THE COURT OF APPEAL

Record No. 164 & 165CJA/2017

Birmingham P.
Mahon J.
Edwards J.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND–

ASTON CARPETS AND FLOORING LIMITED, AND BRENDAN SMITH

RESPONDENTS

JUDGMENT of the Court delivered on the 20th day of June 2018 by Mr. Justice Mahon

1. Both respondents were charged with Engaging in and Implementing an anti competitive Agreement contrary to s. 4(1), 6(1), 8(1) and 8(6) of the Competition Act 2002, as amended. The second respondent was also charged with committing an act with intent to impede a prosecution contrary to s. 7(2) and 7(4) of the Criminal Law Act 1997. Both were returned for trial on the 14th September 2015 and the commencement of their trial was fixed for the 24th April 2017. Pleas of guilty to the charges were entered by the respondents in early 2017, and they were sentenced on the 31st May 2017 at the Central Criminal Court. The first respondent was fined €10,000, and the second respondent was fined €7,500 in respect of the first count against him, and to a term of imprisonment of three months suspended for a period of two years, in respect of the second count against him. The second respondent was also disqualified from acting as a company director for a period of five years pursuant to s. 839 of the Companies Act 2014.

2. The applicant applies to this court pursuant to s. 2 of the Criminal Justice Act 1993 for a review of the sentences imposed on both respondents on the basis that the said sentences were unduly lenient.

3. Section 2 of the Criminal Justice Act provides as follows:-

> *"(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the sentencing court) on conviction of a person on indictment was unduly lenient, he may apply to the (Court of Appeal) to review the sentence.*
>
> *(2) An application under this section shall be made on notice given to the convicted person within 28 days from the day on which the sentence was imposed.*
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> *(3) On such an application, the Court may either:-*
>
> > *(a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or*
> >
> > *(b) refuse the application."*

4. The background facts in respect of the cases against both respondents are as follows. Between the 3rd July 2012 and the 30th April 2013, the second respondent, acting as a director and manager of the first respondent implemented and then engaged in an anti competitive agreement with David Radburn, the operator of another flooring company, Carpet Centre (Contract) Limited. The initial approach which subsequently led to the anti-competitive agreement entered into was by the second respondent to Mr. Radburn in early 2011. Both companies were said to be the two major carpet and flooring companies operating in the area of Dublin at the time. It was alleged that over the course of approximately a two year period the first respondent and Carpet Centre (Contracts) Limited shared tendering information with each other in relation to sixteen separate open market tenders for carpeting contracts. It is alleged that they agreed in advance which of the two companies would be given commercial advantage in relation to each particular tender. It was alleged that then ensured that the company nominated as the favourite for a particular contract would tender a lower price for the same work than the tender from the company agreed to be the loser. In the course of this unlawful activity the companies shared confidential and price sensitive information. The second count in respect of the second respondent arose from evidence that in an effort to frustrate or impede the investigation and prosecution of the anti-competitive offences the second named respondent actively sought to persuade Mr. Redburn to delete relevant e-mails.

5. It was alleged that the parties implemented and engaged in anti competitive agreements in relation to sixteen successfully tendered transactions, with an average contract price of €137,000. The total value of the tenders won by the Carpet Centre was €617,674.72 while the value of the bids said to have been won by the first respondent was €758,221.42. Two of the largest contracts related to the multi-national companies of Pay Pal, Dell and Google. A number of other contracts in respect of which the parties bid were unsuccessful. The practice operated between both companies ended on the 30th April 2013 when the Commission,

assisted by gardaí raided the offices of both companies. Neither respondent had previous convictions. The managing director of Carpet Centre, Mr. Radburn, was granted immunity by the Competition and Consumer Protection Commission in return for his co-operation in relation to the relevant investigation of both companies.

6. The second respondent was engaged in the carpet business since 2003. His business was sold to Crean Mosaics for a significant sum of money in 2007. He continued to work in company for its new owner until he left it in 2014 whereupon he commenced a new business venture. The fine imposed on the first respondent by the Central Criminal Court was and is not therefore a liability or a company with which the second respondent either then or now has any interest or involvement.

