



## **JUDGMENT**

**R v Hilton (Respondent) (Northern Ireland)**

**before**

**Lord Kerr  
Lord Wilson  
Lord Lloyd-Jones  
Lord Briggs  
Lady Arden**

**JUDGMENT GIVEN ON**

**1 July 2020**

**Heard on 2 December 2019**

*Appellant*

David McDowell QC  
Andrew Brownlie BL

(Instructed by Public Prosecution  
Service (Northern Ireland))

*Respondent*

Gavan Duffy QC  
Luke Curran BL

(Instructed by McKeown & Co  
Solicitors (Belfast))

**LORD KERR: (with whom Lord Wilson, Lord Lloyd-Jones, Lord Briggs and Lady Arden agree)**

***Introduction***

1. On 22 September 2015, Bernadette Hilton was convicted at Belfast Magistrates' court on her plea of guilty of three offences contrary to section 105A of the Social Security Administration (Northern Ireland) Act 1992. One of the offences related to her failure to notify the Social Security Agency of a change in her circumstance which would have affected her entitlement to claim Income Support. The other two offences involved the making of false statements in order to obtain Income Support.

2. Following her conviction, Ms Hilton was committed to the Crown Court and that court was asked to make a confiscation order under section 156 of the Proceeds of Crime Act 2002. This application was heard by His Honour Judge Miller QC on 20 October 2016. It had been calculated that Ms Hilton had wrongly obtained a total sum of £16,517.59 as a result of her crimes. The judge assessed the benefit that she had gained to be that sum.

3. The only property held by Ms Hilton at the time of the hearing before Judge Miller was a house which was owned jointly with a former partner. She contended that the value of her half share in the property, after deduction of an outstanding mortgage was £10,263.50. The judge accepted that contention. He assessed the available amount as that sum and made a confiscation order in respect of it. Ms Hilton was ordered to pay that amount within three months. In default of its payment, it was directed that she serve six months' imprisonment.

4. Ms Hilton appealed. Although not included in her original grounds of appeal, before the Court of Appeal she argued that Judge Miller had failed to comply with the requirements of section 160A(2) of the 2002 Act because neither the co-owner nor the mortgagee had been given the opportunity to make representations about the making of the confiscation order. It transpired that neither Ms Hilton's former partner nor the building society which was the mortgagee was aware of the criminal proceedings or the application for a confiscation order.

### *The proceedings in the Court of Appeal*

5. Deeny J in an extempore judgment gave the decision of the court (Gillen LJ, Deeny J and Keegan J) on 12 May 2017: [2017] NICA 73. The principal issue which concerned the court (and which is the only matter involved in the appeal before us) was in relation to the requirements of section 160A(2) of the 2002 Act and whether the judge's order contravened those requirements. Two other matters were argued before the Court of Appeal, namely, whether a reduction in the amount to be recovered should have been made in order to reflect the costs of the sale of the property and whether article 8 of the European Convention of Human Rights (ECHR) should have been taken into account at the time of the making of the confiscation order, as opposed to the making of an order for its enforcement. It is not necessary to say anything on either issue.

6. The Court of Appeal decided that section 160A(2) required that, at the time of making a confiscation order, the Crown Court must give to anyone who is thought to hold or who, it is considered, may hold an interest in the property an opportunity to make representations on whether a confiscation order should be made and, if so, in what amount. Deeny J observed that the subsection had not been drawn to the attention of Judge Miller but, in any event, the failure to give Ms Hilton's estranged partner and the building society the chance to make representations was "fatal to the decision of the judge" (para 7 of the Court of Appeal judgment).

7. The Director of Public Prosecutions applied for permission to appeal to this court and for a certificate that a point of law of general public importance arose on the appeal. On 6 March 2018, the Court of Appeal refused permission to appeal but certified the following points of law of general public importance:

"1. Where property is held by the defendant and another person, in what circumstances is the court making a confiscation order required by section 160A of the Proceeds of Crime Act 2002, in determining the available amount, to give that other person reasonable opportunity to make representations to it at the time the order is made?

