

Sentencing and confiscation in prosecutions for breaches of planning enforcement notices (R v Roth)

04/08/2020

Corporate Crime analysis: This case involved an appeal against a fine and a confiscation order following criminal proceedings for breach of an enforcement notice served under the Town and Country Planning Act 1990 (TCPA 1990). The appellant, Mr Roth, had converted a property into 12 self-contained flats without prior planning permission. His appeal against sentence was successful; insufficient credit had been given for his guilty plea in the Crown Court, where the case had been committed for the purposes of confiscation. The appeal against the confiscation order was advanced on three grounds: firstly, that the wording of the summons restricted the criminality to one day; secondly, that the rent received was not linked to the breach of the planning legislation; and thirdly, that it was disproportionate for the benefit figure to comprise the gross rental received. All three grounds were dismissed. Written by Sarah Wood, barrister at 5 St Andrew's Hill.

R v Roth [\[2020\] EWCA Crim 967](#)

What are the practical implications of this case?

The case provides guidance for prosecutors when drafting summons in cases for breaches of [TCPA 1990](#) to avoid arguments being mounted by the defence that the offence is confined to one day. In this case, the summons had been drafted as follows:

'On 18th May 2017 at 39 Vartry Road London N15 6PR you did fail to comply with the requirements of an Enforcement Notice served on you as the owner of the Property by the London Borough of Haringey, which required you to cease using the property as self-contained flats by 9 March 2013. Contrary to Section 179 (2) of the [Town and Country Planning Act 1990](#).'

On appeal, and in reliance upon the case of *R v Panayi (Andrew)* [\[2019\] EWCA Crim 413](#), Mr Roth argued that his criminality was restricted to 18 May 2017 and that the confiscation order reflecting a period of criminality in excess of four years was unsupportable. The point had not been taken during the earlier proceedings. The Court of Appeal did not accept Mr Roth's argument and distinguished *Panayi* on the basis that there was a background of uncertainty in that case as to when compliance was required, whereas in this case the wording of the summons did contain a start date for the offending, namely 9 March 2013. In addition, the summons was supported by a statement of facts that clearly set out the time period concerned.

Nevertheless, the Court of Appeal observed that the wording of the summons was clumsily drafted and commented that it was hoped that prosecutors drafting summons for offences contrary to [TCPA 1990, s 179](#) would specify that the offence had been committed between two dates.

The other principles which this case illustrates are that, when a matter is committed to the Crown Court for reasons other than the sufficiency of the sentencing powers of the magistrates, the Crown Court should not impose a sentence in excess of that which the magistrates could have imposed, taking into account credit for a guilty plea. Secondly, the case serves as a reminder that the benefit figure for the purposes of confiscation proceedings arising out of breaches of [TCPA 1990, s 179](#) is to be calculated by reference to gross rental income and that there is a clear causative link between the breach and rental received. It is not akin to a case where the rent that has been obtained by a landlord who has unlawfully failed to obtain a licence is otherwise lawfully received. The appellant's

receipt of the rents in this case derived from his prohibited conduct in ceasing to desist from his use of the property as 12 self-contained flats, contrary to the requirements of the enforcement notice.

What was the background?

In April 2006, Mr Roth purchased the property at 39 Vartry Road and shortly afterwards executed a deed of trust transferring the beneficial interest in it to a company he controlled. In May 2007, planning permission was granted to convert the property into three self-contained flats. Mr Roth did not undertake that conversion and instead converted it into 12 self-contained flats without authority to do so.

An enforcement notice was issued by the London Borough of Hackney on 6 September 2012. The notice was appealed against by Mr Roth, but it was common ground that the time for compliance with the enforcement notice expired on 9 March 2013. Following a visit from a planning enforcement officer on 18 May 2017, it was apparent that the premises were still in use as 12 self-contained flats. Proceedings were commenced by way of summons on 28 June 2017. A detailed statement of facts accompanied the summons and stated that the defendant had been in breach of the enforcement notice for 53 months and had gained financial benefit from non-compliance in the sum of approximately £508,800.

Mr Roth pleaded guilty on 16 November 2017 and the matter was committed to Wood Green Crown Court for sentence, but only because confiscation proceedings were to take place. Had he been sentenced in the magistrates' court, the maximum sentence he could have received was a £20,000 fine. It was agreed between the parties that the Crown Court's sentencing powers were also to be capped at £20,000 because Mr Roth had not been committed on the basis that the magistrates' courts sentencing powers were inadequate.

In sentencing Mr Roth, the Crown Court judge imposed a £20,000 fine, stating that, if it wasn't for the cap, he would have imposed a fine of £50,000. Having heard a contested confiscation hearing based upon whether Mr Roth or the company had been in receipt of the rental income, the Crown Court judge found that Mr Roth had received it personally and made a confiscation order in the sum of £527,887 against him. Mr Roth appealed both the sentence, on the basis that no credit had been given for his guilty plea, and the confiscation order; although he did not seek to challenge the judge's finding that he had received the rental income.

What did the court decide?

The Court of Appeal had no hesitation in finding that the Crown Court judge had failed to give Mr Roth credit for his guilty plea and that the credit ought to have been discounted from the maximum fine available, namely £20,000. It was not for the judge to take it upon himself to consider that, absent the technical jurisdictional point, he would have imposed a fine, before credit for plea, of £50,000. The sentence was therefore reduced to £13,333.

In considering the appeal against the confiscation order, the Court of Appeal dismissed Mr Roth's arguments that the summons only referred to criminality on 18 May 2017 because it was clear from the wording of the summons, and the accompanying statement of facts, that the criminality alleged was between 9 March 2013 and 18 May 2017.

The Court of Appeal also dismissed Mr Roth's other arguments in respect of the confiscation order. Firstly, in finding that the benefit had derived from the enforcement breach, the Court of Appeal referred to the case of *R v Hussain* [[2014](#) EWCA Crim 2344, [2014](#) All ER (D) 217 (Nov)] (which was another case concerning [TCPA 1990, s 179](#)), in which it was held that, but for the criminal

conduct in ignoring the rents in the relevant period covered by the charge, they would not have come into the offender's hands or within his disposition or control as they did. The court stressed that *Hussain* is directly on the point and endorsed the ruling, stating that if Mr Roth had complied with the requirements of the enforcement notice by ceasing to use the property as self-contained flats, he could not have rented it out in the way he did. The court rejected the arguments on behalf of Mr Roth that were based upon other statutory regimes and commented that they hoped 'this will be the last time an argument of this kind is advanced on this basis in confiscation proceedings in the context of section 179 of the 1990 Act'.

Secondly, the Court of Appeal rejected Mr Roth's argument that the benefit figure ought to have been calculated by reference to the net profit as opposed to the gross rental income. The court stressed that the focus of the confiscation legislation is on what is obtained; not on what is retained. The court referred to para [26] of *R v Waya* [\[2012\] UKSC 51](#), [\[2012\] All ER \(D\) 166 \(Nov\)](#), in which it was said that a proportionate order is capable of having the effect of requiring a defendant to pay over the whole sum which he has obtained by crime without enabling him to set off expenses, and that the Crown Court was therefore entitled to find that the order it imposed was proportionate.

Case details:

- Court: Court of Appeal, Criminal Division
- Judge: Lord Justice Davis, Lord Justice Fraser and Judge Michael Chambers QC
- Date of judgment: 24 July 2020

Sarah Wood is a barrister at 5 St Andrew's Hill. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysis@lexisnexis.co.uk.

FREE TRIAL