Neutral Citation Number: [2019] EWCA Crim 501

Case No: 201803206 C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT ST ALBANS
HHJ BRIGHT QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2019

Before :

LORD JUSTICE DAVIS
MR JUSTICE WILLIAM DAVIS
and
HIS HONOUR JUDGE POTTER (SITTING AS A JUDGE OF THE CACD)

- -

Between :

	R.	**Respondent**
	- and -	
	PAUL MOSS	**Appellant**

- -
- -

Kennedy Talbot QC and Gary Pons for the **Appellant**
Jonathan Hall QC and Michael Newbold for the **Respondent**

Hearing date: 12th March 2019

- -

Approved Judgment

Lord Justice Davis :

Introduction

1. This appeal, brought by leave granted by this court at the hearing after reference by the Registrar, relates to the proposed enforcement of domestic confiscation orders made under the Proceeds of Crime Act 2002 ("the 2002 Act") in a Member State of the European Union.

2. There are two particular issues raised. Both involve the true interpretation to be ascribed to the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014, which were made and came into force on 2 December 2014 ("the 2014 Regulations"). The first issue is whether the certification process included in those Regulations can be applied to confiscation orders made prior to 2 December 2014. The second issue is whether (if it can be so applied) certification may only be made in respect of assets which are shown to be the traceable proceeds of crime.

3. The process of interpretation of the 2014 Regulations necessarily involves consideration of the context in which they were made: and most particularly, for present purposes, consideration of the Council Framework Decision 2006/783/JHA of 6 October 2006 ("the 2006 Framework Decision").

4. The appellant was represented in this court by Mr Kennedy Talbot QC and Mr Gary Pons. The respondent was represented by Mr Jonathan Hall QC and Mr Michael Newbold. We place on record that the arguments, both written and oral, as presented to us were excellent. The oral arguments were further enhanced by being commendably concise.

Background facts

5. The background needs only a short summary.

6. The appellant, Paul Moss, pleaded guilty on 8 December 2005 in the St Albans Crown Court to a significant number of drugs offences. These included a count of conspiracy to import Class A drugs into the United Kingdom. That conspiracy had involved the transportation of some 119 kgs (at 66% purity) of cocaine from the Caribbean. It was planned that the cocaine was to be delivered by boat to Spain and then divided into separate consignments with a view to being transported overland into the United Kingdom. (In the event, the boat was intercepted.) For this offence, and the other offences, the appellant, who had a significant and relevant antecedent history, was on 21 December 2005 sentenced to a total term of 17 years imprisonment.

7. There were confiscation proceedings. It emerged that the appellant had also used a number of aliases; and he beneficially owned properties and had various bank accounts under a variety of names.

8. Following a lengthy hearing in the Crown Court before HH Judge Plumstead, the judge on 6 March 2008 assessed the benefit to be in the sum of £4,357,323. The judge found that the appellant had a criminal lifestyle and that the assumptions contained in s.10 of the 2002 Act were to be applied. The judge described the appellant as having chosen

throughout his adult life either to make his living out of crime or to attempt to do so. The judge said: "he truthfully deserves the description 'career criminal'." As to the available amount, the judge ultimately assessed that in the sum of £1,433,753. A confiscation order was made in that sum accordingly. That was ordered to be paid within 12 months, with a five year term of imprisonment set in the event of default.

9. There was an appeal. A constitution of this court on 8 October 2008 reduced the amount of the benefit to £2,207,823. However the amount of available assets, and hence the recoverable amount specified in the confiscation order, was affirmed.

10. The Confiscation Order as drawn up included a schedule of the available assets (cf. s.7(5) of the 2002 Act). Those assets included two properties in Greater London; a property in Barbados; and a property – 9 Mar Adriatico, Urb El Rafelet, Javea – in Spain. The scheduled assets also included money in various bank accounts, including one in Spain. The present appeal relates solely to the property in Spain. A value of £350,000 was ascribed to that property.

11. On 14 July 2005 a judge had made a Restraint Order over the assets of the appellant (and certain other co-accused). Subsequently, an Enforcement Receiver was appointed for a period of time, before being discharged. Payments of some £741,000 were made towards discharge of the confiscation order. However the balance remained unpaid; and, with accrued interest, the amount outstanding now exceeds the amount of the original confiscation order. The default term of imprisonment was triggered and the appellant has served the appropriate period for that, being released on 12 February 2018.

