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Albion Chambers CRIME TEAM NEWSLETTER

'When do I get out?'

For a simple question, and the one most asked after a defendant is sentenced, "when do I get out?" has become increasingly difficult to answer. The confusing inter-relationship of numerous statutes, coupled with the new powers of early release given to the prison authorities has meant that any meaningful calculation of the release date is all but impossible.

That is made even more complex in the area where the power of the court and the prison both extend namely the return of a defendant to prison in respect of a previous sentence. The difficulties in this area became all too apparent on a recent morning in the Court of Appeal Criminal Division when of the seven appeals against sentence which were listed, nearly all dealt with the same technical errors made by sentencing judges. All of those errors had been missed by both counsel and the judge at the time of sentence and had not been picked up within the 28 days allowed by the slip-rule.

The most common areas of difficulty, dealt with in turn below, are:

(i) Time not allowed for an administrative recall following a return to prison under s116 the Powers of Criminal Courts Sentencing Act 2000 (PCC (S) A 2000);

(ii) The imposition of a sentence to run consecutively to a term being served under recall provisions.

Time not allowed for recall

Judges are still entitled to order the return of a defendant to custody to serve the unexpired term of a previous sentence – but only if that previous sentence was in relation to an offence committed before 4 April 2005, or was a sentence of less than 12 months (the CJA 2003 largely repealed s116 PCC (S) A 2000). If a judge makes an order for return to prison under s116, the maximum term, following the wording of s116, is simply the term between the new offence and the expiry date of the original sentence. However, the Court of Appeal has effectively added another clause to this: the maximum term is the term between the new offence and the expiry date of the original sentence ***minus twice the number of days which the defendant spent in custody having been recalled administratively under s39 CJA 1991 for the original sentence.***

The Court of Appeal applied this revised calculation in *R v Bignell* [2006] EWCA Crim. 69, *R v Bingham* [2004] EWCA Crim. 1865, *R v Horrocks* [2004] EWCA Crim. 3224, *R v Stoker* [2003] EWCA Crim. 121 and *R v Teasdale* [2003] EWCA Crim. 1641. However, in one case *(R v Shilling [2008] EWCA Crim. 78)* the Court of Appeal applied a different formula, only allowing for one-third of the number of days on recall to be deducted. The reasoning behind this change was less than clear, and the Court of Appeal appears to have rejected that course, by following the previous line of authorities and returning to the 'double-time' formula as held in *R v Conquer*, Court of Appeal 28 August 2009.

The problem is that defendants frequently do not know themselves whether they have been recalled, or are simply remanded in custody on a new matter. The recall period sometimes runs from the day of arrest, but on other occasions, the recall papers are not issued for weeks during which time the defendant is remanded in custody. In addition, there may have been other earlier periods of recall which the defendant has served and been released from. Therefore, where neither the Crown nor the prison authorities have clear dates, it is strongly arguable that no term under s.116 should be imposed as there is a real risk of not taking the recall time properly into account.

Imposing a sentence to run consecutively to a term being served

Under CJA 2003 s.265, 'a court sentencing a person to a term of imprisonment may not order that the term is to commence on the expiry of any other sentence of imprisonment from which he has been released early under this chapter.'

The effect of this is that if a defendant has been administratively recalled to serve the remainder of a lengthy prison sentence (say, a remaining 2 years,) a judge sentencing for a subsequent and entirely unconnected new offence cannot order that the new sentence should start at the end of the existing term. The new sentence must start on the day of sentence *(Bruce [2006] AER 45, CA)*. That means that if a defendant has been recalled on a sentence with two years remaining, and the sentence passed for the new offences is one of four years, the new sentence will add nothing to the number of days which the defendant is required to spend in custody. As s116 PCC(S)A has been repealed, a judge cannot now order that the unexpired portion of the existing sentence should be served before the new sentence (unless the original sentence was in relation to an offence before 4 April 2005, or was a sentence of under 12 months).

However, that protection only applies where a defendant has been *released* from a previous sentence and then recalled. The sentencing court may still direct that a sentence should start after the end of an *existing* sentence which the defendant is still serving on the date of sentence (S154 PCC(S) A 2000).

The effect of that is that in respect of defendants who have been administratively recalled in relation to a post-2005 sentence, and who are likely to face a further custodial term for a new offence, they should be advised to enter a plea or have a trial at the earliest opportunity to enable them to avail themselves of an early sentence. In these situations, the answer to 'when do I get out' is 'sooner than you think' (and possibly 'sooner than the public would expect').

Kate Brunner

Inadequate?

