

Crime doesn't pay

Henderson v Wilcox [2015] sheds light on uncertain aspects of the forfeiture rule. Sarah Playforth analyses the case



Sarah Playforth is a solicitor in the private client team at Kingsley Napley LLP

'If a forfeiture issue arises, it is important to look in detail at the nature of the assets and the interests, particularly when and why they were created and whether or not they are affected by the death.'

What could be more straightforward than the forfeiture rule? On the face of it, the rule of public policy that prevents a killer from benefitting financially from their crime offers glorious certainty in a morally ambiguous world. But, like most legal concepts, you only have to scratch the surface to find that things are not as black and white as they seem.

The recent case of *Henderson v Wilcox* [2015] deals with both of the two main grey areas of the forfeiture rule. Firstly, not all financial interests are necessarily covered by it. Secondly, in non-murder cases, the court has wide powers to re-write the rule entirely.

Facts

The case concerns a man with a low IQ who killed his elderly mother. The issues for the court were whether he should be allowed to benefit from her will and whether he was barred from benefitting under a lifetime trust she had set up a few years before.

The claim

Lillian Henderson died on 2 April 2013, aged 86, as a result of multiple injuries inflicted on her during an assault by her son Ian just over two weeks earlier.

Ian denied murder but admitted manslaughter at Wolverhampton Crown Court on 15 September 2014. The plea was accepted by the prosecution because Ian had not intended to kill his mother. The judge made an indefinite detention order under s37 of the Mental Health Act 1983. This was accompanied by a restriction order under s47, the main effect of which was that Ian could not be discharged from hospital without the consent of the Secretary of State.

Mrs Henderson made a will in 2006 leaving her £150,000 estate to Ian, with

her nephew Julian Wilcox as substitute beneficiary. However, Ian was barred from inheriting under the 'forfeiture rule', which prevents a person who has unlawfully killed another person from benefiting from their death.

Ian applied to the High Court for an order modifying the effect of the rule in relation to his mother's will. The application also concerned the application of the rule to a 'family protection trust' created by his mother in relation to her half share of their house.

Prior to the creation of the trust, the house was owned jointly by Ian and his mother but in May 2011 it was transferred into the names of Ian, his mother and two solicitor trustees. At the same time, Ian and his mother each transferred their share of the property into discretionary trusts. Mrs Henderson's trust was for the benefit of herself, Ian and her sister's son Julian. Ian's trust was for the benefit of himself, his mother, Julian, a personal friend and an animal charity.

Ian argued that the forfeiture rule did not apply to the trust or, if it did, that the rule should be modified.

The case came before HHJ David Cooke on 3 December 2015. There were four defendants, all of whom took a neutral position:

- June Wilcox, Mrs Henderson's sister-in-law and executor of her will, together with Ian;
- Julian, who would inherit his aunt's estate if the forfeiture rule was held to apply; and
- Andrew Robertson and Cynthia Duff, who were the solicitor trustees of the two family protection trusts.

The law

The forfeiture rule is set out in the Forfeiture Act 1982 which defines the rule in s1 as:

... the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing.

However, provided that the 'unlawful killing' was not murder, then the court has discretion, at s2, to modify the effect of the rule where the 'justice of the case' requires it. When choosing whether or not to exercise this discretion, the court will have regard to the conduct of the offender, the conduct of the deceased and 'such other circumstances as appear to the court to be material'. In other words, the discretion is very wide.

What interests are affected by forfeiture?

Section 2(4) lists the circumstances where the rule applies. These include:

- where the offender benefits under the deceased's will (or codicil) or under the intestacy rules;
- nominations made by the deceased for the benefit of the offender;
- where property passes to the offender as a result of a *donatia*

Mrs Henderson's will and Ian's interest in her discretionary trust were subject to the operation of the forfeiture rule. There can be no argument about whether the rule applied to her will but it was less clear whether it applied to the trust.

Further detail about when the rule does and does not apply can be found in the decided cases.

Provided that the 'unlawful killing' was not murder, then the court has discretion, at s2, to modify the effect of the rule where the 'justice of the case' requires it.

mortis causa made by the deceased; and

- where property was held on trust and passes to the offender as a result of the death of the deceased.

Therefore, on the face of it, both the property passing under

Life insurance policies

The case of *Cleaver v Mutual Fund Life Association* [1892] concerned a wife who had murdered her husband. His life insurance company argued they should not have to pay out to her as this would be contrary to public policy.

The court agreed that the wife should not benefit from her crime.

FAMILY LAW JOURNAL

Practical advice from the family law experts

GET YOUR FREE SAMPLE

'We read *Family Law Journal* from cover to cover every month. It is always full of articles by the best firms and chambers; articles which are useful on a day-to-day basis.'

