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UPDATE ON CRIMINAL PROCEEDS JURISPRUDENCE

This paper is a detailed update on the jurisprudence affecting the proceeds of crime during 2008/2010.

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Part I

BENEFIT ASSESSMENT

May,[2008] 2 WLR 1131.
Jennings[2008] 2 WLR 1148
Green. [2008] 2 WLR 1154

These three cases were heard together in The House of Lords and the principles articulated in *May* were applied in the other two cases. *May* and *Jennings* were cases under the CJA and *Green* was a case under the DTA.

May had pleaded guilty to conspiracy to cheat the Revenue through a “missing trader” fraud. The court made a confiscation order against him of £3.2 million. Green had pleaded guilty to conspiracy to import and supply controlled drugs and to launder the proceeds of drug trafficking. The court made a confiscation order against him of £2.5 million.

In both instances the lower courts held that the offenders had benefited jointly with their fellow conspirators. May and Green argued before the Lords that in that case the amount of their confiscation orders was too high. May submitted that the benefit could not exceed the Revenue’s loss, and that that loss should be apportioned equally among all those held jointly liable. Green submitted that he had only benefited by the value of the property that he had actually received.

The Lords rejected these arguments. They held that benefit could not be apportioned between offenders who were jointly liable. Indeed, where one defendant received money on behalf of several defendants jointly, each defendant had received the whole amount even if it had never passed through his hands. Thus the aggregate amount by which joint offenders had benefited was not limited to the amount of the victim’s loss. The confiscation orders made against May and Green were upheld.

The Lords also gave guidance in *May* emphasising the broad principles to be followed when confiscation orders were made. They had earlier noted that the essential structure of the confiscation regime had remained unchanged from the DTOA down through all subsequent confiscation legislation including the CJA and the DTA to the PCA.[1] Thus the guidance was equally applicable to confiscation orders made under any of these statutes.

(1) The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of a fine. The benefit gained is the total value of the property or advantage obtained, not the defendant’s net profit after deduction of expenses or any amounts payable to co-conspirators.

(2) The court should proceed by asking three questions: (i) Has the defendant benefited from relevant criminal conduct? (ii) If so, what is the value of the benefit that he has so obtained? (iii) What sum is recoverable from D? These are separate questions calling for separate answers, and the questions and answers must not be elided.

(3) In addressing these questions the court must first establish the facts as best it can on the material available, relying as appropriate on the statutory

[1] At para. 8.

assumptions. In very many cases the factual findings made will be decisive.

(4) In addressing the questions the court should focus very closely on the language of the statutory provision in question in the context of the statute and in the light of any statutory definition. The language used is not arcane or obscure and any judicial gloss or exegesis should be viewed with caution. Guidance should ordinarily be sought in the statutory language rather than in the proliferating case law.

(5) In determining whether the defendant has obtained property or a pecuniary advantage and, if so, the value of any property or advantage so obtained, the court should (subject to any relevant statutory definition) apply ordinary common law principles to the facts as found. The exercise of this jurisdiction involves no departure from familiar rules governing entitlement and ownership. While the answering of the third question calls for inquiry into the financial resources of the defendant at the date of the determination, the answering of the first two questions plainly calls for a historical inquiry into past transactions. Although this point was expressed to apply specifically to determinations under the PCA, by parity of reasoning it is equally applicable to determinations under the CJA and the DTA.

(6) The defendant ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property. It may be otherwise with money launderers. It is thought that this approach to the meaning of "obtains", which is the term used in the CJA and the PCA, was intended to apply equally to "has received", which is the corresponding term used in the DTA.[2]

Most of this guidance is perfectly clear. But there are several areas that are not. "Ownership" is problematic. Take the example of a thief. He does not "own" the property that he has stolen. He does have a right to possession, but this can be displaced by someone with a better title, such as the person from whom he stole it.[3] Did the Lords really intend that thieves should be exempt from confiscation orders? More likely, they merely intended that a person should have dealt with the property as if he were the owner. As for "ordinarily", in what circumstances

[2] See eg *May* at para. 17: "But the question under sections 2(3) and 4(1) of the 1994 Act is whether a defendant has received any payment or other reward in connection with drug trafficking, and this will ordinarily require a payment or reward to him, whether on his own or jointly."
[3] *Costello* v *Chief Constable of Derbyshire Constabulary* [2001] 1 WLR 1437 at para. 31.

need an offender not have obtained property for himself? Perhaps, the Lords suggested, where he is a money launderer. But it is hard to draw any distinction in principle between money launderers and mere couriers or custodians.

The Lords applied this guidance in *Jennings*. The appellant appealed against the refusal of the lower courts to discharge a restraint order that was made while he was awaiting trial for conspiracy to defraud. The value of the assets with which Jennings was restrained from dealing was not limited to a maximum sum. By the time the appeal reached the Lords all the other conspirators had pleaded guilty and Jennings had been convicted.

Jennings said that even so the restraint order should have been for no more than £50,000 as this was all that he had got from the crime for himself. He argued that this was the only property that he had obtained as this was the only property that had come into his possession or control.

The prosecution alleged that he had obtained £580,000. This was the total amount obtained as a result of the conspiracy. They argued that even applying a possession or control test Jennings had obtained this amount as he was a prime mover in the conspiracy. But they also relied on the test given by the Court of Appeal. Namely, that all that was required was that the defendant's acts should have contributed, to a non-trivial extent, to the getting of the property from the crime.