Defaulting on PoCA-esque orders

Despite the government's claims that the aim of the Proceeds of Crime Act legislation (POCA) is to target the fat cats, organised crime syndicates and those on the upper tiers of the criminal pyramid, the reality for those of us grappling daily with what is widely acknowledged to be draconian legislation has proved to be very different. More and more individuals are coming under the scrutiny of the financial investigators of the various prosecuting agencies, many of whom fall far below the previously anticipated echelons of the criminal hierarchy.

The making of the order

Readers of this article will, through their own practices, be well aware that the benefit figure is often inflated due to the statutory assumptions within the various pieces of legislation dealing with the proceeds of crime. This has the effect that the benefit figure is almost invariably far in excess of that of the realisable assets. Unsurprisingly in those circumstances, it is a defendant's home that is assessed as being their most valuable 'realisable asset'.

To determine the value of that property, the financial investigator, 'Mr O'Reilly', will rely upon three valuations of '29 Acacia Avenue' from three of the local agents. That puts the judge dealing with the application in the position of inevitably choosing the middle valuation from 'Eric Twinge & Co' in her assessment as to realisable assets. Thereafter, a sentence in default is set in reference to the assessment of value and a date for payment ordered.

That is as far as many of us get with confiscation proceedings and the lawyers breathe a sigh of relief as this complicated and unrewarding part of the process has now been concluded. Again, inevitably, the defendant is left feeling aggrieved because their ill-gotten, or even sometimes honestly acquired assets, have been assessed for sale. This naturally puts a strain on the relationship between the defendant and his solicitor. Yet despite the defendant's unhappiness, nothing in reality is done for a month or two until the enormity of what has happened sets in. It is at that point that the defendant tries to sell the 'goodies' to realise the benefit figure and the amount assessed by the judge as being realisable. It is just at that point that the *'credit crunch'* or even simply the everyday volubility of the market rears its ugly head.

Remedy

The defendant having lost that Monika to become the applicant is forced to return to the solicitors' office to complain about his predicament. Prior to the credit crunch, the certificate of inadequacy mechanism which enables an applicant to obtain an order securing a reduction in the value of assets was often underused. However, the dramatic fall in value (and the associated sentence if the order is unpaid) caused by the global economic meltdown has caused a flurry of activity from those seeking to secure such an order. Therefore, now seems an appropriate time, not only to examine the certificate of inadequacy in relation to the fall in house prices but also in relation to housing related expenditure in general.

The first and most important point to note is that the applicant is not permitted to re-litigate or go behind the original tribunal's order by way of a certificate of inadequacy. That was made clear by the Court in *McKinsley v The Crown Prosecution Service [2006] EWCH 1092 Civ*, when it stated that, *"the court must take as an established fact that a defendant's realisable assets at the date of the confiscation hearing were as found by the judge and that on an application for a certificate of inadequacy all that can be investigated is what has happened since then."*

In addition, for a certificate of inadequacy to be granted it must be on the basis of a 'post confiscation order event'. That would obviously include a depreciation in the housing market (and in particular, the applicant's house) as stipulated in *RE: B [2008] EWHC 3217*.

Once the applicant is able to prove the post confiscation order event, it is likely that an application can be made to reflect the difference in value. However, care must be taken in respect of the legislation under which the original order was made. If the confiscation order was made under the auspices of the POCA 2002 then the appropriate forum for the application is the Crown Court. If the proceedings precede that legislation for instance following under *Criminal Justice Act 1988* or the *Drug Trafficking Act 1994*, the application has to be to the High Court.

Duty to prove inadequacy

In all such applications the onus is upon the applicant to prove that the assets, as realised, are inadequate to satisfy the order. Therefore an applicant must prove both what assets he has and the total value of his assets as realised.
In the leading case *R v Walbrook and Glasgow [1994] Crim LR 612* the Court stated that vague and generalised assertions unsupported by evidence will rarely be sufficient to discharge the burden on the defendant. That burden will only be discharged if the applicant proves on the balance of probabilities that his property is inadequate for the payment of the confiscation order. That means that any court considering the question of inadequacy will require such an assertion to be supported by evidence. Simply asking the court to rely upon the oral evidence of an applicant whose credibility is in question will rarely discharge the burden.

Hidden assets

The first aspect of this duty is particularly pertinent in cases where a defendant as he then was, was suspected of and subsequently found to have hidden assets in the form of objects or property, kept out of the reach and knowledge of the British authorities.

Equally, the position may arise where a particular asset, though within the knowledge of the relevant authorities, was asserted by the defendant during the proceedings not to have belonged to him. If the court found against such an assertion then that too would be a 'hidden asset' for the purposes of any certificate of inadequacy application.

In such circumstances the Court of Appeal has taken a very strict approach. In *Gokal v Serious Fraud Office [2001] EWCH Civ 368* Newman J stated *"it is not enough for a defendant to come to court and say that his assets are inadequate to meet the confiscation order, unless at the same time he condescends to demonstrate what has happened since the making of the order*

to the realisable property found by the trial judge to have existed when the order was made".