Huw Miles, Head of Family, Paris, Smith & Randall Solicitors



Each issue provides:

- Practical guidance on real issues
- Analysis of key cases and legislation
- Advice on implementing the latest developments
- Expert comment and opinion
- Concise, useful information that saves you time

For a **FREE** sample copy, call us on 020 7396 9313 or e-mail subscriptions@legalease.co.uk

However, this did not mean that the insurer did not have to pay out. This was because the policy was set up before the crime and therefore not 'by virtue' of the crime. Instead, the insurers should pay out to the deceased's executors, who would hold the proceeds as part of his estate.

Rights of personal representatives

The most famous of all forfeiture cases is that of *Re Crippen* [1911]. This case concerned the infamous 1910 murder by Dr Crippen of his wife Cora. Here, Dr Crippen's mistress Ethel Le Neve, as personal representative of Dr Crippen,

distinction are not discussed in any detail in the Court of Appeal judgment as it seems there was no argument about this. Possibly, the reasoning is that the policy paid out to the building society, rather than to Miss Plant.

Indemnity against liability for accidental death

In *Gray v Barr* [1971], Mr Barr was convicted of manslaughter having accidentally killed Mr Gray with a shotgun. Mrs Gray's widow sued him for damages. Mr Barr had an insurance policy covering liability for accidental injury but was barred from recovering

her death and did not change as a result of her death.

It would be a matter for the trustees to decide if and when Ian would benefit from the trust. Of course, they may take the manner of his mother's death into consideration when exercising this discretion. However, the forfeiture rule does not apply to the trust and the trustees are not fettered by public policy considerations.

Should the forfeiture rule be modified in relation to Mrs Henderson's will?

When deciding whether to exercise his discretion in Ian's favour, HHJ Cooke noted that he was entitled to take into account an extremely broad range of circumstances, in addition to the conduct of Ian and his mother. In *Dunbar*, Mummery J said this included:

- the relationship between the deceased;
- the degree of moral culpability;
- the nature and gravity of the offence;
- the intentions of the deceased;
- the size of the estate;
- the financial position of the offender; and
- the moral claims and wishes of those who would benefit if the rule applied.

In the instant case, HHJ Cooke looked in great detail at the events which led up to the offence, the offence itself and at medical evidence concerning Ian's mental state.

He concluded that the interests of justice did not require that the rule should be disapplied in Ian's case. Mrs Henderson's estate would therefore pass to her nephew. The reasoning is discussed in more detail below.

Events leading up to the offence

HHJ was not impressed by Ian's conduct in the months leading up to the offence. He found that Ian had been repeatedly verbally and physically abusive towards his mother and that he had been deliberately

When deciding whether to exercise his discretion in Ian's favour, HHJ Cooke noted that he was entitled to take into account an extremely broad range of circumstances, in addition to the conduct of Ian and his mother.

applied for letters of administration in Cora's estate.

The court held that the forfeiture rule continued to operate on Dr Crippen's estate even after his death. His rights to Cora's estate on intestacy would have been extinguished under the forfeiture rule as he had murdered her. As he could not have enforced these rights, neither could his personal representative.

Life insurance secured on a mortgage

The tragic case of *Dunbar v Plant* [1988] concerned a suicide pact between a couple in their early 20s where Mr Dunbar killed himself but Miss Plant's attempt was not successful. The court concluded that taking part in a suicide pact fell within the wide definition of 'unlawful killing' in s1(2) of the 1982 Act.

In this case, the 'unlawful killing' was held to sever the parties' joint tenancy in their home so that Mr Dunbar's share passed via his estate rather than by survivorship. However, in contrast to *Cleaver*, Miss Plant was able to indirectly benefit from a life policy that was charged to secure the mortgage of the property by having her share of the mortgage debt reduced. The reasons for this

any monies from the insurer due to public policy. It is notable that in cases of 'motor manslaughter', this rule does not necessarily apply which, again, muddies the waters slightly.

Is there a common thread?

Unsatisfactory though some of these cases are, they do draw a distinction between interests that arise to the perpetrator as a result of the death and/or the criminal act and those interests which were pre-existing. Although a life insurance policy is pre-existing, the right to payment arises as a result of the death.

As HHJ Cooke put it, the forfeiture rule applies to rights and benefits where:

... the offender's right is caused to come into existence, or be enforceable, or the benefit to the offender is caused to accrue directly by the death or the criminal act connected with that death.

Mrs Henderson's family protection trust

Following the reasoning above, Ian's interest under his mother's discretionary trust had no connection whatsoever with her death. The interest did not arise as a result of

obstructive when the authorities had tried to intervene.

