Neutral Citation No [2017] NICA 12 | *Ref:* **MOR10229**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)** | *Delivered:* **27/02/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

MALACHY AUGUSTINE HIGGINS

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Before: Morgan LCJ, Weir LJ and Colton J

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MORGAN LCJ (giving the judgment of the court)

[1] This is an application to extend time to appeal arising from the applicant's conviction on his plea of guilty on 17 October 2006 at Antrim Crown Court on charges that on 30 May 2003 he kept controlled waste in a manner likely to cause pollution of the environment or harm to human health contrary to Article 4(1)(c) and Article 4(6) of the Waste and Contaminated Land (Northern Ireland) Order 1997 and that he breached the terms and conditions of the discharge consent issued by the Department of the Environment on 29 May 1996 under the Water Act (Northern Ireland) 1972 contrary to Article 9(4) of the Water (Northern Ireland) Order 1999. On 15 March 2007 he was sentenced by His Honour Judge Grant to 4 months in custody. Subsequently, on 13 February 2008, the court made a confiscation order in the sum of £400,000. By a notice of application dated 17 February 2016 the applicant applied for an extension of time in which to appeal against the confiscation order. Mr Arthur Harvey QC appeared with Mr Ciaran Harvey for the applicant and Mr Mateer QC and Mr Lowry appeared for the PPS. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The applicant commenced a skip hire business in 1981. On 30 August 1993 he purchased a parcel of land now known as Craigmore Landfill Site near Garvagh. The Department of the Environment granted Discharge Consent 817/96 on 29 May 1996 to discharge effluent into the underground stratum at the site subject to conditions that the site should only receive categories A and B waste, should be developed in a phased manner and on a cellular basis, that cells which had been filled should be capped appropriately and that no discharge from the site should contain any substance which is toxic or injurious to fish or other aquatic organisms.

[3] A Waste Disposal Licence, 96/10, was granted to the applicant in respect of the site by Coleraine Borough Council on 30 September 1996. On 23 September 1999 the applicant was registered with EHS as a carrier of controlled waste and a waste disposal licence was granted permitting him to accept categories A and B waste which comprises inert waste or material which may decompose slowly but its deposited form is only slightly soluble in water.

[4] On 26 February 2003 Coleraine Borough Council issued a notice revoking the applicant's waste disposal licence. An appeal against the revocation was unsuccessful. On 6 May 2003 officers from EHS visited the site and raised concerns about its operation and the waste that had been accepted for infill. On 30 May 2003 they returned to the site to complete a full inspection. They observed all areas of the site showed heavy infestation of flies, numerous rats, underground fires, a very strong odour of landfill gas and decaying waste with large quantities of household waste with similar commercial and industrial waste. Sample exhibits were taken and observations were conducted to determine the quantity, depth and nature of the waste deposited on the site. It was noted that one lorry was tipping waste which had originated in Donegal. The applicant sold the site in February 2004 and on 16/17 October 2006 EHS assessed the total amount of category B and C waste on the site at somewhere between 65,000 m^3 and 70,000 m^3. That figure was not in dispute as an assessment made at that time.

[5] A basis of plea document was agreed between the parties prior to sentencing on 15 March 2007. The prosecution contended that the net benefit to the applicant was somewhere between £1.3 million and £2.3 million whereas for the purposes of that hearing the applicant accepted a net benefit between £1.3 million and £1.7 million. It was however agreed between the parties that these figures were agreed solely for the purpose of the plea and that they were not binding in relation to the question of confiscation. One of the issues in dispute was the amount actually paid to the applicant per tonne for the waste deposited and at least some of the figures were based on the cost of removal rather than the benefit to the applicant.

[6] The confiscation hearing was held on 13 February 2008. There was considerable discussion between the parties before that. One of the matters discussed was a so-called retrospectivity argument. The Proceeds of Crime Act 2002 came into operation on 24 March 2003. Accordingly it was being contended on behalf of the applicant that the prosecution could only maintain confiscation in respect of the period after 24 March 2003. This argument had been rejected in a judgement delivered on 28 November 2007 (R v Allingham [2007] NICC 53) by His Honour Judge Babington. He concluded that the offence consisted of the keeping of the materials on site and that the keeping of the entire materials was a continuing offence which occurred on the dates on which the offences were charged. That analysis was subsequently affirmed by the Court of Appeal (R v McKenna [2012] NICA 29).

[7] The applicant was advised of the issues in the case including the approach to the retrospectivity issue and gave authority to agree a benefit amount assessed at £400,000. An Order was subsequently made to that effect. The money has now been paid. It appears that the applicant enquired about his right to appeal the Order on 28 April 2008 but was advised by his then solicitors that he could not do so as he had consented to the Order being made.

[8] On 1 September 2009 a notice under section 317 of the Proceeds of Crime Act 2002 was issued by SOCA taking over the income tax, national insurance contributions and capital gains tax functions from HMRC for the period 1996/97 to 2002/03 in respect of the applicant. A further notice included the period 2003/04. SOCA determined that an additional sum of £160,104.94 was owing to HMRC in income tax and penalties for that period. The matter was appealed to the First-Tier Tribunal ("FTT"). Before that tribunal it appears that there was considerable confusion as to how the confiscation sum had been assessed at £400,000 and it was submitted on behalf of SOCA that the amount had been assessed on the basis of the applicant's ability to pay. The FTT accepted that this was the basis on which the compensation amount had been calculated and considered that accordingly the applicant had paid only one quarter of his criminal gain which it assessed on the basis of the figures contained in the document prepared as a basis of plea. The FTT concluded that the total monetary value of the applicant's criminal activity would have been £1,663,378. For some reason the FTT further considered that the case had been settled in the sum of £400,000 because the applicant's legal team had assessed his liability from 24 March 2003 and counsel for the prosecution felt that if the amount was increased it might well give rise to further proceedings. There was absolutely no evidential base for any of this reasoning as far as we can see. We understand that the decision of the FTT is at present subject to appeal.