That was a stance reiterated by Moses LJ in *Telli v Revenue & Customs [2006] EWHC 2233 (Admin*) when he stated *"it is incumbent upon a court to assess the current value of the realisable property in order to determine whether it is inadequate to meet the outstanding sum. Once it is appreciated that the property held by the defendant included unidentified assets forming part of the total value of the realisable property at the time of the order, it is impossible for [the applicant] to establish that the realisable property is inadequate now to meet payment of the outstanding amount…Absent consideration of current value, no court could be satisfied that the realisable property was inadequate. If the assets remain unidentified no conclusion can be reached as to their current value"*

There is however, a little comfort to be found in the subsidiary but not dissenting judgment of Pill LJ in *Keith James O'Donoghue [2004] EWCA Civ 1800* where it was acknowledged that an applicant's failure to account for all assets may not be fatal to the granting of a certificate. However, this writer suggests that this would only apply where the 'hidden asset' was very small, and is set against an application for adjustment in 'realisable assets', which when taken as a whole are substantial.

Further difficulties

The pragmatic and entirely logical approach as expounded in *Telli* also causes difficulties in circumstances where no hidden assets were declared but the realis*able* assets have not yet been real*ised*. An example of this is where the reduction in the value of the home is so great as to extinguish any equity an applicant may have in that property.

As a result, the mortgage lender will not transfer or release the deeds on the property if the sale would realise less than the value of the mortgage. That has the effect that the applicant, through no fault of his own, cannot realise the asset to prove the actual or crystallised value of all his assets. In those circumstances, a certificate of inadequacy cannot be granted and the only solution is to request that the crown does not pursue enforcement of the order as a result of the current circumstances. Again, just as the Court dealing with the application to for adjustment, any application to seek to persuade the Crown not to pursue enforcement will have to be supported by evidence such as by establishing the strenuous efforts the applicant ha undertaken in an attempt to sell the property. The same may well apply to the tribunal hearing the enforcement proceedings.

Drawing down of monies held

It is in the interests of all parties to preserve the value of a property so as to enable a confiscation order to be met. Therefore, where an applicant uses funds within bank accounts which are known to the Crown to furnish the mortgage repayments such a course is permissible as held in *Re: M [2008] EWHC 2226 (Admin)*. The same can also apply to undertaking paid work on the property, such as painting and decorating, in an attempt to assist in the selling of it.

In fact in *Re: M* some of the payments were made to the applicant's father to carry out the work on the property. The crown argued that such payments were a gift and should not form part of the court assessment as to reduction. Somewhat fortunately, the court disagreed, and allowed the payments to the applicant's father to be considered. However, such an approach is at odds with the decision in Walbrook which leads this writer to suggest that it is very is far from the norm and should not be relied upon to any great extent

Conclusions

Whether the application is to the Crown or the High court an applicant must accept that due to the nature and stated aims of the legislation that a cynical eye will be passed over any such application. The duty is always on the applicant to prove his inadequacy and it is the failure to keep this duty at the forefront of an applicant's advisor's mind that is the most common cause of problems.

If there is any reason for a court to declare that a value cannot be ascertained which means that inadequacy cannot be proved, either due to the fact of hidden assets, a paucity in supporting documentation or a simple failure to realise such assets, the application will inevitably fail. There is no room for caginess, tactics or slight of hand; the applicant in such circumstances is falling upon the court's mercy and to do so, he must come to the court and demonstrate that he has come to the court with open hands.

Richard Shepherd

A Note from the Editor

The autumn Newsletter is, much as the season it represents, not dealing with the most inspiring or exciting topics. Nonetheless the matters they raise are important and both address areas that have caused problems for the unwary practitioner.

Another such problem area is that of bad character, which at the moment is causing one member of the circuit sleepless nights as he worries about whether he will have to face a bill for the cost of a hearing to argue the admissibility of evidence which in the event was held not even to constitute bad character. An article dealing with that case and the problems associated with ill-founded applications or indeed a failure to even consider an application will be in the next Newsletter.

And just as both authors of this Newsletter urge caution and a strict adherence to the rules, HHJ Lambert's recent warning that judges are no longer to take a kindly view to those who ignore the court's directions echoes those sentiments. At a time when any ancillary hearing results in a diminution in fees to the instructed advocate, it is easy to ignore a lack of disclosure on the part of the prosecution and hope that everything will resolve itself on the morning of trial. However, understandable, that is not a stance which those of us who undertake criminal work can take. Having forced the Crown to disclose items (which should have been disclosed as a matter of course) in three recent cases has had the result of two not being proceeded with and a basis of plea being accepted in the third. Evidence that adherence to the rules, though time consuming and not cost effective does often bear fruit in the end.

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