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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 5 February 2019

B e f o r e :

LORD JUSTICE DAVIS
MRS JUSTICE CUTTS DBE
THE RECORDER OF LIVERPOOL
HIS HONOUR JUDGE GOLDSTONE QC
(SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

R E G I N A

v

D

(Rev 1)

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(Official Shorthand Writers to the Court)

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LORD JUSTICE DAVIS:

Introduction

1. This is an appeal brought by the prosecution pursuant to the provisions of section 58 of the Criminal Justice Act 2003 challenging a terminating ruling given by the judge during a trial in the Crown Court. The terminating ruling was given in respect of one count on a six count indictment. The judge himself gave leave to appeal. The jury has been discharged. It is perhaps unfortunate that the particular legal point arising was not taken and addressed at an earlier stage and before the jury were sworn.

2. The issue, which is purely one of law, is this. Sections 1 and 3 of the Fraud Act 2006 create an offence of fraud by dishonestly failing to disclose, with intent to make a gain for oneself or to cause a loss to another, information which the defendant is under "a legal duty" to disclose. The particular question in this case is whether the defendant here was, for council tax purposes, under a legal duty to disclose to the relevant local authority (in this case Hertsmere Borough Council) the fact of her residence at a particular address. The trial judge ruled that she was not under a legal duty of notification in this respect. The prosecution argue that the judge was wrong in law so to rule. The outcome of this appeal, if the prosecution are right, will clearly potentially have implications for other cases in the context of local government finance and payment of council tax.

Background facts

3. The background facts can be given the barest summary for present purposes. We say "facts"; but of course we mean those which the prosecution allege to be facts but which they must in due course prove. Such matters will in due course be for the jury to evaluate.

4. The position, shortly put is this, on the prosecution case. The defendant is and at all relevant times since 1998 has been the registered legal owner of a property at 45 Dacre Gardens in Borehamwood. Her name also appears on the council electoral records as being at that address.

5. As alleged by the prosecution, the defendant in October 2008 applied for a single person's discount in respect of her council tax. Shortly thereafter she rang the council tax department of Hertsmere Borough Council saying that she had moved out and she gave a forwarding address. A new council tax account was set up in the name of the tenant as provided to the Borough Council and a 25 per cent single person's discount was granted in respect of payment of council tax.

6. It is the prosecution case that the defendant had in fact herself remained resident, perhaps together with the tenant, at 45 Dacre Gardens. For example, it is said she was at various times separately receiving fostering payments from the Children's Service Department for fostering children there. The prosecution say that there was a false representation made by the defendant, designed to avoid payment by her of the full amount of council tax due. That was in due course to be reflected in count 1 on the indictment. The prosecution say that other similar positive and, as they say, false statements were made by the defendant on various other occasions involving an attempt to avoid the payment of the full amount of council tax due. It is said that during the relevant times the defendant either on her own or with others, for example tenants, had remained herself in occupation at the property and for most such periods the full amount of council tax was payable by her accordingly. Those matters constituted counts 2, 3, 4 and 5 of the counts on the indictment: such statements allegedly being made on various occasions in 2011. All of counts 1 to 5 are pleaded as counts of fraud by false representation, contrary to sections 1 and 2 of the Fraud Act 2006. No issue arises on this appeal with regard to those particular counts.

7. This appeal relates solely to count 6 on the indictment, which reads as follows:

> "
>
> STATEMENT OF OFFENCE
>
> FRAUD BY FAILING TO DISCLOSE, contrary to sections 1 and 3 of the Fraud Act 2006.
>
> PARTICULARS OF OFFENCE
>
> [D] between 23rd day of May 2008 and 24th day of December 2015, committed fraud in that you dishonestly failed to disclose to Hertsmere Borough Council information, namely that you lived at 45 Dacre Gardens, Borehamwood, Hertfordshire, WD6 2JR, which you were under a legal duty to disclose, intending to make a gain for yourself or a loss to another, namely by avoiding to have (sic) to pay Council Tax."

It may be noted that the period specified in count 6 is considerably longer than the period spanned by the specific incidents which are the subject of counts 1 to 5.

