Case Note

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Confiscation Orders: Finding a Middle Way Between Two Extremes

R v Andrewes [2022] UKSC 24

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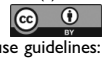

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Facts

Jon Andrewes was a Chief Executive Officer of St Margaret's Hospice from 2004 until 2015. In 2007, he was appointed as non-executive director of Torbay NHS Care Trust, and then in 2015, Chair of the Royal Cornwall NHS Hospital Trust. All the positions were remunerated. Andrewes claimed an impressive education with undergraduate honours, MPhil, MBA, and by 2007, a doctorate. Allied to the impressive set of qualifications was equally impressive work experience. It was all untrue. Andrewes had told, 'a series of staggering lies' ([2020] EWCA Crim 1055, at [21])) in the course of a sophisticated 'CV fraud'. He was charged with obtaining a pecuniary advantage by deception under section 16(1), Theft Act 1968 in relation to the St Margaret's Hospice role, and two counts of fraud by false representation under section 2, Fraud Act 2006, in relation to the Torbay NHS role, and the Royal Cornwall role.

At trial, Andrewes entered a guilty plea for which he received two years' imprisonment. The confiscation hearings were in June and July 2018. It was determined that Andrewes did not have a criminal lifestyle, so focus shifted to whether Andrewes benefited from the particular criminal conduct. He did, so the court calculated the value of the benefit, and the sum which should be recovered from the defendant. Here, in determining whether the defendant must pay the amount, the court considered whether it would not be disproportionate. The proportionality 'proviso', as the Supreme Court termed it, was an insert to the PoCA 2002 by sch 4, para 19, Serious Crime Act 2015, following the Supreme Court decision in R v Waya [2012] UKSC 51.

For the 11 years of his fraud, from 2004 to 2015, his net benefit assessed by reference to the particular criminal conduct, was calculated to be £643,602.91. As it was employment income, albeit fraudulently obtained, the sum was net of income tax and national insurance contributions. The final recoverable amount, in fact the amount Andrewes had available, was calculated at £96,737.24. This was very slightly over 15% of the total net benefit from the particular criminal conduct. This sum pleased neither prosecution nor defence. Andrewes appealed.

On appeal ([2020] EWCA Crim 1055), as might be unsurprising, the opposing arguments of the Crown and Andrewes might neatly be summed up in the title of The Small Faces 1966 hit, *All or Nothing*. The Crown argued for it 'all'. Andrewes argued for 'nothing'. The Court of Appeal allowed the appeal, finding for Andrewes, preferring nothing. The confiscation order was disproportionate, under a proper application of section 6(5), Proceeds of Crime Act ('PoCA') 2002. While Andrewes had obtained the employments by dishonest representations, and benefited thereby, he had, by accounts, performed his duties properly, 'regularly appraised as either strong or outstanding in annual reviews' (at [17]). Further, there was no legal bar on his appointments, nor any legal bar to any of the three employers waiving their essential or desirable requirements. That is, the roles were not subject to regulatory or statutory thresholds. He had given full value for his earnings and, therefore, provided full restoration.

The confiscation order was disproportionate as a double penalty (at [98]), and no confiscation order should have been made.

The Crown appealed to the Supreme Court.

Held, allowing the appeal, in a single joint judgment by Lord Hodge and Lord Burrows, with whom the other Justices (Lord Kitchin, Lord Hamblen and Lord Stephens) agreed, the original confiscation order of £96,737.24 was restored.

The certified question for the Supreme Court was as follows:

> Where a defendant obtains remuneration as a result of or in connection with an offence of fraud based upon the obtaining of employment by false representations or non-disclosure, in what circumstances (if any) will a confiscation order based on the wages earned be disproportionate within the terms of section 6(5) of the Proceeds of Crime Act 2002, or contrary to Article 1, Protocol 1 of the European Convention on Human Rights? ([2022] UKSC 24, at [2])

The Supreme Court was focused on the proportionality question. Therefore, the *All or Nothing* battlelines drawn in the Court of Appeal, were redrawn and rehearsed in the Supreme Court.

