

REGINA

Respondent

-v-

Dennis POTTER

Applicant

APPLICATION FOR CERTIFICATE OF INADEQUACY

s.23 POCA 2002, 58.5 CPR

1. On 15 March 2013 a confiscation order was made against the applicant. I determined he had benefited from his criminal conduct to the extent of £2,625,691.46; that the available amount was £2,492,499.58. Accordingly, I made a confiscation order in the sum of £2,492,499.58, which, upon the respondent's application, was to go by way of compensation to those who have lost from the applicant's fraudulent activities. I ordered that the order be satisfied within six months, with a default period of six years imprisonment. That default period was activated by the Magistrates Court on 1st. October 2014. The applicant's release on licence from the original sentence of 7 years would have been 13th. March 2015.
2. The available amount was mostly derived from the share valuation of NRG Bio Refineries Pte Limited (NRG), which itself was determined from a valuation of a bio diesel plant built in Singapore and funded by those who were defrauded by the boiler room fraud concerning Worldwide Bio Refineries PLC (WBR)
3. In August 2006 the applicant, in his capacity as director of WBR transferred those shares to Jennifer Lim for \$1. There is no dispute that this transfer amounts to a tainted gift.
4. Following the confiscation order, those representing the applicant have made every effort to communicate with, request and recover the value of the tainted gift. They have been as unsuccessful as those representing the respondent.
5. It is now submitted on behalf of the applicant there is no prospect of recovery of the value of the tainted gift and, accordingly, the confiscation order should be varied to reflect an available amount reduced proportionally to exclude the value of the tainted gift. It is submitted that the available amount should be varied from £2,492,499.58 to £137,500.

THE LAW

6. The application has been made in accordance with CPR part 58.5
7. The confiscation agreement was made prior to the reporting of the judgement in R v Kim Smith 2013 EWCA Crim 502.
8. The terms of the agreed confiscation order clearly contemplated variation on the grounds of recoverability, reflecting the law as it was prior to the case of Kim Smith.
9. Kim Smith is authority for the proposition that recoverability is not a factor to be considered when including gifts in the available amount for the purposes of determining a confiscation order under POCA. Mr Lobbenberg QC sets out in his response the Court of Appeal's reasoning at paragraph 17 to this application. Of importance, is the passage quoted from paragraph 14 of the judgement "the whole point of including assets which a defendant has given away as one of the components in assessing the amount which a defendant has available was to prevent a defendant dissipating his assets by giving them away. If he is able to say that they are of no value because he cannot get them back, that would defeat what the inclusion of tainted gifts in section 9 (1) was seeking to achieve. Since you cannot pursue the recipient of a gift for its return, there may be many occasions when gifts cannot be recovered. It cannot have been intended for those gifts which the recipient is prevailed upon to return to be included as part of the offender's available assets, but not those which the recipient cannot be persuaded to give up."
10. However, the Court of Appeal did not consider the consequences of making a confiscation order where irrecoverable tainted gifts were included in the available amount.
11. I am satisfied that this Court has jurisdiction, pursuant to section 23 (3) POCA , to revisit the issue of the adequacy of the available amount. "if the court finds that the available amount (as so calculated) is inadequate for the payment of any amount remaining to be paid under the confiscation order it may vary the order by substituting for the amount required to be paid such smaller amount as the court believes is just". Further, section 23 (5) states that the court may disregard any inadequacy which it believes to be attributable (wholly or partly) to anything done by the defendant for the purpose of preserving property held by the recipient of a tainted gift from any risk of realisation under this Part."
12. Having read all the documents provided to me, I agree with the observations made by Mr Lobbenberg QC at paragraphs 30 to 39 of his response (read into ruling)

13. In the circumstances, I am satisfied it is appropriate to consider and employ the principle of proportionality as applied by the Supreme Court decision in WAYA [2012] UKSC 51.
14. Accordingly, considering the particular facts of this case, employing the discretion afforded by section 23 POCA and adopting a proportionate view of what is recoverable, I am satisfied that it would not only be just but also proportionate to vary the original confiscation order by substituting an amount of £137,500. Having done so, I also vary the default period, employing the same rationale, to 12 months.

His Honour Judge Rupert Overbury
Ipswich Crown Court

October 6th. 2015