2. If section 160A does so require, does a failure to give that other such an opportunity render the confiscation order invalid?"

## *The 2002 Act*

8. There are - or, at least, there can be - two stages to confiscation proceedings: the first is the making of the confiscation order itself and the second the order securing its enforcement. The first stage is provided for in sections 156 to 163B. That stage is triggered in the manner described in section 156. The obligation to make an order arises once the conditions in subsections (2) and (3) are satisfied. These are fairly routine. The order must be made if a defendant has been convicted of an offence before the Crown Court or is committed to that court with a view to a confiscation order being made - subsection (2); and if the prosecutor asks for such an order to be made or the court believes it appropriate to make it - subsection (3). The relative ease with which these conditions can be satisfied suggests that it was envisaged that the *making* of a confiscation order (as opposed to its enforcement) should be straightforward, indeed quasi-automatic.

9. If satisfied that the order should be made, the court is directed how to proceed by section 156(4) and (5), the relevant parts of which, so far as concerns the present case, are these:

“(4) The court must proceed as follows -

...

(c) if it decides that [the defendant] does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.

(5) If the court decides under subsection (4) ... (c) that the defendant has benefited from the conduct referred to it must -

(a) decide the recoverable amount, and

(b) make an order (a confiscation order) requiring him to pay that amount.

[A footnote to sub-paragraph (b) was inserted on 1 June 2015 by the Serious Crime Act 2015 (the 2015 Act) (c 9), section 88(3)(b), Schedule 4 paragraph 46; regulation 3(2)(b). It is to the following effect:

‘Paragraph (b) applies only if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount.’]”

10. Section 157 deals with the calculation of the recoverable amount. The starting point is that the recoverable amount is an amount equal to the defendant’s benefit from the conduct concerned - subsection (1). But if the defendant shows that the available amount is less than the benefit obtained, the recoverable amount is duly adjusted - subsection (2). The available amount is defined in section 159 of the Act. For present purposes it is sufficient to refer to subsection (1)(a) of section 159 which stipulates that the recoverable amount is the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority. It was by dint of the operation of section 157(2) in tandem with section 159(1)(a) that the recoverable amount in Ms Hilton’s case was found to be the sum which, it was considered, could be obtained from the sale of the property which she jointly owned. It is to be noted that section 159(1)(a) specifies that the recoverable amount is the total of the values of all the free property *then held by the defendant* minus the amount payable for debts which have priority. The emphasis is on property which the defendant holds. Section 227(3), which makes provision for determining a property’s value, again makes clear that it is the market value of the defendant’s interest in the property, rather than the overall value of the property which dictates the amount to be specified in the confiscation order.

11. Having made those preliminary observations, one must turn then to the section which is pivotal to this appeal - section 160A. (It was also inserted on 1 June 2015 by the 2015 Act (c 9), sections 24, 88(3)(a), The Serious Crime (2015 Act) (Commencement) Regulations (Northern Ireland) 2015 (SR 2015/190), regulation 3(1)(a)). Section 160A(1) provides:

“Where it appears to a court making a confiscation order that -

(a) there is property held by the defendant that is likely to be realised or otherwise used to satisfy the order, and

(b) a person other than the defendant holds, or may hold, an interest in the property,

the court may, if it thinks it appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant’s interest in the property.”

12. Clearly, in this case, the judge formed a view as to the extent of Ms Hilton's interest in the jointly owned property. The critical question is whether he *determined* the extent of that interest under section 160A, so as to preclude any further representations by persons other than Ms Hilton who held or may hold an interest in the property. Ms Hilton's complaint is that he did and further that he failed to advert to subsection (2) of section 160A which provides:

“The court must not exercise the power conferred by subsection (1) unless it gives to anyone who the court thinks is or may be a person holding an interest in the property a reasonable opportunity to make representations to it.”

