Neutral Citation No. [2005] NICA 39 | *Ref:* **SHEC5351**

Judgment: approved by the Court for handing down | *Delivered:* **16/9/05**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

ATTORNEY GENERAL'S REFERENCE [NO. 2 & 3 OF 2005]

DAVID LAWRENCE MAHOOD AND
JULIAN MICHAEL CUZNER-CHARLES

_____

Before Lord Justice Sheil, Mr Justice Gillen and Mr Justice Weatherup

_____

SHEIL LJ

[1] On 20 September 2004 David Lawrence Mahood and Julian Michael Cuzner-Charles pleaded guilty at Belfast Crown Court to an amended indictment which specified a single count of conspiracy to defraud contrary to common law. On 25 February 2005 Mr Justice McLaughlin sentenced each of them (a) to pay compensation of £125,000 within 12 months, and in default to 12 months' imprisonment (b) to 3 years' imprisonment suspended for 2 years and (c) disqualified each from acting as a company director for 7 years.

[2] On 17 May 2005 Her Majesty's Attorney General for Northern Ireland sought the leave of this court pursuant to Section 36 of the Criminal Justice Act 1988 to refer the case to it for review of those sentences on the ground that they had been "unduly lenient".

[3] As appears from that reference (as amended), the amended indictment to which the offenders pleaded guilty alleged that on divers dates between 1 January 1994 and 30 September 1999 the offenders had conspired together to defraud such corporations, companies, firms and persons as might invest sums in Atrium Trading Limited ("Atrium") and Regal Brook Limited ("*RBL*") by dishonestly doing acts which had the potential to risk investors' money by using money invested in Atrium and advanced to *RBL* for purposes other than as a variant of "factoring" as represented to the investors orally and in the sales information and trader agreements, namely by (a) purchasing stock, shares and/or goods and (b) by making unsecured loans to other

companies. The indictment was concerned with a serious fraud in the course of which investors lost around £2.5M. The company Atrium was established by the offenders in 1994 to provide a vehicle for investing in a finance company, *RBL*. Each of these companies was controlled by the offenders. The essence of the fraud was that investors' funds were put to a purpose other than that expected by the investors. In the scheme devised by the offenders, investors were known as "*traders*". This scheme entailed the use of the investors' monies to finance a variant of factoring known as "merchant finance", a method of providing trading companies with immediate cash for goods they had sold to a third party, while simultaneously providing an income to the offenders. The vehicle for the investments was *RBL*, which was financed by Atrium. The use to which the investors of monies was put was contrary to representations made to them in the traders' agreements and otherwise. It was also outside the terms of *RBL*'s insurance. As a result of the representations made to them, the investors had understood that their money would be used for merchant financing and that the trading would be insured with the result that their capital investments would be secure. Contrary to these representations, a major portion of the investors' monies was used to fund a third company, White Horse Foods ("*WHF*"). The improper use of the investors' monies was follows:

(a) *RBL*'s normal client arrangements with *WHF* altered, as a result of which *WHF* (or a sister company), instead of *RBL*, was permitted to receive payments from the end customer;

(b) in addition to providing its merchant finance system to *WHF*, *RBL* also purchased stock from *WHF*;

(c) *RBL* made direct loans to *WHF*, which went into liquidation in March 1999 owing *RBL* approximately £2.5M;

(d) the offenders had a financial interest in *WHF* which had not been disclosed to the investors.

RBL went into liquidation in September 1999 and, in consequence, so did Atrium. As a result of the improper conduct and activities of *RBL* approximately 160 members of the public lost sums totalling £2.5M.

[4] On 11 January 2005 an application was made by the prosecution for a confiscation hearing under the Criminal Justice (Confiscation) (Northern Ireland) Order 1990 which application was refused by McLaughlin J. This refusal is the only aspect of the undue leniency now asserted in this reference. The issue of the 3 years' imprisonment being suspended for 2 years, which had been part of the reference as being unduly lenient, is no longer before this court having been withdrawn by the Attorney General with the leave of this court, pursuant to rule 7 of the Criminal Appeal (Review of Sentencing) Rules

1989. The reasons for that withdrawal are set out in a letter to the offenders' solicitors dated 16 June 2005 in response to a letter from them of 26 May 2005. That letter of 16 June 2005 stated:

> "The Attorney General has given careful consideration to the contents of the judge's notebook. This was not, of course, available to him at the time he decided to refer the matter. He has had further advice and information from prosecuting counsel and from senior Crown counsel. The Attorney General accepts that in pressing for a confiscation hearing, in order to best protect the interests of investors that they lost money as a result of this offence, the prosecution may inadvertently have left the defence with an expectation that it was content with the suspension of a sentence."

The Attorney General referred in that letter to the decision of the Court of Appeal in England in Attorney General's Reference No 19 of 2004 (Charlton) [2004] EWCA 1239 in which Latham LJ stated at para. 21:

> "It is undoubtedly right that if the prosecution had acted in ways in which it could be said that it had played a part in giving the offender the relevant expectation, then clearly it would not be appropriate for this court to permit the Attorney General to argue that the sentence which was imposed, partly as a result of what the prosecution had said or done, was unduly lenient."