12. The assets of the appellant in Spain had not thus far been realised towards discharge of the confiscation order. The prosecution then sought to achieve this by applying for a certificate under the 2014 Regulations (to the provisions of which we will come) with a view to enforcement of the confiscation order in Spain. The application came on for hearing before HH Judge Bright QC in the St Albans Crown Court. He directed the issue of such a certificate on 2 May 2018. He gave full reasons for his decision. The certificate identified, for the purposes of enforcement, the property at Javea and also the money in the Spanish bank account in the name of the appellant.

13. It is the decision to make such a certificate which is the subject of this appeal. No challenge is pursued to the certificate in so far as it relates to the Spanish bank account: it is accepted that the money held in such account could properly be assessed as representing the proceeds of crime. The challenge is pursued solely with regard to the property at Javea. In view of the trenchant findings of HH Judge Plumstead, it might well be queried why this property too should not be viewed as deriving from criminality. However, it seems that no evidence as to the date of purchase of this particular property was put in nor was there any evidence as to the circumstances of its purchase by the appellant. At all events, the matter has proceeded, both in the court below and in this court, on the basis that the property at Javea, whilst part of the realisable assets of the appellant, was not to be regarded as derived from criminality.

The legislative scheme

14. The essential working of Part 2 of the 2002 Act with regard to confiscation orders is – putting it in general terms – that the court first decides whether the defendant has a

criminal lifestyle. If he has, the court decides whether he has benefited from general criminal conduct; if he has not the court decides whether he has benefited from particular criminal conduct (see, in particular, ss.6, 75 and 76). Benefit is then calculated under s.8 ; the available amount is then calculated under s.9; and the recoverable amount, which is to be the subject of the confiscation order, is either the amount of the benefit or (if the defendant has shown the available amount to be less than the amount of the benefit) the available amount: s. 7.

15. It is evident that a confiscation order made under the 2002 Act operates on what may be called a value basis. The recoverable amount is not directed at or confined to assets which are specifically shown to represent the proceeds of crime: rather, it is directed at the amount which the defendant is adjudged liable to pay. It is thus to be noted that the recoverable amount can extend to assets available to the defendant which may have nothing whatsoever to do with crime. That, indeed, was common ground before us.

16. Put another way, the general scheme of the domestic confiscation process operates in personam, not in rem. This is yet further confirmed by, for example, the operation of the criminal lifestyle assumptions as set out in s.10 of the 2002 Act and by the requirement that the value of any tainted gifts is to be included in the available amount, as provided by s.9(1) and s.77.

17. That then (put very shortly) is the domestic statutory context in which the 2014 Regulations were made. But there is a wider, European, context. For the 2014 Regulations in the relevant respects were made (by exercise of the powers contained in s.2(2) of the European Communities Act 1972) in order to give effect to the 2006 Framework Decision. For the purposes of certification that is in fact made explicit by Regulation 11(3).

18. So it is appropriate first to refer to the scheme and relevant provisions of the 2006 Framework Decision.

19. The recitals, to which it is important to have regard, stress the principle of mutual recognition as being the cornerstone of judicial cooperation within the European Union. Emphasis is also placed on the "determination to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime" and on the aim "to improve, in accordance with the principle of mutual recognition, execution in one Member State of a confiscation order issued in another Member State…."

20. In Article 1, the purpose of the Framework Decision is stated to be to establish the rules under which a Member State will recognise and execute a confiscation order duly made by another Member State. Article 2 then sets out certain definitions. In particular, for present purposes, Article 2(c)(d) and (e) provide as follows:

> "(c) 'confiscation order' shall mean a final penalty or measure imposed by a court following proceedings in relation to a criminal offence or offences, resulting in the definitive deprivation of property;
>
> (d) 'property' shall mean property of any description, whether corporeal or incorporeal, movable or immovable, and legal

> documents and instruments evidencing title to or interest in such property, which the court in the issuing State has decided:
>
> > (i) is the proceeds of an offence, or equivalent to either the full value or part of the value of such proceeds,
>
> or
>
> > (ii) constitutes the instrumentalities of such an offence,
>
> or
>
> > (iii) is liable to confiscation resulting from the application in issuing State of any of the extended powers of confiscation specified in Article 3(1) and (2) of Framework Decision 2005/212/JHA,
>
> or
>
> > (iv) is liable to confiscation under any other provisions relating to extended powers of confiscation under the law of the issuing State;
>
> (e) 'proceeds' shall mean any economic advantage derived from criminal offences. It may consist of any form of property;"