The legal scheme

8. We turn then to the legal position. Section 1(1) and (2) of the Fraud Act 2006 provide as follows:

> "1 Fraud
>
> (1) A person is guilty of fraud if he is in breach of any of the sections listed in subsection (2) (which provide for different ways of committing the offence).
>
> (2) The sections are—
>
> (a) section 2 (fraud by false representation)
>
> (b) section 3 (fraud by failing to disclose information), and
>
> (c) section 4 (fraud by abuse of position)."

Section 3 provides as follows:

> "3 Fraud by failing to disclose information
>
> A person is in breach of this section if he—
>
> (d) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and
>
> (e) intends, by failing to disclose the information—
>
> (i) to make a gain for himself or another, or
>
> (ii)to cause loss to another or to expose another to a risk of loss."

9. So far as payment of council tax is concerned, the liability of persons required to pay and the identification of those persons who are required to pay can be found in section 6 of the Local Government Finance Act 1992. Section 6 provides by subsections (1) and (2) as follows:

> "Persons liable to pay council tax.

> (1) The person who is liable to pay council tax in respect of any chargeable dwelling and any day is the person who falls within the first paragraph of subsection (2) below to apply, taking paragraph (a) of that subsection first, paragraph (b) next, and so on.
>
> (2) A person falls within this subsection in relation to any chargeable dwelling and any day if, on that day—
>
> (a) he is a resident of the dwelling and has a freehold interest in the whole or any part of it;
>
> (b) he is such a resident and has a leasehold interest in the whole or any part of the dwelling which is not inferior to another such interest held by another such resident;
>
> (c) he is both such a resident and a statutory [secure or introductory tenant] of the whole or any part of the dwelling;
>
> (d) he is such a resident and has a contractual licence to occupy the whole or any part of the dwelling;
>
> (e) he is such a resident; or
>
> (f) he is the owner of the dwelling..."

It may be seen from the provisions of section 6 that the liability for payment of council tax is primarily based on residence, albeit the owner is included at the final stage of the sequential list of those liable to pay.

10. On the footing, as is the prosecution case, that the defendant was the freehold owner of the property throughout this period and was herself resident at the property throughout this period, whether with or without others also resident, she would have been potentially primarily liable for the due amount of council tax with regard to that property. That is so because of section 6(2)(a) of the 1992 Act. But the question for present purposes does not relate simply to payment. The question for present purposes is whether she was under a legal duty so to notify the council of the fact, as is alleged, of her own continued residence. It is a feature of this case that the prosecution has been unable, both in the Crown Court and now in this court, to point to any provision of the 1992 Act or of any statutory instrument made pursuant to such Act which imposes such a liability so to notify.

11. So far as section 3 of the Fraud Act 2006 itself is concerned, that is clearly designed to create a new offence. This section extends beyond dishonest positive representations, be they express or be they implied, which are covered by section 2 of the 2006 Act. Section 3 instead relates to dishonest non-disclosure of information where there is a legal duty to disclose. This is a new offence. (Indeed a further new offence is created by section 4 of the 2006 Act relating to fraud by abuse of position.) Dishonest non-disclosure in fact was potentially capable, in appropriate factual circumstances, of giving rise to criminal liability under the provisions of the Theft Act 1968: see for example the case of Firth (1989) 91 Cr.App.R 217. But section 3 of the 2006 Act is plainly designed both to supersede and to supplement the previous legal position prevailing and consequently it should be treated as an entirely new provision. It is a point also to be noted, at all events, that in the present case the prosecution have not sought, by reference to the factual matters covered by count 6, to advance any case of implied false representation. The prosecution have pinned their colours for the purposes of count 6 to section 3 of the 2006 Act.

12. Section 3, however, is specific that for criminal culpability to attach there must be a "legal duty" to disclose such information. The phrase "legal duty" is not defined in the 2006 Act. But there is a very helpful discussion both in the report of the Law Commission which preceded the 2006 Act and also in

the Explanatory Notes to the 2006 Act itself. This court is aware of the formal limitations in general terms on reliance on such materials in construing an Act of Parliament. In the present context, however, it is appropriate to take them into account.

