

The Benefit of Lying on a CV : R v Andrewes [2022] UKSC 24

Case Comment : Colin Witcher and Fiona McAddy

The confiscation regime laid down by the Proceeds of Crime Act 2002 (“POCA”) has often proved confusing and difficult. Striving for logic has often been the trap that advisors fall into, for in the correct application of the regime, logical is not always a term that one can apply to the result. However, in the view of the present authors, logic and fairness were very much the tramlines for the recent approach of the Supreme Court in *R v Andrewes*.

In this case the Supreme Court considered an important issue in respect of the confiscation regime. The case concerned what is often described as “cv fraud”. Typically, as explained by the Court this occurs where a fraudster lies on his or her application form for a job, for example, by including qualifications or experience which he or she does not have and, as a result, is appointed to the job concerned. The fraudster performs the agreed services (usually satisfactorily) and is paid the agreed salary until the fraud is discovered. On a conviction for fraud, the question before the Court was whether there should be a confiscation order stripping the fraudster of his or her earnings, and, in particular, whether if such a confiscation order is made it would be disproportionate under the proviso in section 6(5) of POCA.

The facts are instructive as to the conclusions reached by the Supreme Court. Jon Andrewes successfully applied for the role of CEO at St Margaret’s Hospice, Taunton, having claimed that he had university degrees, as well as significant relevant work experience. These claims were, as accepted by his subsequent pleas, untrue. Mr Andrewes was appointed CEO in December 2004 and remained in post until March 2015 when his employment was terminated. The agreed position is that he would not have been appointed had the truth about his education and prior job experience been known. During his time as CEO, there was no dispute that Mr Andrewes performed well and was regularly appraised as either strong or outstanding. Mr Andrewes was also appointed to two remunerated roles as a director and then Chair of two trusts. In January 2017, Mr Andrewes pleaded guilty to one count of obtaining a pecuniary advantage by deception and two counts of fraud.

Following his conviction, the Crown sought a confiscation order against Mr Andrewes. The Crown advocated that the “benefit figure” (in simple terms, a figure calculated to reflect the proceeds generated by a criminal act or the value attributed to the crime in-of-itself) was the full net earnings during the relevant period, namely £643,602.91. The “recoverable amount” (in simple terms, a term used to reflect the amount a defendant has to settle an order) was agreed to be £96,737.24. The Judge ordered confiscation of that sum accordingly.

Mr Andrewes appealed that decision. The Court of Appeal allowed Mr Andrewes’ appeal, making no confiscation order, however it duly certified the question of whether or not a confiscation order in such circumstances would be disproportionate as a point of law of

general public importance. The Crown duly appealed to the Supreme Court. One of the key issues to consider was whether the order was disproportionate in that Mr Andrewes had performed his role without complaint and had seemingly “earned” the sums by completing lawful work (albeit unlawfully obtained).

The Supreme Court unanimously allowed the appeal; however they adopted an approach that fell between the submissions advanced by the parties. The authority provides useful guidance for practitioners and the Courts in approaching the confiscation regime in such cases of CV fraud.

The Supreme Court found that as a starting point, it would be disproportionate to make a confiscation order of the full net earnings. To do so without making any deduction for the value of the services rendered would amount to “double confiscation” and a penalty. There has long been an approach of the Courts reinforcing the principle that the confiscation regime is not supposed to serve as a penalty. Importantly, this reasoning as “to double confiscation” does not the Court opined extend to cases where, different to the present case, the actual rendering of services was illegal. This would arise the Court opined, for example, if a surgeon performed operations without the required qualifications. In such a scenario, it would not be disproportionate to confiscate the full net earnings. The Court noted, however, that it would be unjust to take the full net earnings simply because there was a “legal bar” to a person being appointed to a particular office. The appropriate line to draw is marked by where the performance of the services would be a criminal offence. Arguably, that distinction may appear at first blush unusual, however if conducting the work was in-of-itself a crime, there would never have been any lawful work undertaken; performing the work would be performing a criminal act. As such, the reasoning is consistent with earlier authorities and the general aims of the confiscation regime.

Contrary to the decision of the Court of Appeal, the Supreme Court found that it was unacceptable for no confiscation order to be made in this case. The Supreme Court decided that when considering proportionality, the court should seek to confiscate the difference between the higher earnings obtained through fraud and the lower earnings that would have been obtained if there had been no fraud. As such, Mr Andrewes would have to give up any “profit” he made through his lies, but account would be taken of the fact that his employers did receive value in the form of services rendered, in exchange for paying his salary. This is to adopt a principled “middle way” in contrast to either a “take all” approach (as advocated by the Crown) or a “take nothing” approach (as adopted by the Court of Appeal).

The Court observed that if the middle way is correctly applied it would not produce arbitrary outcomes and would reflect a principled way of determining the defendant’s profit from their crime, namely their inflated CV. In short, one is seeking to confiscate the profit measured by the difference between the net earnings that the defendant would have had if he or she had not fraudulently obtained this job and the defendant’s actual higher net earnings. The Court noted, it may be that on particular facts there is evidence allowing a court to finely-tune the amount of the difference in net earnings. But, in general, a

pragmatic broad-brush approach will be appropriate so as not to ensnare the courts in complex assessments requiring detailed evidential enquiries

Thus, it is important for practitioners to consider when advising in this area:

- (a) whether the work performed was lawful or not;
- (b) whether the work performed was to an appropriate standard;
- (c) what the defendant's earnings capabilities would have been but for the fraud;
- (d) what the defendant's earnings were as a result of the fraud;
- (e) what the difference is between the figures arrived at when answering (b) and (c) above;

Cases involving "cv fraud" are potentially complex and defendants will often benefit from advice on both the alleged fraud and the potential consequences under POCA at an early stage in the proceedings.

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