of plea in order to avoid costly and time-consuming hearings in busy Crown Courts;

- The Court would wish to emphasise how rarely a "*Newton*" ruling/outcome should purport to make definitive findings/conclusions regarding contested material issues without affording the defendant a full opportunity to be heard and call witnesses. This is especially so in a context where the central issue in dispute is mainly one of fact. Elementary fair hearing rights must be scrupulously respected;
- There is a need for clearly understood parameters at the outset of every such hearing, whether of the *Newton* variety or otherwise;
- Every defendant's right to a fair trial extends to the sentencing process. This inalienable right is not restricted to the determination of guilt/innocence; and
- The Court would positively encourage strenuous *inter-partes* attempts to resolve confiscation order applications by agreement, subject of course to judicial endorsement, as there is a strong public interest in such matters being resolved without the need for time consuming and costly hearings.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk