

Neutral Citation Number: [2012] EWCA Crim 671

Case No: 201102762 C5 & 201106316 C5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM LIVERPOOL CROWN COURT

His Honour Judge Gilmour QC

T20107397

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2012

Before :

LADY JUSTICE RAFFERTY DBE

MR JUSTICE HOLMAN

and

MR JUSTICE MADDISON

Between :

(1) TRACEY NOLAN

Appellants

(2) ALISON HOWARD

- and -

REGINA

Respondent

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Charlotte Kenny (instructed by **CPS (Fraud Group North)**) for the **Respondent**

Martin Taylor (instructed by **Kangs Solicitors**) for the **1st Appellant**

Ray Herman (instructed by **Quinn Melville Solicitors**) for the **2nd Appellant**

Hearing date: 3rd February 2012

Judgment

As Approved by the Court

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Lady Justice Rafferty:

1. As part of Operation Lilywhite, with 22 other defendants the Appellants were charged with conspiracy to commit fraud in contravention of Section 35 of the Tax Credits Act 2002 contrary to section 1(1) of the Criminal Law Act 1977. On 7 February 2011 at the Crown Court at Liverpool both appellants, both 47, pleaded guilty to a substantive count of fraud under section 35 and on 15 April 2011 were sentenced to a suspended sentence order comprising for Nolan 7 and for Howard 12 weeks imprisonment, suspended for Nolan for 12 and for Howard for 18 months. Nolan also faced a requirement of residence for 9 months, Howard a requirement of 80 hours unpaid work. All co-accused pleaded guilty to conspiracy to commit fraud, save two who were acquitted.
2. On 20th October 2011 the Full Court raised the question whether Nolan were properly convicted of the offence to which she pleaded guilty and in particular whether her passive receipt of funds and failure to report the matter amounted to fraud under the section indicted. It granted leave to appeal and Howard's application has been referred. We grant leave.

The Substantive Counts

3. **Count 4**, to which Nolan pleaded guilty, was particularised as follows: "Tracey Nolan between the 1st August 2005 and the 24th February 2007 was knowingly concerned in fraudulent activity namely permitting payments of Tax Credits to which she knew she was not entitled into her bank account." **Count 5**, to which Howard pleaded guilty, was similarly particularised with the dates expressed as between the 4th July 2006 and the 23rd January 2007. Each count was indicted as contrary to S35 Tax Credits Act 2002.
4. S35 Tax Credits Act 2002 creates an offence:

"... if [an individual] is knowingly concerned in any fraudulent activity undertaken with a view to obtaining payments of a tax credit by him or any other person".
5. The indicted benefits fraud involved falsification of tax credit claims between 2004 and 2007. Suspicion arose in 2004 during a routine audit. Liam Stanford an experienced Administration Office at the Tax Credit Office in Preston was at the centre. He had diverted monies from the Revenue by falsifying claims and inflating payments for working tax and child tax credit by manipulation of a computer system, causing greater amounts to be paid into the accounts of various claimants.
6. Alone among co-defendants Nolan had a genuine claim to Disability Living Allowance albeit at the lower rate. In 2000 she submitted a legitimate claim for disability benefits and received tax credits and incapacity benefit, although she was not entitled to and did not at that stage receive Disability Living Allowance which attracted a higher care component. However, on 13th September 2005, Stanford accessed her records, added and then removed the higher care component, and added a disability element in respect of her son Thomas. In October 2005 he added a further disability element in respect of her daughter Stephanie. He further amended the components in November 2005 and March 2006. The final amendments resulted in a

claim which falsely showed her and both her children entitled to Disability Living Allowance with the higher care component. Throughout the period of the claim, the money was paid into an existing account in the joint names of Nolan and her partner Brian Nolan (with whom Stanford had contact). Nolan was the only person using the account.

