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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

GAVIN DAVID McCARTAN

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Before Kerr LCJ, Nicholson LJ and Campbell LJ

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KERR LCJ

Introduction

[1] This is an application for leave to appeal against sentence by Gavin David McCartan, leave having been refused by the single judge. The applicant was sentenced on 4 October 2004 by Higgins J to two concurrent terms of imprisonment of six months and two months on charges of failing to disclose information, contrary to article 44 of the Proceeds of Crime (Northern Ireland) Order 1996 and using a false instrument, contrary to section 3 of the Forgery and Counterfeiting Act 1981. The applicant had pleaded guilty to the charges.

Factual background

[2] The applicant is a solicitor who practised in Belfast under the name of McCartan & Company. He qualified in 1985 and had been a sole practitioner since 1987, mainly working in conveyancing. He undertook very little criminal work.

[3] In July 2000 a mortgage broker, Mr Noel Anderson of A&B Financial Services, with whom the applicant had had a professional relationship for some three years, referred a client to the applicant. The client, a Mr Walsh, wished to buy a newly constructed dwelling in a development in Glengormley. The purchase price was £100,000 and a mortgage application had been made for £50,000. Some time before he referred the client to the applicant, Mr Anderson had alerted police to suspicions regarding Walsh's ability to produce £50,000. He nevertheless filled in and proceeded with the mortgage application on Walsh's behalf and the application was submitted to the mortgage company, TMB (a subsidiary of Bank of Scotland) on or about 25 July 2000. The applicant was named on the application as the purchaser's solicitor. An offer for £50,000 was made on 2 October 2000 and monies were transferred on 8 January 2001 when the purchase was completed.

[4] The first offence relates to the failure of the applicant to alert police to suspicions that he is alleged to have had that Walsh was engaged in money laundering the proceeds of drug trafficking. At no time during the transaction did Mr McCartan meet Walsh. He could not have done so because throughout the time that it took place, Walsh was in prison. The applicant claims that he did not know that or that Walsh had a substantial criminal record. The prosecution have not disputed those claims.

[5] The applicant dealt at all times through an intermediary, one Kavanagh. This man took £70,250 in cash and cheques to Mr McCartan's offices on 8 January 2001. This sum was to be used as a deposit for the purchase of the house. The applicant did not see or count the money but simply made out a lodgment slip to enable the intermediary to pay the money into the client account. He told police that at the time the money was deposited he became suspicious but he satisfied himself of Mr Walsh's antecedents by speaking to Mr Anderson. According to the applicant, Mr Anderson told him that Walsh was a car dealer and was therefore accustomed to have large sums of money in cash. In his statement to police Mr Anderson said that he could not recall the applicant ever contacting him to express his misgivings.

[6] The second offence relates to a building agreement on which the applicant purported to authenticate Walsh's signature on 10 November 2000. The applicant had given the agreement to Kavanagh to have it signed by Walsh. It was later returned supposedly signed by Walsh. The applicant then countersigned it. The signed agreement was returned to

the vendor's solicitor who, as a result, advised the vendor to proceed with the sale and enter a binding contract. The applicant told police that he had signed the document "as a matter of course" having been told that the signature belonged to Walsh. Forensic evidence later established that the signature was a forgery.

[7] Walsh was charged with obtaining money by deception. He was found not guilty by direction of the judge. It appears that the learned judge accepted a defence submission that the charge was not viable since Walsh had honoured his contractual obligations and had not missed a payment on the mortgage. Mr Anderson gave evidence on the trial of Walsh.

The applicant's submissions

[8] For the applicant Mr Harvey QC submitted that the sentences imposed were wrong in principle and manifestly excessive. He claimed that it was "overwhelmingly probable" that if the applicant had contested the charges he would have been acquitted. He suggested that it could not have been established that the applicant knew or suspected that Walsh was engaged in money laundering proceeds of drug trafficking; although the applicant had admitted to a suspicion that something about the transaction was amiss, this was never related to drug trafficking. Likewise, Mr Harvey suggested, there was no evidence that the applicant knew or could be imputed with knowledge that the signature on the building contract was a forgery.