The Crown argued that Andrewes' full net earnings of £643,602.91 for the material time should be confiscated. The fact that the lower amount in the confiscation order (£96,737.24) was all that was available was irrelevant since it would not have been disproportionate to disgorge the full net earnings. Any value represented by the services which Andrewes provided to the employers should not be deducted since they were equivalent to the costs of the criminal enterprise and were not restorative (at [40]). The Supreme Court rejected that argument. Such an approach, that is, one which did not deduct for the value of services Andrewes provided, requiring payment of the full net earnings, would amount to 'double disgorgement' and, therefore, be disproportionate (at [41]).

Andrewes argued that *any* confiscation order would be disproportionate and invited the Supreme Court to follow the Court of Appeal in holding that no confiscation order should be made. The Supreme Court also rejected that argument. While Andrewes had provided valuable services to all three organisations, it was also the case that Andrewes would have been an unsuccessful applicant had the truth been known before appointment. Given those circumstances, ordering no confiscation order would allow Andrewes to profit from criminal conduct. A third way, encapsulated in the proportionality proviso, was needed to balance restorative value with the policy that crime does not pay (at [44]).

The Court preferred an approach, where concerned with proportionality, which did not disgorge the full net earnings, 'but rather the difference between the higher earnings that Mr Andrewes has obtained and the lower earnings that he would have obtained had he not used fraud and hence had not been offered the particular job' (at [45]). This approach disgorges the 'profit' made by the defendant, and represents a, '"middle way" (or "halfway house") between the take all or take nothing approaches to confiscation in cv fraud cases' (at [45]).

This 'middle way' is not arbitrary or a discretionary multi-factored approach, but an, 'evidential basis for comparing earnings with and without the cv fraud' (at [48]). It is also not meant to require judges to engage in, 'a detailed or precise evidential or accounting exercise' (at [48]), rather to encourage a 'broad-brush' approach to confiscation orders where the rules are clear to allow judges to find a 'pragmatic approximation' (at [48]). Such an approach avoids, 'complicating the administration of justice in the Crown Courts' (at [48]). On this basis, the relevant profit made by Andrewes was £244,569, based on the 38% pay increase between the salary he had before the fraudulently obtained employment. Consequently, the actual sum on the confiscation order (£96,737.24) was not disproportionate.

Two further points made by the Supreme Court are illustrative of situations where the 'middle way' should not, and may not, apply. First, where it should not apply. While not directly concerned with such cases, the Court was clear that a full disgorgement approach did have a role to play in the confiscation context. For this, a distinction was needed between those cases where the, 'performance of the services by that person would constitute a criminal offence' (at [42]), examples being where a person

misrepresents they have the qualifications to carry out surgery, to fly a plane, or to drive a heavy goods vehicle, and cases such as Andrewes. In the former examples, disgorgement of the full benefit from the particular criminal conduct was not disproportionate. Such wrongs were equivalent to, 'confiscation of the turnover from the illegal sale of goods such as criminal drug dealing or arms dealing' (at [42]). Secondly, the Court left open the question of receipt by the CV fraudster of a 'golden hello' or a 'golden handshake' since, 'one cannot say that performance of the services by the fraudster constitutes the equivalent to restoration of what has been paid' (at [55]).

Commentary

Andrewes is an important case. It provides some guidance to lower courts in their calculation of confiscation in difficult 'middle way' cases, and particularly given the engaged proportionality provisions of section 6(5), POCA 2002. However, some elements of the guidance may generate a little more uncertainty than at first might have been anticipated.