7. On 16th August 2006 a completed review form showed all the inflated benefits. Nolan signed and returned it confirming that she had no amendments, and that she agreed the details. Although she realised she was being overpaid, she did not rectify the errors or notify the Benefits Agency and she kept the money. The period representing her admission of dishonesty was approximately 1st August 2005 to 24th February 2007, the overpayment £12,023.46.
8. **Howard** had been overpaid £19,014.91 and was aware of being overpaid between 4th July 2006 and 23rd January 2007. Her initial legitimate claim was processed on 13th February 2004. However on 17th January 2006 Stanford began to access her records and to add disability elements in respect of herself and her child to which neither was entitled. It was the Crown's case that Brian Nolan was involved because documents relating to Howard's claim were found at Stanford's address in an envelope marked "Brian". The false backdated claim for disability produced a payment of £1,700 on 23rd January 2006. Thereafter Stanford backdated other claims producing some larger payments in February 2006. Further significant alterations were made in June /July 2006 when he added a disability element also backdated in respect of another child. The changes meant that Howard received significantly increased weekly payments. In August 2006 Stanford added an entitlement to the higher component of Disability Living Allowance to which she was not entitled, introducing payments into her bank account much higher than normal.
9. Interviewed on 21st February 2007 Howard agreed she knew Stanford, who had suggested she might not be getting the right amount of benefits, and said he would look after it for her. He contacted her to take some employment details and she did not hear from him thereafter. When she later bumped into him in the pub, she bought him a drink.

Grounds of Appeal against conviction

10. Though the Appellants entered guilty pleas it is now submitted that the particulars did not disclose an offence since there was no procurement of the overpayment and each Appellant's passive receipt and failure to report the matter did not amount to "fraudulent activity" as required by s35 Tax Credit Act 2002.
11. Further, Nolan accepted that by reason of the quantum paid (£3,426) she had reasonable cause to suspect that Stanford had recorded false details. She also accepted that she had a dishonest state of mind whilst continuing to accept the fraudulently obtained payments. There was no evidence that she had made any false statement or false declaration. Counsel for the Crown and for the Appellants all apologise that s/he failed to analyse the law correctly. The Appellants contend that, absent any statutory definition to the contrary, the ordinary reading of "fraudulent activity" refers to positive acts of misrepresentation with a view to gain.

12. The offence is argued to be complete once the offender is knowingly concerned in a fraudulent act with a view to obtaining. Knowledge that an offence might have been committed in the past and may be committed in the future cannot amount to participation in the fraudulent activity. The Crown is said wrongly to have characterised the Appellants' failure to contact the authorities or failure to cancel the banking arrangements as an "ongoing course of conduct" when in fact it can only be, at its highest, a failure to act. Further, the Crown relied on evidence that each Appellant continued to withdraw money as evidence of participation when it could only be evidence from which it might be inferred that she knew the payments were incorrect. Accordingly, each contends that there was no evidence that she was knowingly concerned in fraudulent activity, that her plea of guilty was wrongly entered and that her conviction should be quashed.
13. The Respondent Crown, resisting the appeal, points out that Nolan had pre-trial made a formal offer of a plea to a substantive offence under the Tax Credits Act 2002 on the basis that she had submitted her claim for tax credit in good faith unaware of the activities of Stanford, was quickly aware that the level of payments into her account far exceeded her entitlement but continued to allow them to be made, and then to withdraw or spend the money.
14. The Crown accepted that the initial application form for tax credit was not processed by Stanford (as had been initially thought) but submitted to the central office on Merseyside to be processed in the normal way. However, soon after its initial capture the application was accessed and manipulated by Stanford. This involved dishonest amendments to show both Nolan and her children as in receipt of the higher care component of Disability Living Allowance. Howard's plea on a written basis was that on or about 4th July 2006 she discovered that £3,426 had been paid into her account and realised that Stanford must have been recording false details on her behalf. She accepted that she acted dishonestly in continuing to receive the fraudulent payments, which she spent.
15. The Full Court summarised the Crown's case as follows:

"Payments in excess of those to which the appellant was entitled were paid into her bank account by the benefits agency. She appreciated that she was receiving more than her entitlement and did nothing to stop the overpayment. The fraud was said to be deliberately doing nothing to stop the overpayments being made"

The Court went on to identify the issue as:

"...whether in such a case where there has been no procurement by the recipient of the overpayment being made but the case is merely one of passive receipt and failure to report the matter there is an offence under section 35 which requires the defendant to be concerned in a fraudulent activity... not passivity but activity...with a view to obtaining payments therefore the activity must be undertaken before the payments or anticipated payments are made".