13. The significance of a determination under section 160A which precludes representations from third parties is clear from subsection (3) which provides:

“(3) A determination under this section is conclusive in relation to any question as to the extent of the defendant's interest in the property that arises in connection with -

(a) the realisation of the property, or the transfer of an interest in the property, with a view to satisfying the confiscation order, or

(b) any action or proceedings taken for the purposes of any such realisation or transfer.”

A determination of the extent of the interest of the person subject to the confiscation order on the basis that no further representations may be made by third parties thus becomes immutable, unless there is an appeal to the Court of Appeal - section 181(4), (5) and (6).

14. The question whether a confiscation order has been made *on foot of such a determination* is therefore critical. But it is also critical that that question be addressed with the two-stage process involved in the making of the order and securing its enforcement firmly in mind. Before turning to that, however, it should be recalled that making a determination as to the extent of a person's interest which precludes later representations by third parties (as opposed to forming a preliminary view about that interest) is conditional on the court's considering it appropriate to do so. Since section 160A(2) *requires* that the court should give to anyone who may be a person holding an interest in the property a reasonable opportunity to make representations to it, by definition, it could not be appropriate to make a determination affecting such a person's

interest without giving him or her that opportunity. Unless the Crown Court judge is confident that the third party's interest will not be affected, he or she should not make a *determination* under section 160A(1) which effectively extinguishes the opportunity for third parties to make later representations. The judge is not prohibited, however, from forming a view as to the extent of the interest of the person subject to the confiscation order for the purpose of computing what is, in effect, a statutory debt - see *R v Ahmed (Mumtaz)* [2005] 1 WLR 122, discussed below at para 19. This is particularly so because of the provisions relating to the quite distinct exercise involved in the realisation of the order or payment of the sum due and it is to those provisions that I now turn.

15. Section 198 makes provision for the circumstances where a confiscation order has been made but has not been satisfied. It is in these terms:

- “(1) This section applies if -
  - (a) a confiscation order is made,
  - (b) it is not satisfied, and
  - (c) it is not subject to appeal.
- (2) On the application of the prosecutor the Crown Court may by order appoint a receiver in respect of realisable property.”

It is to be noted that the exercise of the power under this section is dependent on a confiscation order having been made. This reflects the two-stage approach: the first the making of the confiscation order and the second the realisation or enforcement of that order. As the appellant submits, if the interests of third parties are not considered and disposed of at the confiscation stage, they must be dealt with at the enforcement stage. This is the effect of various provisions in section 199.

16. The first relevant provision in section 199 is subsection (2). It provides that the court may confer on a receiver (appointed under subsection (1)) a number of powers in relation to the realisable property. These include the power to manage or otherwise deal with the property (subsection 2(b)) and the power to realise the property, in such manner as the court may specify (subsection 2(c)). Subsection (6) makes provision for the court's power to order a person holding an interest in realisable property to make a payment to a receiver in respect of a beneficial interest held by the defendant and, on



the payment being made, order the transfer, grant or extinguishment of any interest in the property.

17. Importantly, recourse to subsections (2) and (6) is subject to an important proviso in section 199(8), however. It provides:

“(8) The court must not -

(a) confer the power mentioned in subsection (2)(b) or  
(c) in respect of property, or

(b) exercise the power conferred on it by subsection (6)  
in respect of property,

unless it gives persons holding interests in the property a reasonable opportunity to make representations to it.”

This is important because the section was retained in the legislation, despite the introduction of section 160A. It can be safely assumed, therefore, that Parliament intended that the two-stage process of (i) the making of the confiscation order, and (ii) its enforcement or realisation at a later point should be preserved. Indeed, there can be no doubt about this because a new subsection 8B was introduced by the 2015 Act (c 9), sections 27, 88(3)(a) (SR 2015/190), regulation 3(1)(a). It provides:

“Representations that a person is entitled to make by virtue of subsection (8) do not include representations that are inconsistent with a determination made under section 160A, unless -

(a) the person was not given a reasonable opportunity to make representations when the determination was made and has not appealed against the determination, or

(b) it appears to the court that there would be a serious risk of injustice to the person if the court was bound by the determination;

and the determination does not bind the court if paragraph (a) or (b) applies.”