The first evidence of abuse emerged in June 2012, ten months before the attack, when agency carer Shirley Watson observed Ian shouting at his mother. Mrs Henderson started to tell Mrs Watson that her son was hitting her and she would show her the bruises.

Mrs Watson told social services, who spoke to Mrs Henderson and Ian. After that, Ian stopped Mrs Watson coming round and did what he could to frustrate the authorities. He would say that his mother had fallen and would shout at social workers, demanding they leave. He even instructed solicitors to contact social services and accuse them of harassment – something which HHJ Cooke took a particularly dim view of. As a result, local authority involvement stopped around December 2012, four months before Mrs Henderson's death.

The fact that the attack which killed Ian's mother was the culmination of a series of attacks which had gone over several months was held by the judge to be a serious aggravating factor.

Circumstances of the offence

The judge was also not impressed with Ian's conduct in relation to the offence itself. In particular he had delayed in calling the emergency services and had lied and tried to hide the evidence.

Mrs Henderson is believed to have been killed at around 4am as a neighbour had heard screams. However, Ian did not phone an ambulance until 7am. He told paramedics that she had fallen in the toilet and hit her head. However, this was not consistent with Mrs Henderson's numerous injuries. The paramedics called the police, who searched the house and found Mrs Henderson's clothing, which Ian was thought to have removed in an attempt to clean it before calling the ambulance.

Mrs Henderson was admitted to hospital and did regain consciousness but sadly died three weeks later.

Was there a mental disorder?

Ian's plea of manslaughter was based on lack of intention to kill rather than diminished responsibility due to mental impairment. There was conflicting psychiatric evidence presented during the criminal proceedings. Only one of the three

experts would have supported a plea of diminished responsibility.

Although Ian had a relatively low IQ, the judge noted that he had attended mainstream schools and that he had had a fairly standard work history until 1984 when he was mugged, after which time he remained at home with his parents until his mother's death. He had claimed that he suffered a brain injury as a result of the injury but, again, the medical evidence did not support this. However, it certainly seems to be the case that his mother was very over-protective of

Although HHJ Cooke took into consideration Ian's low IQ and the stress of assuming a caring role, the medical evidence did not support the assertion that a mental disorder played any role in the killing.

him and he enjoyed a close relationship with her, to the exclusion of everyone else. It also seems to be the case that he found the 'role reversal' of caring for his mother as she aged particularly difficult.

During the social services investigations prior to Mrs Henderson's death, the professionals had no doubts about Ian's mental capacity. He was described as 'intelligent and articulate' and was able to explain complex financial information relating to the trust arrangement.

Although HHJ Cooke took into consideration Ian's low IQ and the stress of assuming a caring role, the medical evidence did not support the assertion that a mental disorder played any role in the killing. As a result, Ian's culpability for his actions remained high.

What does this case tell us?

By their very nature, forfeiture cases are not going to impact on the day-to-day practice of a private client lawyer. However, *Henderson* is a timely reminder that there is more to the forfeiture rule than meets the eye and there is potentially wide scope for the courts to depart from it.

It is not just about the deceased's will – there are also trust interests and insurance policies to consider. If a

forfeiture issue arises, it is important to look in detail at the nature of the assets and the interests, particularly when and why they were created and whether or not they are affected by the death. If an interest is not covered by the rule, then even the most cold-blooded of murderers can still claim it.

A particularly interesting feature of this case is that the financial means and needs of Ian and his cousin were barely touched upon. Neither are the wishes of Mrs Henderson. It is only in the penultimate paragraph of the judgment that these matters are even given a

brief mention. Indeed, notwithstanding Mummery J's list of factors in *Dunbar* it does not seem that the court heard any evidence at all about Julian's needs.

Of far greater concern to the court was whether or not Ian is 'deserving' of having the rule modified. On this issue, the judge seems to have taken a very hard and factual line and focused very narrowly on the offence itself. There is much to suggest that Ian was deserving of sympathy. He seems to have led a rather pathetic and joyless life. There was at least some evidence of cognitive impairment and there was certainly a suggestion of someone who had been pushed close to the edge. However, the judgment does not read as if there has been a difficult balancing act at all. This may suggest that the hurdle to obtaining relief under s2 is a particularly high one. ■

Cleaver v Mutual Fund Life Association
[1892] 1 QB 147

Re Crippen
[1911] P 108

Dunbar v Plant
[1988] Ch 412

Gray v Barr
[1971] 2 QB 554

Henderson v Wilcox & ors
[2015] EWCH 3469 (Ch) to be reported in a future edition of *WTLR*