[9] Much of Mr Harvey's submissions to this court and to the court below were preoccupied with a claim that Anderson had perjured himself in the trial of Walsh. Mr Anderson had testified that he had not provided Walsh with the name of an accountant to be included in the mortgage application form. It transpired, however, that Walsh had never engaged an accountant and that the name that appeared on the form was that of Anderson's own accountants. This showed, Mr Harvey claimed, that Anderson was the orchestrator of this entire affair and that Mr McCartan had been used as a pawn. He was unaware of Walsh's background and convictions, Mr Harvey asserted, and was therefore easily duped into facilitating the transaction.

[10] In support of his claim that Mr Anderson had manipulated and controlled the entire enterprise, Mr Harvey suggested that he had chosen a

mortgage company that he knew was less likely to check on the claims made in relation to Walsh's creditworthiness or to seek confirmation that the accountants named in fact acted for Walsh. He had chosen the applicant on the same basis. He had assured him that Walsh was a car dealer when Mr McCartan expressed misgivings and he explained Walsh's absence by suggesting that he was in hospital after a very serious accident.

[11] Mr Harvey argued that this was not a suitable case for a custodial sentence. The applicant had been naïve. He stood to gain only a modest professional fee from the transaction. His career lay in ruins. He faced the virtually certain prospect of being struck off the roll of solicitors. His family had suffered exceedingly and the applicant's ability to support them financially in the future was, at least, in grave doubt. Above all, the applicant had suffered inordinately by his spell in custody to date. This had taken such a toll on him that he was virtually unrecognisable from the person who had entered prison six weeks ago.

Conclusions

[12] The Proceeds of Crime (Northern Ireland) Order 1996 and its successor, the Proceeds of Crime Act 2002, are critically important legislative weapons in the fight against the use by criminals of money generated by illegal activity. Parliament has concluded that, in order to promote that fight, agencies and individuals who become aware of the existence in the hands of individuals of substantial sums of money that are not readily accountable for, must report their knowledge of such money to the appropriate authorities. The success of these legislative provisions depends crucially on scrupulous compliance with that statutory duty. This is of particular importance in the case of solicitors who, under their professional regulations and by dint of their status as officers of the court, have a further duty to ensure that such information is disclosed.

[13] The applicant has pleaded guilty to both offences and, notwithstanding Mr Harvey's urgent submissions to this effect, it is impossible for this court to deal with his application on the basis that he was virtually assured of acquittal had he pleaded not guilty and contested the charges. It is open to us to consider whether, if the charges had been contested, the prosecution would have faced significant difficulty in establishing his guilt. Mr Murphy for the Crown did not suggest otherwise and we have concluded that, if Mr McCartan had pleaded not guilty, his conviction was far from certain. In relation to the first count it would have

been incumbent on the prosecution to establish that he knew or suspected that the money produced for the deposit came from drug trafficking. We do not consider that this would have been readily demonstrable. It would have been necessary to show that Mr McCartan had at least the means of knowledge that this was the likely source of the money and nothing that has been put before us supports that claim. As to the second offence, there is no obvious reason to conclude that Mr McCartan knew that the signature on the building contract was forged and, again, this would have been a prerequisite of conviction. In these circumstances, the applicant is entitled to a greater discount by reason of his plea of guilty than would have been appropriate had the evidence against him been clear.

[14] All the evidence that has been put before us has led us to the unmistakable conclusion that the applicant was gullible rather than malign. He stood to gain little by conscious, deliberate participation in a criminal enterprise and, as these proceedings have demonstrated, he faced catastrophic consequences if it was uncovered. It is difficult to resist the impression that he was used by more sinister elements because he was less likely to question, or, if he did raise questions, that he was more likely to be satisfied by bland assurances than more worldly-wise colleagues.