21. Article 7, with regard to recognition and execution, provides in the relevant respects as follows:

> "Recognition and execution
>
> 1. The competent authorities in the executing State shall without further formality recognise a confiscation order which has been transmitted in accordance with Articles 4 and 5, and shall forthwith take all the necessary measures for its execution, unless the competent authorities decide to invoke one of the grounds for non-recognition or non-execution provided for in Article 8, or one of the grounds for postponement of execution provided for in Article 10.
>
> 2. If a request for confiscation concerns a specific item of property, the competent authorities of the issuing and the executing States may, if provided for under the law of those States, agree that confiscation in the executing State may, if provided for under the law of those States, agree that confiscation in the executing State may take the form of a requirement to pay a sum of money corresponding to the value of the property.
>
> 3. If a confiscation order concerns an amount of money, the competent authorities of the executing State shall, if payment is

> not obtained, execute the confiscation order in accordance with paragraph 1 on any item of property available for that purpose.
>
> 4. If a confiscation order concerns an amount of money, the competent authorities of the executing State shall, if necessary, convert the amount to be confiscated into the currency of the executing State at the rate of exchange obtaining at the time when the confiscation order was issued."

Article 8 then sets out the (limited) circumstances in which an executing state may decline to recognise or execute a certificate of an issuing state.

22. Article 4 provides for a standard form of certificate, which is set out in an Annex to the 2006 Framework Decision. The form of that certificate contemplates that a confiscation order may concern specific items of property or an amount of money.

23. Recital (3) of the 2006 Framework Decision had referred to the 1990 Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. We were ourselves helpfully referred by counsel both to that and to the Explanatory Report in relation to that Convention. It is plain, from the Explanatory Report in particular, that it was acknowledged and accepted that Member States operated differing domestic confiscation systems. One such system so identified was that of confiscation of specific property. Another such system so identified – which extends to that, then as now, adopted in the United Kingdom – was the "value confiscation" system. Of that system the Explanatory Report had said:

> "As a result of a value confiscation, the state can exert a financial claim against the person against whom the order is made which, if not paid, may be realised in any property (no matter whether legally or illegally required) belonging to that person."

It was then stated that it was expressly designed that the two systems – viz. value confiscation and property confiscation – be placed on an "equal footing." Such an approach, we note, is also taken in the subsequent 2005 Warsaw Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism and in the antecedent 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: to which Mr Hall also referred us.

24. That being an important part of the context in which the 2014 Regulations were made, we turn to those Regulations. It is to be borne in mind throughout that the 2014 Regulations are to be read purposively and so as to give effect to the 2006 Framework Decision: see, for example, *In re A* [2017 EWCA Crim 1393, [2017] 1 WLR 713. In *Criminal Proceedings against Pupino*, Case C-105/03, [2006] QB 83, the Court of Justice (First Chamber), speaking in general terms, at paragraph 43 had said:

> "When applying national law, the national court that is called on to interpret it must do so as far as possible in the light of the

> wording and purpose of the framework decision in order to attain the result which it pursues…."

There are other authorities, which we need not cite, to like effect.

25. Regulation 3(2) provides as follows:

> "A reference in this Part to –
>
> (a) property includes a reference to property of any description, whether corporeal or incorporeal, moveable or immovable, and legal documents and instruments evidencing title to or interest in such property;
>
> (b) property used for the purposes of an offence includes a reference to property part of which has been used for those purposes;
>
> (c) the proceeds of an offence or criminal conduct includes a reference to –
>
> (i) any property which wholly or partly, and directly or indirectly, represents the proceeds of an offence (including payments or other rewards in connection with the commission of an offence); and
>
> (ii) any property which is the (sic) equivalent to the full value or part of the value of the property specified in paragraph (i)."

26. Regulation 11 is the Regulation which deals with certification of domestic confiscation orders. That provides as follows:

> "**11. – Domestic confiscation orders: certification**
>
> (1) If any of the property to which an application for a domestic confiscation order relates is property in a Member State other than the United Kingdom, the prosecutor may ask the Crown Court to make a certificate under this regulation.
>
> (2) The Crown Court may make a certificate under this regulation if –
>
> (a) it makes a domestic confiscation order in relation to property in the other Member State, and
>
> (b) it is satisfied that there is a good arguable case that the property –
>
> (i) was used or was intended to be used for the purposes of an offence, or

(ii) is the proceeds of an offence.