7. The grounds of appeal relied upon by the applicant were, in respect of both applications, the following:-

> (i) the learned sentencing judge erred in principle by in effect applying *DPP v. Duffy* [2009] IEHC 208 as a sentencing guideline. The maximum penalty enacted by the Oireachtas for the Competition Act offenses is a prison sentence of ten years and / or a fine of €5m. By applying the *Duffy* decision in the manner in which he did the learned sentencing judge dramatically reduced the spectrum of potential penalties open to him;
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> (ii) the learned sentencing judge erred in principle in failing to attach any significance to the significant aggravating fact that the victims of this cartel were in the main large companies expanding, or opening new premises in this jurisdiction at a time of deep recession;
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> (iii) the learned sentencing judge erred in principle in observing that the respondent and Mr. Radburn (or by extension Carpet Centre (Contracts) Limited) were not a cartel in circumstances where the evidence established the existence of a cartel and same formed the basis of the offence to which the respondents had pleaded guilty;
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> (iv) the learned sentencing judge erred in drawing a significant distinction between an anti competitive scheme as perpetrated on consumers as oppose to other commercial entities. In doing so the learned sentencing judge failed to give any weight to the fact that anti competitive agreements are clandestine in nature. Moreover there was no evidence before the learned sentencing judge to the effect that the victims of the crime, whether consumers or commercial entities, might have been able to detect the unlawful conduct by way of exercising some element of independent judgment.
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> (v) the learned sentencing judge erred in principle by imposing penalties which failed to adequately reflect the principle of specific deterrence. In particular the fines bore no rational relationship to the improperly earned profits earned as a result of the anti competitive conduct;
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> (vi) the learned sentencing judge erred in principle by imposing penalties which failed to adequately reflect the principal of general deterrence, and
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> (in the case of the second respondent only)
>
> (vii) the learned sentencing judge erred in failing to attach sufficient weight to the fact that the second respondent attempted to obstruct the investigation by means of a wilful and deliberate attempt to destroy evidence. Moreover, the learned sentencing judge failed to relate the seriousness of the underlying offence (anti competitive conduct) that was been investigated to the active obstruction)

8. Both respondents were separately legally represented. As already indicated there is no relationship between the respondents since 2014.

9. The first respondent, in submissions made to the learned sentencing judge, identified the following factor which it maintained ought to be taken into consideration in mitigation of any penalty to be imposed. These were:-

> (i) the plea of guilty well in advance of a likely trial date;
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> (ii) the person who was actually responsible on a practical level for the criminal conduct was the second respondent, and no other officer of the first respondent was prosecuted;
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> (iii) the first respondent was sold by the second respondent to Queen Mosaics for €2.5m, and Queen Mosaics were required to borrow in order to affect the purchase;
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> (iv) the first respondent did not prosper commercially after 2008 because of the recession;
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> (v) the first respondent was co-operative and did not seek to wind its operations down in the face of the charges preferred against it, and
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> (vi) the first respondent engaged in legal representation at considerable cost.

10. The second respondent relied on the following mitigating factors:-

> (i) an early plea of guilty;
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> (ii) the provision of *some limited assistance*;
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> (iii) the lack of personal financial benefit to himself and the overall relatively small additional profit to the company earned as a result of the criminal activity;
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> (iv) his personal difficulties including a history of alcohol and cocaine addiction, self harm and suicidal ideation, and
>
> (v) no previous convictions

11. In sentencing the respondents, the learned sentencing judge relied heavily on the decision of the High Court in *DPP v. Duffy Motors Newbridge Limited* [2009] IEHC 208 and the judgment of McKechnie J.. The appellant maintains that he did so erroneously.

The learned sentencing judge concluded his sentencing remarks as follows:-

> *"So, how do I approach this matter? It seems to me that I must be guided by Mr Justice McKechnie's decision and it seems to me, in those circumstances, that since the decision, the conduct he was dealing with was in - exponentially more serious the appropriate penalty in respect of the company is a fine of €7,500 on each of the two counts.*
>
> *Now, in respect of the individual, the human person, as it were, he bears a responsibility for the matter as well. I think an appropriate figure in respect of the charge under the competition acts is the same, which is €7,500, but I do take a very serious view of the - of what I have described as the offence against public justice and it seems to me that in that case a suspended prison sentence is appropriate and it may be very modest, but such serious offence must be - must be marked and accordingly, therefore, I will impose a sentence on him, very modest sentence, but nonetheless the seriousness of the matter must be marked by three months' imprisonment which I will suspend for a period of two years on his entering into the usual bond."*

12. On being advised by prosecution counsel, Mr. Staines BL, that the company was facing just a single count, the learned sentencing judge varied the penalty by imposing a single fine of €10,000.

13. The case of *DPP v. Duffy/Duffy Motors (Newbridge) Limited* concerned the involvement of a cartel operating a detailed scheme of price fixing in respect of the sale, delivery and trading in of Citroen motor vehicles.