Nolan

16. The offence to which Nolan pleaded guilty represented an ongoing and extended course of conduct during which she repeatedly and regularly permitted the receipt into her account of payments of tax credit to which she knew she was not entitled. She accepted that within three months of the claim being made she knew she was receiving payments to which she was not entitled. The payments extended over some 16 months. She repeatedly withdrew or spent the monies received in the knowledge or at least the expectation that the dishonest payments would continue. In the circumstances, the Crown disputes that as a matter of law Nolan can be characterised as a passive recipient.
17. It argues that the fraudulent activity is characterised by:
 - i) The ongoing permitted use of the account to receive the money. Following a conscious decision not to inform the authorities of her non-entitlement, permission cannot be passive;
 - ii) The ongoing withdrawal or spending of the money to which she knew she was not entitled;
 - iii) The completion of a Tax Credit review form in April 2006 (in the case of Nolan) dishonestly confirming as correct the basis upon which payments were made. The effect of this positive act was to perpetuate the dishonest scheme and to ensure continued receipt of tax credits to which she knew she was not entitled. All this activity was with a view to obtaining tax credits within the meaning of the Act.
18. The Crown accepts that S35 requires that the fraudulent activity be undertaken with a view to tax credits being obtained. The positive decision by Nolan not to notify the authorities of the over-payments and the consequent act of permitting the account to be used was, it argues, with a view to continuing receipt of regular payments. Furthermore she continued to spend the monies in the knowledge that regular and ongoing payments were being and would be made. A schedule of the payments and subsequent withdrawals of cash is attached at Appendix 1. Consequently, so the submission goes, the offence is made out on the facts and Nolan's conviction safe.

Howard

19. Howard maintains that she behaved passively and was not concerned in the fraudulent activity which caused the payments to be transferred to her account. A schedule of the payments to the Appellant and subsequent withdrawals of cash is attached at Appendix 2.
20. It is in any event arguable that her basis of plea, having realised on her return from holiday that Stanford was dishonestly inflating her payments of tax credit, concedes that at that point at the latest she become concerned in the fraudulent activity by continuing to allow payments to be made into her account. Even if (contrary to her admission) she had not realised Stanford was manipulating her account, the offence to which she pleaded guilty represented an ongoing course of conduct during which she

repeatedly permitted the receipt into her account of payments to which she knew she was not entitled. Furthermore, she also continued to spend the money.

Conclusion

21. We confess we are puzzled by why the Crown sought to indict this offence. The dishonesty of each Appellant was not in dispute, and it would not have been difficult to plead a count under a different statute or even statutes which would uncontroversially have caught the offending. Be that as it may, the task for this court is to consider whether the concern ventilated by the Full Court is on closer examination made out on these facts. After anxious consideration we have concluded that it is.
22. Absent authority or statutory comparators to illumine the debate, the approach must be simple, and is the better for it. The pleading required the Crown to prove that each Appellant behaved – we chose a neutral verb – in a way which was with a view to obtaining payments of tax credit. That the particulars drafted by the Crown plead “knowingly permitted” cannot be dispositive of the issue. A strict reading of the section requires proof of behaviour calculated to achieve, rather than calculated to capitalise upon what had already been achieved. On these facts, permitting her account to be used by Stanford does not prove that either Appellant behaved so that, prospectively, he could perpetrate the fraud. The Crown’s allegation was that by the time each realised that her account was richer than it should have been, the fraudulent manipulation had occurred, that is, it was in the past. That each continued dishonestly to use funds in her account could, as we have said, without difficulty have been reflected in counts differently phrased and particularised.
23. It is true that there is some factual distinction to be made between Nolan and Howard and that on a pure construction it is arguable that one might succeed and another might be less likely to succeed. However, we are confident that the justice of the case requires resolution to be in common. We therefore quash, as not made out in law, convictions in respect of each Appellant.