To be clear, cases such as *Andrewes*, where the service provision is not inherently illegal, and the fraudster's performance is satisfactory to the employer, is not a case type where full disgorgement of net earnings would be awarded by confiscation. In these cases, the restoration element in the fraudster's performance has to be taken into account, but 'services can never be restored in the same way as money or goods' (at [41]). Money and goods are objectively quantifiable, even to the extent where money loses its value by the effects of inflation, and goods depreciate by the passage of time and use. The provision of a service inevitably involves a little more subjectivity in the confiscation process. To avoid the difficulties of subjectivity, the judge might simply determine, as the Supreme Court seems to have accepted in *Andrewes*, that there was an inherent value in the fraudster's performance. Andrewes, '…performed valuable services … in return for the net earnings and, if one were to focus solely on his performance of the services…, it would be hard to deny that the hospice and the two trusts were receiving full value in exchange for the salary paid' (at [44]). However, this may, in some cases, over-simplify what is a rather more difficult question. Certainly, cases involving senior employees may be more readily determined in this way, especially where the performance is materially distinguishable from a broader effort. However, not all cases will be this capable of resolution. For example, where an employee is senior, there is, at least theoretically, greater scope for delegation of tasks away from the senior person to a relative junior. In such circumstances, it is arguable that the restorative element of performance is made by a lawfully appointed person within the organisation, not the fraudster. Thus, that element of the performance is a cost already borne by the organisation, which might make the gains by the fraudster unwarranted and unperformed. This may, indeed, be compounded where an unqualified fraudster is appointed, as in *Andrewes*, and greater levels of delegation are seen as more likely to happen than not, such that the restorative performance becomes less compelling as a basis for denying a higher level of confiscation. Questions of restorative performance are more nuanced and more complex in circumstances where the fraudster is at a lower level within an organisation, perhaps operating in a wider team, where the 'stand-out' nature of their contribution is more difficult to determine. This latter point may be more pressing to resolve than might have been appreciated by the Supreme Court, since Cifas has identified that younger people (16–24 year olds), that is, those more likely to be at a lower organisational level, have less reluctance to commit CV fraud (https://www.cifas.org.uk/newsroom/false-qualifications-cv-fraud).

A particular disappointment was the Supreme Court's unwillingness to provide at least a little guidance, albeit strictly *obiter*, on the confiscation status a 'golden hello' provided to a fraudster at the commencement of their employment, or a 'golden handshake' provided at the end. This is disappointing because, it is submitted, these could be set within the general framework provided by the Supreme Court or treated as a separate category. First, take a 'golden hello'. A 'golden hello' is a lump-sum payment provided as an incentive to an employee to join from a competitor, or as a sweetener. It is arguable that a 'golden hello' is based on information provided at interview, drawn from an application, and by references supplied, all of which in the context of CV fraud, are likely to be false. In such

circumstances, full disgorgement of the 'golden hello' sum should be awarded since it would be analogous with a purely criminal exercise and no restorative value is provided for it, whether in a situation where the fraudster takes up the post, or where the fraud is discovered before work is performed.

A 'golden handshake' provides a little more difficulty which principally relates to the terms of the 'golden handshake', but even this is not insurmountable. A 'golden handshake' is typically paid following lawful severance of the relationship, and payment might either be automatic following severance, or linked to previous performance. In cases of automatic payment, full disgorgement by confiscation would be appropriate because it is not linked to restorative performance. Cases where a 'golden handshake' is linked to performance could be brought within the Supreme Court's 'middle way' assessment or, without committing egregious logical abuse, treated as cases of full disgorgement as being either analogous to purely criminal exercises, or as advocated here, by treating 'golden payments' as separate categories of payment distinct from standard performative remuneration. This has the twin benefits of being a 'clear rule' (at [48]), aligning with the Supreme Court in *Andrewes*, and reasserting the simplicity of the maxim that crime does not pay.

The further significance of the decision of *Andrewes*, beyond its proportionality guidance, is the departure from the 'Nothing' confiscation approach of the Court of Appeal. As a fraud typology, CV fraud is one which is generally seen to be increasing. Earlier this year, Cifas, the fraud prevention membership organisation, drawing membership from a range of sectors, published research on CV fraud (Cifas, above). It found that one in 12 adults admitted to lying on their CV about their academic qualifications, with one in eight seeing it as reasonable. More significantly, perhaps, the figure is one in six of respondents admitting to this form of CV embellishment between the ages of 16 and 24, with one in five of that age range seeing it as reasonable. For those applicants, the benefit to be gained outweighs the risk of being caught, but *Andrewes* might go some way to making the fraudster weigh the risk more heavily in their analysis.

One final contextual point arises from how *Andrewes* might impact the compliance systems of employers. While decent due diligence measures on the part of organisations should stop most attempts, some will inevitably slip through, either because of resource limitations within the target organisation, or the sophistication of the fraud being such as to raise no 'red flags'. Appropriate legal responses require the private policing which organisations undertake in this area to provide significant resource and intelligence commitments, both at the outset and as an ongoing aspect of their compliance model. Therefore, while a robust response from the law sending a clear message that fraudulently obtained funds will be disgorged, notwithstanding the practical uncertainties in the framework as formulated by *Andrewes*, it does need organisations to have robust compliance systems in order to be an effective deterrent.

Christopher Kirkbride