18. This provision proceeds on the premise that section 160A and section 199 continue, in relevant circumstances, to co-exist. Third party representations are forbidden, subject to the qualifications in sub-paras (a) and (b), *if* a determination under section 160A has been made. If such a determination has not been made, however, there is no inhibition to the making of third-party representations. Put simply, section 160A does not purport to occupy the field. The opportunity to make representations at the enforcement stage continues to apply either because a determination under section 160A has not been made or because the conditions in section 199(8B) are met. The fundamental point is that, at the enforcement stage, third party rights may continue to be considered either because the Crown Court did not make a section 160A determination, or because it did so without affording a person with an interest in property the opportunity to make representations when the determination was made.

### ***Discussion***

19. The distinct two-stage process in (i) the making a confiscation order; and (ii) the enforcement of that order, was an inevitable feature of proceeds of crime applications before the introduction of section 160A to the 2002 Act by the 2015 Act. In *R v Ahmed (Mumtaz)* and *R v Qureshi (Ghulam)* [2005] 1 WLR 122, after dealing with the question of whether the defendants had benefited from their criminal activities, Latham LJ turned to the nature of the exercise involved in the making of a confiscation order. At paras 11 and 12, he said:

“11. ... The court is merely concerned with the arithmetic exercise of computing what is, in effect, a statutory debt. That process does not involve any assessment, in our judgment, of the way in which that debt may ultimately be paid, any more than the assessment of any other debt. ...

12. Different considerations, will, however arise if the debt is not met and the prosecution determine to take enforcement action, for example by obtaining an order for a receiver. As the House of Lords explained in *In re Norris* [2001] 1 WLR 1388 this is the stage of the procedure in which a third party’s rights can not only be taken into account but resolved. ...”

20. A third party’s rights were not considered at the confiscation order stage. This was - and still may be - a computation exercise to decide how much the defendant has benefited from his or her criminal activity and to assess what assets they have that might be recoverable. Whether those assets were in fact realisable was left to the enforcement stage. The crucial question to be determined in the present appeal is whether, and in

what circumstances, that division of functions can still occur where there are third party interests at stake.

21. The circumstance that the confiscation stage did not involve any consideration of how the debt might be realised was reinforced by the fact that, as Latham LJ put it, it was akin to a statutory debt and it was owed in personam. The significance of this is explained in *Millington and Sutherland Williams on The Proceeds of Crime*, 5th ed (2018), chapter 16, para 16.53:

“A confiscation order is an *in personam* order against the convicted defendant and not an *in rem* order against specific items of property. The consequence of this, prior to 1 June 2015, was that third parties who held an interest in realisable property did not have a right to be heard at the confiscation hearing in the Crown Court or to have counsel make representations to the court on their behalf. If the defendant wished the third party to be called as a witness on his behalf for the purpose of establishing the extent of his interest in realisable property, he could of course do so. Following the introduction of section 10A of POCA [in Northern Ireland section 160A] ... the position has been modified.”

22. The extent of the modification is contained in section 160A(2) which stipulates that the Crown Court must give to anyone who is thought to hold or who, it is considered, may hold an interest in the property an opportunity to make representations on whether a confiscation order should be made and, if so, in what amount - see para 6 above.

23. What has not been modified, in my opinion, in cases where third party interests have been identified, is the opportunity available to the Crown Court, to make a confiscation order other than under section 160A. In such circumstances, the confiscation stage of proceedings remains separate from the enforcement stage. In the present case, the Court of Appeal’s judgment is premised on the proposition that on every occasion that third party interests arise, the court must proceed under section 160A. The consequence of that approach would be that there would be an inevitable collapse of the traditional two stages into one hearing with all the panoply of investigation of the merits of the rights of third parties, such as a former partner and the building society in the present appeal. This would inevitably introduce a cumbersome procedure to the making of the confiscation order. Conventionally, as in the present instance, those with some interest in the property which might become available at the realisation stage, such as former partners and mortgagees, are not made parties to the application for a confiscation order. If, in every case where third party interests were potentially at stake, a full section 160A investigation had to be undertaken *at the stage of making the confiscation order*, the case would have to be adjourned; those with

possible interests would have to be put on notice; and the making of a confiscation order would have to be postponed.