[15] Mr Harvey referred us to the case of *R. v Duff* [2003] 1 Cr.App.R. (S.) 88 which appears to be theonly reported decision in this field that is directly relevant. In that case Duff, a 43-year-old English solicitor in sole practice, became friends with, and then represented a man who was later convicted of large-scale drug crime. The man had passed Duff £70,000 in cash between April and May 1997; £10,000 was for legal costs, £50,000 was for an investment in Duff's practice and £10,000 was for another company established by Duff to promote his practice. In March 1998 the drug dealer was arrested in possession of £5m of cocaine. Duff was instructed to act for him. In September 1998 he was accused of a much wider drug conspiracy. At this point Duff became suspicious. He consulted Law Society literature and reached the conclusion that he was within the law. He took no advice from the Law Society or from another legal adviser. In April/May 1999 the drug dealer was convicted. Duff took advice about his interpretation of the legislation and was reassured by another solicitor that he was correct. He was arrested in October 1999. When interviewed he was not entirely frank although he later said this was a result of having no proper advice. He pleaded guilty to two counts under section 52 of the Drug Trafficking Act 1994 and was sentenced to six months' imprisonment. The Court of Appeal dismissed his application for leave to appeal that sentence.

[16] The Court of Appeal, in the following passage of its judgment, emphasised the importance of the underlying facts: -

> "Here was a case where a solicitor received £70,000 in cash in the space of a month. He became concerned about the matter in October 1998. The money had been put in part into fictitious names. He did not seek advice immediately in October 1998 but only sought it in April 1999. Clearly for the six months from October 1998 to April 1999 he was courting a risk that his suspicions were reportable. Thereafter he can perhaps claim some benefit for acting under legal advice. He was not, as we have said, entirely co-operative with the authorities at his initial arrest. We have set out the circumstances advanced to excuse that. Money laundering is, of course, a very serious matter and breaches of the legislation by professional people cannot be overlooked. We agree with the learned judge about that."

[17] There are clear points of distinction between *Duff* and the present case. Most obviously, the defendant in that case derived relatively substantial benefit, £20,000 of the £70,000 went on fees or in sponsoring his business. Moreover, his modus operandi of placing the money in assumed names, raised obvious suspicions about his motivation. The client was convicted of drugs offences and this must have given rise to suspicion in the mind of the solicitor that the money was the proceeds of drug trafficking.

[18] Notwithstanding these differences, the *Duff* case is helpful in deciding on the approach that should be taken in the present case. It correctly recognised the need to take a firm line where a breach of this important species of legislation by a professional person has occurred. A custodial sentence will almost invariably be required to make clear the importance of scrupulous adherence to the requirements of the legislation. For that reason we do not accept that the learned judge's disposal was wrong in principle.

[19] We have reflected carefully on the submissions made on behalf of the applicant. As we have said, we consider that these offences are more likely to have been the product of a lapse in the high standards expected of a solicitor in his position rather than a desire to benefit by criminal activity. As a consequence of his failure to observe the statutory obligations that applied to his conduct of this transaction, his professional life has been brought to an end and he and his family face an unenviable future. The penalty that he must suffer is significantly greater because of these professional repercussions. Prison has had a devastating effect upon him.

[20] We have concluded, therefore, that an exceptional course is justified in this case. The applicant has served six weeks of the sentence imposed. We consider that justice would be served if we were to suspend the remainder of the sentences that he was due to complete under the judge's order. The balance of each of those sentences (*i.e.* four and a half months under count 3 and two weeks under count 5) will be suspended for a period of two years. In this way the applicant can be released immediately.

[21] We wish to take the opportunity to emphasise that the course we have adopted in the present case should not be regarded as in any way a precedent for future cases. As we have said, a custodial sentence will be the virtually inevitable outcome of conviction of such offences. It is only because of the highly unusual features of this case that we have felt able to reach this conclusion.