APPENDIX 1

Tax Credit payments to the account numbered 30-96-85 01376392 in the name of Mr B and Mrs T A NOLAN

26/08/2005	£1,034.88
19/09/2005	£ 237.16
19/09/2005	£ 274.89
20/09/2005	£ 432.67
20/09/2005	£ 319.00
17/10/2005	£ 432.64
19/10/2005	£ 218.52
19/10/2005	£ 579.72
14/11/2005	£ 579.66
24/11/2005	£ 360.38
12/12/2005	£ 703.12
09/01/2006	£ 703.12
17/01/2006	£ 861.08
06/02/2006	£ 794.64
06/03/2006	£ 794.64
17/03/2006	£ 154.44
03/04/2006	£ 652.74
28/04/2006	£ 796.86
17/05/2006	£ 255.78
26/05/2006	£ 801.70
01/06/2006	£ 736.23
26/06/2006	£ 734.73
27/06/2006	£ 671.00
24/07/2006	£ 669.09
21/08/2006	£ 668.03
23/08/2006	£ 594.88
18/09/2006	£ 595.21
16/10/2006	£ 593.63
13/11/2006	£ 593.92
11/12/2006	£ 593.32
08/01/2007	£ 593.32

Large Payments TC's/Cash Withdrawals

Acct Number 30-96-85 01376392

Mr B and Mrs T A Nolan

26/08/2005 Payments In £1,034.88
26/08/2005 Cash withdrawal £200.00

19/09/2005 Payment In £237.16
19/09/2005 Payment In £274.89
19/09/2005 Cash withdrawal £200.00

20/09/2005 Payment In £319.00
20/09/2005 Payment In £432.67
20/09/2005 Cash withdrawal £200.00

19/10/2005 Payment In £218.52
19/10/2005 Payment In £579.72
19/10/2005 Cash withdrawal £120.00

14/11/2005 Payment In £579.66
15/11/2005 Cash withdrawal £200.00
16/11/2005 Cash withdrawal £200.00
17/11/2005 Cash withdrawal £200.00

12/12/2005 Payment In £703.12
13/12/2005 Cash withdrawal £200.00
15/12/2005 Cash withdrawal £200.00

09/01/2006 Payment In £703.12
10/01/2006 Cash withdrawal £200.00
11/01/2006 Cash withdrawal £200.00

06/02/2006 Payment In £794.64
07/02/2006 Cash withdrawal £200.00
08/02/2006 Cash withdrawal £200.00
09/02/2006 Cash withdrawal £200.00
10/02/2005 Cash withdrawal £200.00

06/03/2006 Payment In £794.64
07/03/2006 Cash withdrawal £200.00
09/03/2006 Cash withdrawal £200.00
13/03/2006 Cash withdrawal £200.00

03/04/2006 Payment In £652.74
04/04/2006 Cash withdrawal £200.00

28/04/2006 Payment In £796.86
02/05/2006 Cash withdrawal £200.00
03/05/2006 Cash withdrawal £200.00

26/05/2006 Payment In £801.70
30/05/2006 Cash withdrawal £200.00
31/05/2006 Cash withdrawal £200.00

01/06/2006 Payment In £736.23
05/06/2006 Cash withdrawal £200.00
06/06/2006 Cash withdrawal £200.00

26/06/2006 Payment In £734.73
27/06/2006 Payment In £671.00
28/06/2006 Cash withdrawal £800.00

24/07/2006 Payment In £669.09
24/07/2006 Cash withdrawal £100.00
27/07/2006 Cash withdrawal £200.00

21/08/2006 Payment In £668.03
23/08/2006 Payment In £594.88
24/08/2006 Cash withdrawal £200.00
29/08/2006 Cash withdrawal £200.00

18/09/2006 Payment In £595.21
20/09/2006 Cash withdrawal £200.00
21/09/2006 Cash withdrawal £200.00

16/10/2006 Payment In £593.21
17/10/2006 Cash withdrawal £200.00
19/10/2006 Cash withdrawal £200.00

APPENDIX 2

Tax Credit payments to account number 30128260 206985 in the name of Miss Alison HOWARD