14. In the course of his lengthy judgment in that case McKechnie J. stated (at para 35):-

> *"In Irish Law, it has been established for many years that any sentence imposed must reflect the crime and the criminal. It must be rational in its connection to both. It must be proportionate. Therefore, factors such as the seriousness of the offence (culpability, harm, behaviour etc.), the circumstances in which it is committed and the prescribed punishment must be looked at. As of course must be any aggravating circumstance as well as any mitigating one. The latter would include, if the evidence so established, matters such as a guilty plea, co-operation, remorse, absence of previous convictions, good character, likelihood of re-offending etc. This list must be added to by any other individual factor which is legally capable of attracting credit. Having done this exercise the appropriate sentence to fit the crime and the offender is then arrived at."*

15. McKechnie J. also quoted Werden from an essay entitled *"Sanctioning Cartel Activity: Let the Punishment fit the Crime"* in the course of a seminar organised by the Irish Competition Authority in November 2008:-

> *"Cartel activity is properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm. Cartel activity robs consumers and other market participants of the tangible blessings of competition. Cartel activity is never efficient or otherwise socially desirable; cartel participants can never gain more than the public loses. Cartel activity, therefore, is not like tortuous conduct, which is redressed with a liability rule focussing on the harm to victims and providing the incentive to take due care. Like other property crimes, cartel activity should be prohibited rather than merely taxed. As Judge Richard Posner explained of criminal sanctions generally, they "are not really prices designed to ration the activity; the purpose so far as possible is to extirpate it.""*

16. In his judgment in *DPP v. Manning* (Unreported, High Court, 9th February 2007), McKechnie J. remarked as follows:-

> *"This type of crime is a crime against all consumers and is not simply against one or more individuals. To that extent it is different from other types of crime, and while society has an interest in preventing, detecting and prosecuting all crimes, those which involve a breach of the Competition Act are particularly pernicious. In effect, every individual who wished to purchase, for cash, a vehicle from these dealers over the period which I have mentioned was liable to be defrauded, and many surely were by this scheme and by the practices which this cartel operated unashamedly. These activities in my view have done a shocking disservice to the public at large."*

17. In the instant cases the profits made as the result of unlawful cartel activity were, to use a term of the learned sentencing judge *"modest"*. Equally, it must be said that the customers affected, or potentially affected, by the unlawful cartel activity were relatively few in number and, in general, confined to large corporations or businesses, rather than, as was the case, in *Duffy Motors*, the larger number of individual car buying members of the public.

18. The maximum penalties provided by statute for Competition Act offences are considerable. They are a prison sentence of ten years and/or a fine of €5m. These maximum penalties have been increased since the *Duffy Motors* case, and were then a maximum sentence of two years imprisonment and a maximum fine of €3m. In *Duffy Motors* fines were imposed on Mr. Duffy, the director of the company totalling €50,000. Fines of a similar level were imposed on the company, taking the fines in total in that case to €100,000.

19. The law in relation to undue leniency applications and the principles that ought to be applied by this court are well settled. In the often quoted judgment of the Court of Criminal Appeal (Barron J.) in the case of *DPP v. McCormack* [2000] 4 I.R., the following is stated (at p. 359):-

> *"Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon those two factors. It is only when the penalty is below the range so determined on this basis that the question of undue leniency may be considered."*

Decision

20. The applicant is critical of the learned sentencing judge's referral to *Duffy Motors* decision as a sentencing guideline because of the subsequently introduced increased penalties for this type of offending. However he expressly did so in the context of the increased penalties having been introduced and doing so in those circumstances did not constitute an error of principle.

21. It is a feature of these cases that the first respondent was, for all practical purposes, a company very much controlled by the second respondent at the time the offences were committed. While no direct personal consequential financial gain for the second respondent was identified, there was clearly an element of indirect gain for him in the sense that he was in receipt of an income from the company and in that his personal prosperity benefited from the prosperity of the company. Be that as it may, the position now is,

following the respondents parting company with each other that the first respondent faces the considerable liability of having to pay a substantial fine in circumstances where its current owners and shareholders were in no way responsible for the criminal conduct in question.

22. The court is satisfied that the fine of €10,000 imposed on the respondent company was appropriate and within the discretion available to the learned sentencing judge. The undue leniency application therefore in respect of the first respondent will be dismissed.

23. In relation to the second respondent, the court is satisfied that the fine of €7,500 imposed on him was not just lenient but was unduly lenient. The second respondent was the person with overall responsibility for the events that occurred in that he effectively orchestrated them and indirectly stood to benefit from them. The second respondent was in reality the person who orchestrated, authorised and conducted the criminal behaviour in question. In the court's view a fine of €7,500 was unduly lenient. The fine should more closely have reflected the actual financial gain accruing from the activity in question which was in the region of €31,000. The court is also of the view that, save in exceptional circumstances, a fine should be for a sum greater than the financial gain so that it satisfies the requirement that it is punitive and acts as a deterrent. The court will therefore impose a fine of €45,000 on the second respondent and will hear submissions as to a reasonable period in which to pay that fine. In respect of the suspended prison sentence imposed on the second respondent the court is satisfied that this was reasonable and proportionate, and indeed appropriate, and therefore will not interfere with it. Any activity undertaken to impede a prosecution for offences committed is itself a serious crime and will invariably attract a sentence of imprisonment.

24. In summary therefore, the second respondent's fine is increased to €45,000 and his three month suspended prison sentence remains unaltered as does his disqualification to act as a company director, and the first named defendant's fine of €10,000 remains unaltered. Disqualification remains in place. Six months to pay €45,000 from today.