(3) A certificate under this regulation is a certificate which –

(a) is made for the purposes of the 2006 Framework Decision, and

(b) gives the specific information.

(4) If the Crown Court makes a certificate under this regulation, the domestic confiscation order must provide for notice of the certificate to be given to the person affected by it.

(5) A court which has relevant powers in respect of a domestic confiscation order is to have the same relevant powers in respect of a certificate under this regulation.

(6) For that purpose "relevant powers" means the powers –

(a) to consider an appeal,

(b) to consider an application for reconsideration, variation or discharge, and

(c) to make an order on any such appeal or application."

Decision

(a) Retrospectivity

27. Mr Talbot argued that the 2014 Regulations do not apply to confiscation orders made before they came into force. He relied to an extent on the general presumption against retrospectivity and on the fact that the 2014 Regulations nowhere make explicit – as, he says, they readily could have done if it was so intended – that they apply to confiscation orders made before, as well as after, the date they came into force.

28. Ultimately, however, as Mr Talbot acknowledged, it comes down to interpretation and to the fairness and sense of the postulated outcome. At all events, analogous points were considered by the House of Lords in *Government of the United Kingdom v Montgomery* [2001] UKHL3, [2001] 1 WLR 396. That was a case concerning the lawfulness of a restraint order in the High Court made under s.77 of the Criminal Justice Act 1988 in aid of confiscation orders made by a Federal District Court in the United States. In that case, the relevant regulations in domestic law had taken effect from 1 August 1994, whereas the US confiscation orders had been made well prior to that date. One argument was that the relevant regulations could not apply retrospectively. That argument was rejected. Lord Hoffmann among other things stated that the general presumption against retrospectivity ultimately was rooted on fairness; and the enforcement in this country of rights conferred by the courts of the United States before those regulations came into force was "a very different matter from the retrospective imposition of a penalty" (paragraph 30). A similar approach was taken by Gross J in the case of *re Al Zayat* [2008] EWHC 315 Crim, [2008] Lloyds Rep FC 390.

29. Although the decision in *Montgomery* was not on a subject-matter precisely identical to the present case, it is at least comparable: and at all events the drafter of the 2014 Regulations is to be taken as having been aware of the principles stated in *Montgomery*. Moreover, the focus of the 2014 Regulations in these respects (as of the 2006 Framework Decision) is itself on the recognition and execution of confiscation orders: not on the substantive making of such orders. All this therefore points strongly towards the 2014 Regulations being designed to apply to confiscation orders made before, as well as after, the date on which the 2014 Regulations came into effect. As Mr Hall also noted, that certainly was the understanding conveyed in the prior Impact Assessment signed by the responsible Minister on 24 June 2014.

30. Mr Talbot nevertheless objected that Regulation 11 is drafted throughout in the present tense. The requirements are by reference to "an application" for a confiscation order; and the certificate may only (under Regulation 11(2)(a)) be made if the court "makes" a domestic confiscation order. He said that that language is not consistent with an intended retrospectivity and, to the contrary, requires the certificate to be made at the time of the confiscation order itself.

31. We do not accept that. It is plain that a certificate may be sought and made after the initial confiscation order has been made: to conclude otherwise would be senseless. That could happen in the light of, for example, there being subsequently identified hitherto unrevealed assets or after an application for reconsideration of benefit or of available amount under s.21 or s.22 of the 2002 Act. Another situation might be, as Mr Hall observed, where time to pay has been given and there are considered to be prospects of full recovery in that period: the prosecution might well not apply for, or the court might choose not to make, a certificate at the time the confiscation order is actually made in such circumstances. Regulation 11(4), we add, clearly can be read so as to accommodate a confiscation order which is varied or amended so as subsequently to include a certificate. Moreover, if in any particular case certification of a confiscation order made prior to 2 December 2014 would cause real unfairness then the position is covered by the court having, by Regulation 11, a discretion ("may") as to whether or not to make the certificate.

32. In our judgment, the 2014 Regulations are to be read purposively so as readily to facilitate enforcement: not to limit it. That purpose is inherent in the 2006 Framework Decision. The language of Regulation 11 is sufficient to make it applicable to confiscation orders previously made. So this particular argument fails, as a matter of purposive interpretation. There is no unfairness to the appellant in such a conclusion. The judge in the Crown Court was right to reject this argument as he did.