[9] In light of what had happened in the FTT we asked Mr Mateer to take precise instructions in relation to the position of SOCA on the calculation of the confiscation sum. In a letter dated 8 November 2016 the Public Prosecution Service indicated that their position on the Confiscation Order was as follows:

> "Please be advised that as far as the Prosecution is concerned the Confiscation Order dated 13 February 2008 was based on the following:
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> 1. An acceptance that it reflected Mr Higgins' criminal conduct from the time he opened the waste site in 1996 until the date the offending was detected. For the avoidance of doubt, the sum recovered was not restricted to offending behaviour occurring after the commencement of the Proceeds of Crime Act regime in 2003.
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> 2. The sum of £400,000 was to reflect Mr Higgins' criminal benefit for the offending period and the Confiscation Order was not made in this amount due to inadequate or insufficient assets on his part.
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> 3. The calculations on which the application for a Confiscation Order proceeded at no time took into account income tax and were based on a gross receipt by Mr Higgins of criminal benefit. It follows that in directing confiscation of the entire sum, any income tax payable on the gross receipts by Higgins is already contained within the gross figure confiscated."

Although that would appear to undermine to at least some extent the reasoning of the FTT Mr Mateer indicated that the National Crime Agency stand over their own position in the matter before the tribunal.

The issues in the appeal

[10] It was agreed between the parties that the task of the learned trial judge was to identify benefit in accordance with the question determined by the House Of Lords in R v May [2008] 1 AC 1028:

> (a) Whether the applicant (D) had benefited from the relevant criminal conduct,
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> (b) if so, what is the value of the benefit D has obtained and
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> (c) what sum is recoverable from D?

[11] In this case the papers show that there was very careful consideration by both solicitors and senior and junior counsel retained in this matter of the competing arguments about the basis on which the calculation should be made. The applicant was understandably concerned that the figures contained in the basis of plea which included figures based upon the cost of removal of the offending material should not form the basis for the calculation of the benefit received by him. His then solicitors confirmed that the basis of plea figures would not be so introduced in a fax dated 10 October 2007. The prosecution accepted that position in a letter of 6 November 2007. It is abundantly clear that those figures played no part in the calculation of benefit for the purposes of the Confiscation Order.

[12] It was contended that the applicant was misled by the advice that an agreement on the amount had the advantage of certainty and would ensure no appeal and no risk of a higher amount. It is important to recognise that this was in the context of the risks involved in seeking to argue that the period for calculation should be confined to those materials placed on the site between 24 March 2003 and 30 May 2003. That was always a risky option which almost inevitably would have led to an appeal. The advice in that context was clearly accurate. His lawyers were not taking responsibility for any tax liability that he might have beyond that which was the subject of the confiscation order.

[13] A further issue raised was whether the applicant had sufficient time to consider his position and whether he was stressed at the time of making the agreement. He was advised on 13 February 2008 that he should look at the stress that he was under and the stress involved in the appeal but later in the same consultation his solicitor told him to try not to be motivated by the stress that the trial was causing. He should try to weigh up and balance the two risks which centred around whether the order of the court would be higher or lower.

[14] In support of his attack upon the confiscation order Mr Harvey relied on R v Mackle and others [2014] UKSC 5. That was a case in which the appellant had consented to a confiscation order but subsequently appealed on the basis that his consent was based on a mistake of law as a result of wrong legal advice. The Supreme Court stated that the court must itself decide whether the convicted person has benefited from particular criminal conduct. The power to make a confiscation order arises only where the court has made that determination. The consent of the defendant cannot confer jurisdiction. That is particularly so where the facts on which such consent is based cannot as a matter of law support the conclusion that the appellant has benefited. On the other hand if it is clear from the terms in which an appellant consents to a confiscation order that he has accepted facts which would justify the making of an order a judge, provided he is satisfied that there has been an

unambiguous acceptance of those facts from which the appellant should not be permitted to resile, will be entitled to rely on the consent. This is so not because the appellant has consented to the order but because his acceptance of facts itself constitutes evidence on which the judge is entitled to rely.

[15] This is plainly not a mistake of law case. Those advising the applicant were acutely aware of the relevant legal principles. The basis of plea demonstrated the significant amount of waste which was unlawfully maintained on the site and although the applicant took issue with the amount of the benefit in the basis of plea he did not take issue with the other circumstances disclosed in the basis of plea. There was, therefore, unambiguous acceptance of facts from which he should not be permitted to resile and the judge was perfectly entitled to rely on the figure to which he consented as evidencing his benefit.

Conclusion

[16] We do not consider that this is a case in which there has been any injustice arising from the Confiscation Order imposed by the court. This appeal arose solely because of the applicant's dissatisfaction with the outcome of the proceedings before the FTT. The remedy for that disappointment is his appeal to the Upper Tribunal. In light of the approach to extensions of time for leave to appeal set out by this court in R v Brownlee [2015] NICA 39 we refuse leave to extend time.