The Attorney General also referred to the decision of this court in Attorney General's Reference No 8 of 2004 (Dawson). 2005 NICA 18.

[5] In the present case there had been discussions between the learned trial judge and counsel in chambers. In Attorney General's Reference No 3 of 2003 (Rogan) [2001] NI366 Carswell LCJ stated:

> "A full and where possible verbatim note should be made of all discussions in chambers, preferably by a shorthand writer. Where this is not practicable, the judge should take a full note or ask counsel to take a note and furnish it for agreement."

Unfortunately in this case, as was also the position in *Dawson* the clear guidance given by this court in *Rogan* was not observed, save for the very careful and comprehensive notes made by McLaughlin J which at the request of this court he provided, together with an explanatory letter dated 25 May 2005, to this court, which this court then furnished to all the parties concerned in this reference.

[6] This court granted leave to the Attorney General to refer this case to the court for review but, as already stated, the only issue now before this court is the refusal of the learned trial judge to conduct a confiscation hearing under the Criminal Justice (Confiscation) (Northern Ireland) Order 1990. Such a refusal can constitute undue leniency within the meaning of Section 36: Attorney General's References Nos 114-116 and 144-145 of 2002 [2003] EWCA Crim 3374. Those cases involved the equivalent English statutory provisions contained in Section 71 of the Criminal Justice Act 1988, which can be compared directly with Article 4 of the 1990 Order in relation to Northern Ireland.

[7] It was submitted by Mr McCloskey QC on behalf of the Attorney General that the decision of McLaughlin J not to conduct a confiscation hearing was unduly lenient and that he erred in law in not doing so: the Criminal Justice Act 1988, sections 36(1) and section 36(2).

[8] Article 4 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990 provides:

> "4(1) The Crown Court and a court of summary jurisdiction shall each have power, in addition to dealing with an offender in any other way, to make an order (a Confiscation Order) requiring him to pay such amount as the court thinks fit, being an amount which must be at least the minimum amount, but must not exceed –
>
> (a) the benefit in respect of which it is made; or
>
> (b) the amount appearing to the court to be the amount that might be realised at the time the order is made,
>
> whichever is the less.
>
> (2) The Crown Court may make such an order against an offender where –

(a) he is convicted of any offence to which this order applies other than a drug trafficking offence; and

(b) it is satisfied –

(i) that he has benefited from that offence or from that offence taken together with some other offence of which he is convicted in the same proceedings, or which the court takes into consideration in determining a sentence, and which is not a drug trafficking offence; and

(ii) that his benefit is at least the minimum amount.

(3) [*Not relevant*]

(4) For the purposes of this Order 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 property so obtained.

(5) Where a person derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this Order as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage.

(6) A court shall not make a Confiscation Order under this article unless the prosecution has given written notice to the court to the effect that it appears to the prosecution that, were the court to consider that it ought to make such order, it would be able to make an order requiring the offender to pay at least the minimum amount.

(7) If the prosecution gives the court such a notice, the court shall determine whether it ought to make a Confiscation Order under this article."

It is accepted by Mr McCloskey QC on behalf of the Attorney General that it was a matter for the discretion of McLaughlin J as to whether or not he should make a Confiscation Order.

[9] Before sentencing the offenders, McLaughlin J had before him an agreed "basis of plea" document which reads as follows:

> "1. Both men are previously of good character.
>
> 2. There was no intention on the part of either of the accused at the outset to dishonestly take money from investors. It is accepted that the accused and others were initially involved in a bona fide investment scheme which was commercially viable.
>
> 3. There is no allegation of deceit (which is in any event not an essential ingredient of fraud).
>
> 4. There was initially no intention on the part of the accused to cause loss to the investors or foresight that would occur.
>
> 5. It is not alleged that either of the accused misappropriated the investors' money by siphoning it off into accounts for their own personal use.
>
> 6. The accused accept that they did acts which had a potential to risk investors' money and that the money was lost as a result."

[10] In the course of sentencing the offenders the learned trial judge stated that he considered that the basis of plea document represented a proper and fair analysis of the case. He went on to say:

> "It also presents a very different profile of the fraud in this case from that which would be generally understood by members of the public and perhaps many lawyers. A fraud committed without deceit and with no siphoning of funds for personal enrichment is different in quality to the more common kind where conspirators agree upon a scheme with a view to fleecing unsuspecting investors for the sole purpose of lining their own pockets. It would be wrong if this

> distinction was not reflected in the punishment imposed on both accused.
>
> The collapse of *RBL* and *ATL* sparked off extensive investigations by the financial and other regulatory authorities in the UK, USA, Isle of Man and Kuwait. I am satisfied that these inquiries show that neither accused has hidden assets either in the UK or abroad, neither has there been any evidence uncovered of any vast lifestyle eg expensive cars, boats, horses, foreign property etc. I have no doubt that if there had been evidence of that kind it would have been uncovered in the course of its investigations."