(b) Whether the Spanish property constitutes proceeds of an offence

33. We turn to the second ground of appeal: which perhaps was, in truth, the principal ground advanced on behalf of the appellant.

34. Mr Talbot made a number of points in support of his argument that a certificate could only be made with regard to property shown to represent proceeds of crime and could not properly be made with regard to what was called before us "clean" property. He necessarily accepted that, under the scheme of the 2002 Act, the available amount did not have to be comprised of assets derived from criminality. But he said that if the 2014 Regulations, for the purposes of certification, were intended to apply to "clean"

property or to the "available amount" then they could have expressly said so. But, he said, Regulation 11(2)(b) is in terms directed either to property to be used for the purposes of an offence or to property which is the proceeds of an offence. And, he said, the property in Javea, on the assumed facts, was neither.

35. He further submitted that nothing else in the 2014 Regulations or in the 2006 Framework Decision controverted such a position. In fact, he said, paragraph 7.4 of the Explanatory Memorandum to the 2014 Regulations – to the extent that it is admissible in aid of interpretation – tended to reinforce it. For that refers to the measure being designed to enable confiscation of "not only property that is or which represents the proceeds of the crime for which an individual has been convicted but also property that is or represents the proceeds of other criminal activity by the convicted individual." He further said that that was also consistent with the language of Article 2(d)(i) of the 2006 Framework Decision (which was the only provision relied on by the prosecution in the form of the certificate in this case). He added, for good measure, that such an approach did not leave the prosecution without remedy: it could, for example, in an appropriate case apply for a request for assistance under s.74 of the 2002 Act.

36. Skilfully though these arguments were advanced, we are in no doubt that they should be rejected. They fail at a number of levels.

37. Both the wording and purpose of the 2006 Framework Decision are plain enough in this regard. It is obvious – and consistent also with Conventions such as the Strasbourg Convention – that the whole scheme is designed to extend, equally and without differentiation, both to value confiscation and to property confiscation systems. The domestic system here is a value based system – albeit it is perfectly capable of also extending to (and often will in particular cases extend to) specific items of property which are in actuality derived from crime. The point remains that the available amount, under the 2002 Act, can include property which may have no taint of criminality. That is the way the domestic scheme works. The link with criminality is provided by the link with benefit. For benefit is identified by reference to general criminal conduct or to particular criminal conduct: and a confiscation order for the recoverable amount may not exceed the amount of the benefit. Accordingly a value based scheme of this kind is comprehended in and respected by the 2006 Framework Decision. Since, self-evidently, Regulation 11, read with Regulation 3 of the 2014 Regulations, is seeking to give effect to Article 7, read with Article 2, of the 2006 Framework Decision, the 2014 Regulations are to be interpreted accordingly.

38. Moreover, the appellant's argument has difficulties even at a narrower level of interpretation. It is true that Regulation 11(2)(b)(ii) – with the introduced requirement (for whatever reason) of a good arguable case – must relate to property which "is the proceeds of the offence". But proceeds of an offence is then the subject of the interpretative provision – albeit not, by reason of the word "includes", a definition as such - contained in Regulation 3(2)(c). In particular, Regulation 3(2)(c)(ii) is, in our view, apt to extend to "clean" property, as being part of the available amount. The argument on behalf of the appellant would seem to deprive Regulation 3(2)(c)(ii) of purpose and effect and effectively would make it otiose. But there is no reason not to give full and wide effect to Regulation 3(2)(c)(ii). It therefore follows that there is no requirement, for the purpose of seeking a certificate, that the Crown must at that stage engage in an evidential tracing exercise seeking to show that a specified asset derives from criminal conduct. Indeed, given the evident intent of the 2006 Framework

Decision to treat both systems of confiscation equally and given the evident intent to make recognition and enforcement relatively straightforward, it is difficult to comprehend why a value based confiscation jurisdiction should, at the stage of certification, then be intended by the 2014 Regulations to be required positively to engage in the potentially complex process of tracing in order to show that a particular asset derives from criminality.

39. It is, perhaps, not altogether clear precisely what Regulation 11(2)(b) was designed to achieve, since it is predicated on there already being in place a confiscation order extending to available assets. But be that is it may, the overall intent to give effect to the 2006 Framework Decision remains absolutely clear. Given that, and given the specific wording of Regulation 3(2)(c), the conclusion has to be reached that this ground of appeal also must fail.

Conclusion

40. Both grounds of appeal are rejected. The judge reached the right conclusion on both points. The appeal is dismissed.