19/02/2004	£88.30	25/01/2005	£130.99
19/02/2004	£126.16	01/02/2005	£130.99
24/02/2004	£124.16	08/02/2005	£130.99
02/03/2004	£126.14	15/02/2005	£130.99
09/03/2004	£126.14	22/02/2005	£130.99
16/03/2004	£126.14	01/03/2005	£130.99
23/03/2004	£126.14	08/03/2005	£130.99
30/03/2004	£126.14	15/03/2005	£130.99
13/04/2004	£124.45	22/03/2005	£130.99
20/04/2004	£123.95	29/03/2005	£130.99
27/04/2004	£123.95	05/04/2005	£130.99
04/05/2004	£123.95	12/04/2005	£133.96
11/05/2004	£123.95	19/04/2005	£133.68
18/05/2004	£123.95	26/04/2005	£133.68
25/05/2004	£123.95	03/05/2005	£133.68
27/05/2004	£ 28.34	10/05/2005	£133.68
27/05/2004	£133.02	17/05/2005	£133.68
01/06/2004	£130.99	24/05/2005	£133.68
08/06/2004	£130.99	31/05/2005	£133.68
15/06/2004	£130.99	07/06/2005	£133.68
22/06/2004	£130.99	14/06/2005	£133.68
29/06/2004	£130.99	21/06/2005	£133.68
06/07/2004	£130.99	28/06/2005	£133.68
12/07/2004	£130.99	05/07/2005	£133.68
20/07/2004	£130.99	11/07/2005	£133.68
27/07/2004	£130.99	19/07/2005	£133.68
02/08/2004	£130.99	26/07/2005	£133.68
10/08/2004	£130.99	01/08/2005	£133.68
17/08/2004	£130.99	09/08/2005	£133.68
24/08/2004	£130.99	16/08/2005	£133.68
31/08/2004	£130.99	23/08/2005	£133.68
07/09/2004	£130.99	30/08/2005	£133.68
14/09/2004	£130.99	06/09/2005	£101.57
21/09/2004	£130.99	07/09/2005	£ 17.70
28/09/2004	£130.99	07/09/2005	£104.43
05/10/2004	£130.99	08/09/2005	£103.80
12/10/2004	£130.99	13/09/2005	£100.28
19/10/2004	£130.99	19/09/2005	£ 6.33
26/10/2004	£130.99	20/09/2005	£135.11
02/11/2004	£130.99	27/09/2005	£134.77
09/11/2004	£130.99	04/10/2005	£134.77
16/11/2004	£130.99	11/10/2005	£134.77
23/11/2004	£130.99	18/10/2005	£134.77
30/11/2004	£130.99	25/10/2005	£134.77
07/12/2004	£130.99	01/11/2005	£134.77
14/12/2004	£130.99	08/11/2005	£134.77
21/12/2004	£130.99	15/11/2005	£134.77
24/12/2004	£130.99	22/11/2005	£134.77
30/12/2004	£130.99	29/11/2005	£134.77
11/01/2005	£130.99	06/12/2005	£134.77
18/01/2005	£130.99	13/12/2005	£134.77