Thus in paragraph 7.28, 7.29 and 7.30 of the Law Commission's report, under the heading of Legal Duty of Disclosure, the following is said by way of illustration of where a "legal duty" may arise:

> "7.28 First, non-disclosure of information should suffice if there is a legal duty to disclose it. Such a duty may derive from statute (such as the provisions governing company prospectuses), from the fact that the transaction in question is one of the utmost good faith (such as a contract of insurance), from the express or implied terms of a contract, from the custom of a particular trade or market, or from the existence of a fiduciary relationship between the parties (such as that of agent and principal).
>
> 7.29 For this purpose there is a legal duty to disclose information not only if the defendant's failure to disclose it gives the victim a cause of action for damages but also if the law gives the victim a right to set aside any change in his or her legal position to which he or she may consent as a result of the non-disclosure. For example, a person in a fiduciary position has a duty to disclose material information when entering into a contract with his or her beneficiary, in the sense that a failure to make such disclosure will entitle the beneficiary to rescind the contract and to reclaim any property transferred under it.
>
> 7.30 It is perhaps unlikely that a person might be under a legal duty to disclose information despite being ignorant of the circumstances giving rise to the duty. On principle, however, we believe that the offence should require knowledge that such circumstances exist, or at least awareness that they might exist."

13. Turning then to the Explanatory Notes to the 2006 Act, it may be noted that in paragraph 18 of the Explanatory Notes the examples given by the Law Commission in paragraph 7.28 and 7.29 of the Commission's report are quoted with clear approval. A further illustration is given in the Explanatory Notes in paragraph 19, which states as follows:

> "For example, the failure of a solicitor to share vital information with a client within the context of their work relationship, in order to perpetrate a fraud upon that client, would be covered by this section. Similarly, an offence could be committed under this section if a person intentionally failed to disclose information relating to his heart condition when making an application for life insurance."

The Judge's ruling

14. So far as the proceedings in the Crown Court below are concerned, the judge expressed some surprise that there was no provision in the statutory regime demonstrating an express obligation upon persons in the position of the defendant to keep a local authority informed of where such a person was living. Having raised this point, he gave the prosecution more time to research the matter. Having been given such time, and having no doubt further sought instructions from the local authority itself, counsel still was unable to locate any express provision of notification to this effect either in the 1992 Act or in any statutory instrument made pursuant to it. But the position of the prosecution remained that such obligation of notification was to be statutorily implied.

15. At all events, it should also be made clear for present purposes that the local authority in this case has also produced no evidence and no document emanating from it by which persons resident within its area are required to notify, or have agreed to notify, the local authority of such residence for council tax purposes. Whether such an obligation to notify could lawfully be imposed by a council by issuing some kind of publication to that effect is not a matter on which we need express any concluded view.

The position does not arise in this case. The position in the present case, on the assumed facts, therefore depends solely upon whether as a matter of law such an obligation can be statutorily implied.

16. The judge throughout was sympathetic to the local authority's position. He clearly, and to an extent understandably, had concerns that the absence of a duty to notify might provide, as the saying is, a fast car and an open road to achieving successful fraud. In the course of discussion, the judge reiterated his initial surprise that there was not somewhere within the statutory provisions an obligation to keep the local authority informed of the defendant's address. Having so stated, he, as we have said, adjourned the matter for a while to enable further research to be made. But that further research achieved nothing.

17. When the matter came back before the judge, the judge said this:

> "I have asked Mr Dennis [counsel then, as now, appearing for the prosecution] to point me to any legislative provision imposing such a duty. He has not sought or today been able to do so. I am surprised if it is the case that there is no provision imposing such a duty, but none is advanced ....
>
> The prosecution in short say that it is obvious that there is such a legal duty, that it is ludicrous to contend otherwise. Every household, they say, has an obligation to tell the local authority if they are residing in a property otherwise how would any local authority have the necessary information to collect council tax? As I said to Mr Dennis during argument, it would surely be a great surprise to everybody if there was no legal duty to give a local authority that information. I remain surprised that I have not been taken to a provision or a document evidencing such a duty. The fact is, however, that I have not been."