He went on to say:

> "I propose to proceed on the basis that the plea was proffered by the accused at the first realistic opportunity. The case also presented many complex legal issues of which the outcome was by no means certain. It is appropriate to take that into account when permitting some reduction of sentence since in many cases where a plea is offered even at a very early stage, it is done in the face of clear evidence of guilt. Authorities also indicate I should take account of the public interest where savings of court time and public money result from an early plea of guilty. After being reviewed on a number of occasions it was considered that the trial might last approximately 6 months. This would have imposed an enormous burden on a jury and I consider that an estimated sum of £1M has been saved as a result of a plea being entered. Those costs would have been incurred in addition to those already spent during the course of lengthy investigations. In the light of the above considerations I propose to allow full credit for the plea of guilty entered by each accused."

He then went on to consider the question of whether or not to make a Confiscation Order and/or Compensation Order stating:

> "Having regard to all the papers put before me I was satisfied that the proper course to adopt was

> to secure compensation for the investors as a first priority even though their whole or even a large part of their losses, cannot be made up. I was satisfied that under the 1990 Order there is a very strong possibility (summarised in Mr Sefton's skeleton argument) that in strict law it might be said that the accused had benefited to the extent of £2.5M from the offences – that being the sum allegedly put at risk by their offending. In the light of the basis of plea document any such finding would have been entirely artificial and unfair. It is important to note that the policy of recovering or confiscating assets is generally concentrated on the amount of which the accused have benefited from the crime as it usually equates to the loss suffered. It is accepted by the prosecution that neither accused siphoned off any of the losses for their own benefit so that a departure from the general policy is justified in this case. I was satisfied also that if I made both orders the confiscated sum would be used to satisfy any Compensation Order as the one would have to offset the other, recovery of both being impossible. Further protracted hearings which involved more expense for no realistically achievable financial benefit led me to conclude that I should not make a Confiscation Order but rather should concentrate on the use of my powers under the 1994 Order. For that reason I refuse a Confiscation Order."

In making the Compensation Orders, the trial judge stated:

> "I have already stated that I propose to impose a Compensation Order so that some monies may be recovered for the benefit of the investors. Having regard to the recoverable assets, their individual means, the degree of criminality involved in bringing about the losses and allowing for the fact that even in the best regulated investment scheme loss can result, I have decided that each of you should pay a Compensation Order in the sum of £125,000 thus making available a sum of £250,000 to provide some recompense for the investors. In default of payment of those sums within 6 months

(*later amended to 12 months*), a sentence of 12 months' imprisonment shall be imposed in lieu."

[11] Mr McCloskey QC, on behalf of the Attorney General, submits that without a confiscation hearing the learned trial judge had only a jumble of figures before him and that in the absence of such a hearing it was not possible to ascertain the true assets of each of the defendants. Mr McCloskey accepted that if the offenders did not have assets other than those disclosed, he does not submit that the sentence was unduly lenient.

[12] The learned trial judge had before him a vast amount of material, including reports from reputable accountants and affidavits sworn by each of the defendants as to their assets. The issue of whether or not pensions should be taken into account was not clear as there are no authorities on this point. As already stated the learned trial judge stated that he was satisfied that the inquiries carried out by the financial and other regulatory authorities show that neither accused had hidden assets either in the UK or abroad.

[13] When considering the appropriate sentence to be imposed on David Lawrence Mahood the learned trial judge noted that he was then 65 years old, married with no children. His wife was extremely ill and required constant care and specially adapted living accommodation. He had a clear record. He was remorseful. His main assets were his house, its contents and a pension fund. He had been unemployed since June 2002 and it is unlikely that he will be able to enjoy gainful employment in the future having regard to his age and his plea of guilty and the fact that he is now disqualified from acting as a director for a period of 7 years.

[14] Mr Cuzner-Charles, was noted by the learned trial judge to be aged 51 with a clear record. He is a Chartered Accountant by profession, married with two daughters. His marriage has been put under serious strain as a result of these proceedings and divorce is presently a prospect. He is unemployed since June 2002 and has been disqualified from acting as a director for 7 years. The learned trial judge noted that this conviction is almost certain to disqualify him from pursuing his profession as an accountant in the future. His main assets are his house, a pension fund and money held in bank or building society accounts.

[15] With regard to section 36(1) of the Criminal Justice Act 1988, Lord Lane CJ in Attorney General's Reference (No 4 of 1989) [1990] 1 WLR 41 at 45 stated:

> "The first thing to be observed is that it is implicit in the section that this court may only increase sentences which it concludes were *unduly* lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that this naturally gives rise to – merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we were told, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate."

[16] In exercising his discretion not to conduct a confiscation hearing, this court does not consider that the learned trial judge misunderstood the various statutory provisions or that he erred in law in not embarking upon a confiscation hearing. This court does not consider that the sentences fall outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. This court does not consider that the sentences imposed by him were unduly lenient.

Hearing: 20 May 2005
17 June 2005

McCloskey QC/Sefton for the Attorney-General

Brangham QC/Hopley for Mahood
Gallagher QC/McCartney for Cuzner-Charles