

“Tainted Gifts under the Criminal Justice Act 1988” - Colin Wells

The recent decision in **Revenue and Customs Prosecutions Office v Craig Johnson** [2011] EWHC 1950 (Admin) by the Queen's Bench Division (Administrative Court 25 July 2011) confirmed that the prosecution when applying for confiscation of “tainted gifts” under the CJA 1988 had to analyse how under ordinary principles of property and trust law a criminal defendant acquired and held property. Any abandonment of property rights could amount to a “tainted gift” for purposes of confiscation enforcement.

Background to case

Following convictions for Cheating the Revenue (of VAT on mobile telephones estimated at £20 million) and Money Laundering, (following a guilty plea to a single count of £6.25 million, being the proceeds of another's criminal conduct relating again to a VAT fraud involving mobile telephones) a confiscation order in excess of £26 million was made against the defendant (J) under Part VI of the Criminal Justice Act 1988. J received 12 ½ years imprisonment for the substantive offences.

Enforcement

An enforcement receivership order was made to assist in enforcement of the confiscation order.

Subsequently, the Revenue and Customs successfully applied, against the Respondent businessman (B), to have an a Cessna Citation II 550 aircraft treated as a “tainted gift”.

That aircraft had at one time been the subject of a genuine operating agreement (the aircraft was used under sharing arrangements made between B and others) whereby B and J jointly purchased it and were to be jointly responsible for its operating expenses. The agreement allowed J 50 per cent access to the aircraft.

The Administrative court recognised that the application by Revenue and Customs raised difficult issues as to realisable property under Part VI of the 1988 Act.

Tainted gift

The Revenue successfully argued that in relation to the aircraft B had assets to which the receiver of J's assets was entitled for satisfaction of the confiscation order. J had not obtained a beneficial interest in the aircraft, nor could any such interest he might have had survived the various transactions to which the aircraft was subject. However, the Revenue had established that when J, through the passage of time, had abandoned his rights to the aircraft he had effectively made a tainted gift to B.

Accordingly, the aircraft was available to the enforcement receiver for satisfaction of the confiscation order.

Accepting that there was a deficit on the aircraft's operating expenses when B and J parted company, there was never any contention by B that that amount equalled the sums that had been paid by J in respect of the aircraft. Accordingly, having regard to the sums due by J, when he abandoned his rights to the aircraft he made a tainted gift of \$461,268.59 to B and that amount was available to the enforcement receiver to satisfy the confiscation order (as per Mr. Justice Cranston's judgment at paras 52, 54-56, 63-65).

Mr Justice Cranston found that (1) J had a long established history of hiding assets by putting them in the names of others. (2) the purported termination of J's interest did not make commercial sense. J having obtained nothing for his \$637,000 and £70,000 payments except use of the aircraft over a two year period. This amounted to a tainted gift for confiscation purposes.

Conclusion

Mr Justice Cranston held:

“ [65]. In establishing a regime for pursuing the proceeds of crime Part VI of the Criminal Justice Act 1988 assumes the ordinary rules as to how a defendant has an interest in property. That means that the prosecution must analyse how under ordinary principles of property and trust law a defendant acquired and hold property which is said to be subject to the confiscation order. In this case the prosecution has not persuaded me that the defendant obtained a beneficial interest in this aircraft, or that this interest survived the various transactions to which it was subject. However, the prosecution has established that the defendant disposed of a value of not less than \$461,268.59 to the respondent as a tainted gift when he abandoned his rights to the aircraft. That amount is available to the enforcement receiver to satisfy the confiscation order.”