The judge then went on to refer to the fact that there was no other evidence, leaving aside the legal position, which could show the existence of such a duty on the facts of this particular case. He concluded that in those circumstances count 6 was unsustainable.

Disposal

18. We can see no real answer to the reasoning and conclusion of the Crown Court judge.

19. There can be no real doubt that on the assumed facts, and assuming that the defendant had herself been resident throughout at this property, as well as being its owner, she would have been legally obliged to *pay* the due amount of council tax. If she did not, the council could, on demand made under the statutory scheme, seek recovery of the sums due in the civil courts. But that cannot of itself, as we see it, connote that she was obliged in law to *notify* the council of her continued residence. It is quite wrong to equate a liability to pay with a liability to notify. It may be, as the judge thought, that one might have expected to find such a provision as to notification in the statutory scheme. But that was a matter for Parliament to decide. The fact is, as we have said, that such a provision simply is not there, either within the primary legislation or in subordinate legislation made pursuant to the provisions of the 1992 Act itself.

20. Mr Dennis sought to say that such an obligation of notification was to be implied into the legislative scheme, either as a matter of "public policy" or as a matter of "common sense" or both. We can accept that there may sometimes be occasions where implications can properly be made into a statutory provision where it is necessary or proper to do so. But we consider, most emphatically, that that is not the proper interpretative approach available here.

21. The matter has to be addressed by relevance to the statutory provisions. As Mr Dennis inevitably conceded, there was no common law relationship between the local authority and the defendant which could give rise to any such duty of notification; nor was there any relevant fiduciary duty or other equitable obligation existing in this regard so as to require notification. The local authority is itself a creature of statute; and if it is to be able to recover council tax from those resident within its area then it must look to statutory authority for so doing. But so far from there being any obligation of notification set out in the statutory scheme, the indications are in fact positively to the contrary.

22. For example, broad obligations are placed on a local authority, for instance under section 22 of the 1992 Act, through its listing officer to compile and maintain a valuation list. There is no reason in principle why a local authority, if Parliament saw fit, itself should not be required to ascertain the relevant information which would reveal the person or persons liable to pay council tax. Indeed, that the relevant obligations are on the local authority in this regard seems to us to be confirmed by various aspects of the Council Tax (Administration and Enforcement) Regulations 1992 which were made pursuant to the provisions of section 14 and Schedule 2 of the 1992 Act itself. Thus Schedule 2 to the 1992 Act, by paragraph 2, specifically empowers a local authority to make regulations, amongst other things, which might include provision that any person appearing to an authority to be a resident, owner or managing agent of a particular dwelling, to supply to the authority such information as fulfils a number of conditions whereby: (1) it is in the possession or control of the person concerned; (2) the authority requests the person concerned to supply it; and (3) it is requested by the authority for the purpose of identifying the person who in respect of any period specified in the request is or will be the liable person in relation to that dwelling ... and so on. The point to be noted, however, is that the obligation is placed upon the authority to make such a request before the person concerned is required to supply the information sought.

23. That enabling provision was then duly taken up in the Council Tax (Administration and Enforcement) Regulations 1992. In particular in Regulation 3 the following is provided:

> "3.—Information from residents, etc.
>
> (1) A person who appears to a billing authority to be a resident, owner or managing agent of a particular dwelling shall supply to the authority such information as fulfils the following conditions—
>
> (a) it is in the possession or control of the person concerned;
>
> (b) the authority requests (by notice given in writing) the person concerned to supply it; and
>
> (c) it is requested by the authority for the purposes of identifying the person who, in respect of any period specified in the notice, is the liable person in relation to the dwelling.
>
> (2) A person on whom such a notice as is mentioned in paragraph (1) is served shall supply the information so requested—
>
> (a) within the period of 21 days beginning on the day on which the notice was served; and
>
> (b) if the authority so requires, in the form specified in the request.
>
> (3) In paragraph (1)—
>
> (a) 'managing agent' means any person authorised to arrange lettings of the dwelling concerned; and
>
> (b) the reference to the liable person is a reference to a person who is liable (whether solely or jointly and severally) to pay to a billing authority, in respect of a particular dwelling, an amount in respect of council tax; and includes a reference to a person who in the opinion of the authority will be so liable."