20/12/2005	£134.77	11/09/2006	£392.77
23/12/2005	£134.77	11/09/2006	£861.32
29/12/2005	£134.77	11/09/2006	£923.45
10/01/2006	£134.77	12/09/2006	£330.54
17/01/2006	£134.77	11/10/2006	£329.00
23/01/2006	£1,719.62	11/10/2006	£962.64
24/01/2006	£225.50	17/10/2006	£329.00
31/01/2006	£225.49	24/10/2006	£329.00
07/02/2006	£225.49	31/10/2006	£329.00
13/02/2006	£455.04	07/11/2006	£329.00
13/02/2006	£518.69	14/11/2006	£329.00
14/02/2006	£226.44	21/11/2006	£329.00
21/02/2006	£225.93	28/11/2006	£329.00
28/02/2006	£225.93	05/12/2006	£329.00
07/03/2006	£225.93	06/12/2006	£322.61
14/03/2006	£225.93	06/12/2006	£331.38
20/03/2006	£225.93	06/12/2006	£642.40
28/03/2006	£225.93	06/12/2006	£660.65
04/04/2006	£225.93	12/12/2006	£330.68
11/04/2006	£223.80	19/12/2006	£330.68
18/04/2006	£223.20	22/12/2006	£330.68
25/04/2006	£223.20	28/12/2006	£330.68
02/05/2006	£223.20	02/01/2007	£233.66
09/05/2006	£223.20	02/01/2007	£234.77
16/05/2006	£223.20	09/01/2007	£233.66
23/05/2006	£223.20	16/01/2007	£233.66
30/05/2006	£223.20	23/01/2007	£341.90
06/06/2006	£223.20		
13/06/2006	£223.20		
16/06/2006	£438.97		
16/06/2006	£1,360.59		
20/06/2006	£279.72		
23/06/2006	£1,638.32		
27/06/2006	£277.50		
04/07/2006	£277.48		
07/07/2006	£1,216.38		
07/07/2006	£2,209.79		
11/07/2006	£277.92		
18/07/2006	£277.62		
21/07/2006	£927.96		
21/07/2006	£2,209.23		
25/07/2006	£277.82		
01/08/2006	£277.79		
07/08/2006	£277.79		
14/08/2006	£353.41		
14/08/2006	£707.60		
14/08/2006	£923.45		
15/08/2006	£295.53		
17/08/2006	£289.74		
22/08/2006	£286.41		
29/08/2006	£195.41		
29/08/2006	£310.64		
29/08/2006	£368.44		
29/08/2006	£923.45		
05/09/2006	£309.82		

Large Payments TC's/Cash Withdrawals

Account 20-69-85 30128260

Miss Alison HOWARD

13/02/2006	Payment In £455.04
13/02/2006	Payment In £518.69
14/02/2006	Payment In £226.44
14/02/2006	Cash withdrawal £1,020
16/06/2006	Payment In £438.97
16/06/2006	Payment In £1,360.59
20/06/2006	Cash withdrawal £1,500.00
23/06/2006	Payment In £1,638.32
26/06/2006	Cash withdrawal £100.00
26/06/2006	Cash withdrawal £200.00
26/06/2006	Cash withdrawal £200.00
28/06/2006	Cash withdrawal £300.00
29/06/2006	Cash withdrawal £300.00
30/06/2006	Cash withdrawal £300.00
03/07/2006	Cash withdrawal £300.00
03/07/2006	Cash withdrawal £300.00
04/07/2006	Cash withdrawal £300.00
07/07/2006	Payment In £1,216.38
07/07/2006	Payment In £2,209.79
10/07/2006	Cash withdrawal £300.00
10/07/2006	Cash withdrawal £300.00
11/07/2006	Cash withdrawal £300.00
17/07/2006	Cash withdrawal £750.00
19/07/2006	Cash withdrawal £520.00
21/07/2006	Payment In £927.96
21/07/2006	Payment In £2,209.23
27/07/2006	Cash withdrawal £300.00
31/07/2006	Cash withdrawal £1,500.00
14/08/2006	Payment In £353.41
14/08/2006	Payment In £707.60
14/08/2006	Payment In £923.45
15/08/2006	Payment In £295.53
21/08/2006	Cash withdrawal £200.00
24/08/2006	Cash withdrawal £200.00
24/08/2006	Cash withdrawal £2,000.00
29/08/2006	Payment In £195.41
29/08/2006	Payment In £310.64
29/08/2006	Payment In £366.44
29/08/2006	Payment In £923.45
31/08/2006	Cash withdrawal £500.00
11/09/2006	Payment In £329.77
11/09/2006	Payment In £861.32
11/09/2006	Payment In £923.45
12/09/2006	Payment In £330.54
18/09/2006	Cash withdrawal £300.00
25/09/2006	Cash withdrawal £250.00
25/09/2006	Cash withdrawal £300.00

25/09/2006	Cash withdrawal £300.00
05/12/2006	Payment In £329.00
06/12/2006	Payment In £322.61
06/12/2006	Payment In £331.38
06/12/2006	Payment In £642.40
06/12/2006	Payment In £660.65
11/12/2006	Cash withdrawal £300.00
12/12/2006	Cash withdrawal £300.00
18/12/2006	Cash withdrawal £300.00
22/12/2006	Cash withdrawal £300.00