24. I am satisfied that this was not intended. The making of a confiscation order would no longer be straightforward, much less quasi-automatic (see para 8 above) if section 160A had to be applied in all its rigour in every case where third-party interests arose. The enactment of the section was designed to streamline the system, not to complicate it. In my view, its purpose was to combine the confiscation and enforcement stages in simple cases where there could be no sensible debate about how the confiscation order should be enforced. This conclusion is supported by consideration of academic commentary and case-law which predates the introduction of section 160A.

25. In Blackstone's *Guide to The Proceeds of Crime Act 2002*, 5th ed (2015), the authors note at para 2.197 that "traditional advice for third parties wishing to protect property in their possession was to await enforcement proceedings. Of course, during the determination hearing itself, the defendant himself might call the third party as a witness in order to prove an interest which reduced the amount of the defendant's available property. However, there has never been any procedure allowing for third parties to make their own freestanding representations at that stage."

26. Dicta in *In re Norris* [2001] UKHL 34; [2001] 1 WLR 1388 underscore the distinction between the confiscation order and the order for its enforcement. The House of Lords emphasised the *in personam* nature of a confiscation order: "The order which it makes is an order which is directed against the defendant only, and it is simply an order for the payment of a sum of money. The question of realisation, if the exercise of powers by a receiver is needed in order to make good the order which the defendant is required to satisfy, is reserved for the High Court" (para 5). It was further emphasised that the structure of the 2002 Act reflected the engrained distinction between the courts' criminal jurisdiction and their civil jurisdiction, and the "division of responsibility and function between the Crown Court exercising the criminal jurisdiction and the High Court exercising the civil jurisdiction. The criminal jurisdiction is concerned alone with what order to make under sections 1 to 4 of the Act. The procedure of the criminal court is solely concerned with the parties before it, the prosecution and the defendant" (para 23).

27. There is now, of course, a procedure allowing third parties to make representations at the confiscation stage of proceedings but only where the Crown Court is minded to make a determination under section 160A. Indeed, this is the combined effect of sections 160A(2) and (3) and section 199(8)(b) - see paras 12-14 and 17 above.

28. It is evident, therefore, that it was open to Judge Miller to make a confiscation order other than under section 160A. Having read the transcript of the hearing of the

application for a confiscation order and the order which the judge made, it is clear to me that no determination under that section was made. It was not mentioned during the submissions that were made to the judge nor in the order of the court. The hearing of the application for a confiscation order was principally concerned with the relevance of the costs of the sale of the property to the calculation of the realisable amount. The possible significance of third-party interests was not referred to by any party. It seems likely that the judge was completely unaware of these. Section 160A has no bearing on this case, therefore, unless the judge was bound to make an order under its provisions. For the reasons that I have given, he was not. Having considered the transcript of the hearing before him, I am satisfied that he did not.

### ***Conclusion***

29. I consider that the answer to the first question certified, namely,

“Where property is held by the defendant and another person, in what circumstances is the court making a confiscation order required by section 160A of the Proceeds of Crime Act 2002, in determining the available amount, to give that other person reasonable opportunity to make representations to it at the time the order is made?”

should be that this question does not arise on the present appeal because a determination under section 160A was not made. The same answer must be given to the second certified question.

30. The appeal is therefore allowed and the learned County Court judge’s order is restored. It will be open to the third parties to make representations at the enforcement stage of the proceedings. Likewise, at that stage, it will be open to Ms Hilton to canvass the matters adverted to in para 5 above.