24. Moreover, reference may also be made to Regulation 16, which in part (at the relevant time) provided as follows:

> "16.- Correction of discount assumptions

(1) Subject to paragraph (2), where a person—

> (a) has been informed in accordance with any provision of demand notice regulations of an assumption as to discount made in his case; and
>
> (b) at any time before the end of the financial year following the financial year in respect of which the assumption is made has reason to believe that the chargeable amount is not in fact subject to any discount, or is subject to a discount of a smaller amount

he shall, within the period of 21 days beginning on the day on which he first has reason so to believe, notify the authority in writing of his belief."

It may be noted that the Council had not placed any reliance in this particular case on Regulation 16. But it is also to be observed that that regulation *expressly* requires notification to the authority in the circumstances there arising. The point thus is that the obligation to notify in such circumstances is made explicit; it is not left to any implication.

25. All these various provisions are therefore against the kind of implication which Mr Dennis would seek to introduce into the statutory scheme. Moreover, Mr Dennis struggled to identify the precise form of wording which he says should statutorily be implied. Ultimately he felt obliged to accept that such an implied obligation of notification would extend to all those specified in section 6(2) of the 1992 Act itself. That is potentially an enormous class of people. We asked him, if his interpretation was right, was there then a large department at Hertsmere Borough Council devoted to dealing with the doubtless many hundreds of notifications from persons moving into the area of their council in the course of any month? We got the impression that there was no such department at all.

26. Not only was Mr Dennis in difficulties in formulating the words which he said should be implied, but more than that, the consequences are potentially very concerning if he is right. It would, for example, potentially connote that a young person - perhaps, one may postulate, a foreign student who moved into the area of this local authority as a licensee - being required to give notification of the fact of residence. If such a person did not (and in the real world such a person doubtless would not) given such notice, that person would, on the prosecution's argument here, potentially be liable to prosecution. Mr Dennis said that does not matter because the case could only be made good if dishonesty were proved and doubtless in such a case dishonesty could not be proved. Well, may be that is so. But the point remains that on his argument such people are at least potentially vulnerable to arrest or to prosecution under section 3 of the 2006 Act: a position which cannot be relished and certainly a position which should not be left to arise as a result of an asserted statutory implication where the relevant statute itself is silent on the point.

27. Moreover, a conclusion that such an implied duty of notification does not arise under the statutory scheme relating to payment of council tax by no means leaves a local authority without remedy. A local authority is in a good position to get the information which it needs. For example, it will almost invariably know who the registered owner of the property is and can always seek, in appropriate circumstances, information under Regulation 3. Moreover, where failure to pay council tax has arisen, the local authority will have a remedy in the form of civil recovery in the civil courts and of subsequent enforcement thereafter. Further, in circumstances where dishonesty is properly thought to be potentially present, then one would have thought that it will, on the facts, frequently be the case that the local authority will be in a position to rely on the provisions of section 2 of the 2006 Act; we making it clear that false representations for the purpose of that section may be implied as well as express. But even if there is no viable criminal sanction available, there must still remain, as we have said, the availability of civil recovery. At all events, the fact that, as we conclude, no implication of the kind argued for can be made does not give rise to such bizarre consequences that that conclusion needs to be revisited. There is no reason to think that Parliament had not considered that sufficient alternative remedy was available under the statutory scheme (with subordinate regulations) as drafted.

Conclusion

28. Our conclusion therefore is that the judge was quite right in his ruling on this particular point. There is no room for the statutory implication of a legal duty to notify as contended for by the prosecution. Accordingly, this appeal is dismissed.

29. Although the name of the defendant shall be anonymised, we make clear that no reporting restrictions apply to this judgment.

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