The Lords rejected the Court of Appeal's approach, although they found that there was clearly enough material to support the making of a restraint order. In order for a person to obtain property it must be obtained *by him*. It would not suffice if he helped someone else to obtain it.

R v Del Basso and another [2010] All ER (D) 176 (May)

Luigi Del Basso and Bradley Goodwin pleaded guilty to offences of failing to comply with an enforcement notice contrary to s. 179(1) and (2) of the Town and Country Planning Act 1990 in relation to a parking scheme run in breach of planning permission on land owned by Mr Del Basso and leased to a football club.

As a consequence, there was a hearing under POCA. Mr Del Basso was adjudged to have received a benefit of £1,881,221.19; the judge determined that £760,000 was available and made a confiscation order in that sum under s 6(5)(b) of POCA. Mr Goodwin was adjudged to have received the same benefit but, because of his financial position, the recoverable amount was determined to be nil.

The case for the Crown was that the ‘park and ride’ operation became criminally unlawful from the moment the enforcement notice, served by the local authority, became effective and that the turnover of the scheme represented the benefit of the offenders irrespective of the corporate vehicle through which the turnover was generated.

On behalf of Mr Del Basso, it was argued that the purpose of the Parking Association was to provide income for the Football Club; it had an altruistic motive and no element was run for personal profit. In fact the Football Club was in a parlous financial state and the scheme had provided much needed income in the form of rent for the use of the land. Further, virtually all the income from the scheme was spent on necessary running expenses. Mr Del Basso, himself, had made a very significant financial contribution to the football club and derived only modest income from services or loans; his income had been approximately £125,000. On behalf of Mr Goodwin, it was added that the breaches of the 1990 Act were modest and had caused little environmental harm and no economic harm.

The judge concluded that although the Parking Association and Parking Company were run on business-like lines and conducted business in an open manner, they were, nevertheless, illegal operations. He also concluded that Mr Del Basso and Mr Goodwin had a criminal lifestyle within the meaning of the 2002 Act as they had committed offences over a period of at least six months and had received some benefit from their offending: this last finding was not challenged.

Both appealed against the confiscation order with leave of the single judge.

Mr Justice Leveson, dismissing the appeals, gave judgment in the Court of Appeal having referred to the House of Lords ruling in May R v May [2008] UKHL 28, [2008] 1 AC 1028. He said it is clear that the legislation looks at the property coming to an offender which is his and not what happens to it subsequently; the court is concerned with what he has obtained “so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control”; whatever disposition of that property is made (whether for socially worthwhile reasons or otherwise) is irrelevant. If it was otherwise, the court would be called upon to make a series of almost impossible value judgments: profit is not the test and the use of the words “true” or “real” to qualify “benefit” does not suggest to the contrary. This analysis is clearly confirmed by the decisions of this court in R v Nelson, R v Pathak and R v Paulet [2009] EWCA Crim 1573, [2010] 2
It is for the judge to find as a fact what property the two men had obtained and, thus, the extent of the benefit. What happens to that benefit after it has been obtained (for example, how it might have been spent) forms no part of the statutory test.

R v Wilkinson [2009] All ER (D) 121; [2009] EWCA Crim 2733[4]

This was an appeal against the imposition of a confiscation order made under POCA 2002. The Court summed up the basic principles relating to the imposition of confiscation orders:

> a confiscation order may be imposed where a criminal defendant has obtained property "as a result of or in connection with criminal conduct". The amount to be recovered will be the value of the property so acquired, unless the defendant can show, the onus being on him, that the value of the assets available to him is less than the benefit acquired, in which case the amount recovered will be that lower sum.

The following facts constituted the basis of plea to possession of criminal property contrary to s.329 of POCA 2002 which the prosecution did not dispute. The appellant was seen by police officers getting into a BMW motorcar. Unknown to the appellant, it had been stolen. A man who wanted to sell it had dropped it at his house so that he could test drive it. The man told the defendant that the car was cheap because it had been "bumped", although there was no evidence of that. The appellant had been in possession of the car for approximately an hour when he was arrested. He had by then suspected that it was stolen. He intended to return it as soon as possible, and he formed the intention not to buy it.

The Crown applied for a confiscation order seeking a ruling that the appellant had benefited from his offending and that the value of that benefit was the market value of the car. The learned judge, with considerable reluctance, concluded on the authorities that the argument was correct, and he made an order in the sum of £15,558.84, the market value of the car months."

Benefit Argument

Wilkinson appealed against the confiscation order submitting that, on the agreed facts, he had not obtained property and therefore had not benefited at all from his offence. Accordingly, no confiscation order ought to have been made.

It was argued on behalf of the appellant that s.76(4) of POCA 2002 provides that a person benefits from conduct if he obtains property as a result of or in connection with criminal conduct. Section 84 defines "property" as all property wherever situated, and includes any property in which the defendant has an interest. Reliance was placed upon May [2008] UKHL 28; Jennings [2008] UKHL 29; and Green [2008] UKHL 30.

The appellant submitted he plainly had no power of disposition or control over the car. He had even less control over the property than a courier or custodian might have. The significance of the defendant having the power of disposition or

[4] See also pages 24 & 45 below

control is reiterated by their Lordships in Jennings. They held that the rationale of the regime was that a defendant should be deprived of what he has gained or its equivalent. He could not be deprived of what he has never obtained, because that would be a fine and would contradict one of the guiding principles.

Lord Justice Elias gave the judgment of the Court of Appeal. The appeal was allowed. In the light of the authorities referred to, in particular following May, it was unreal to say that the defendant obtained property in the sense in which their Lordships had used that term. He never had any right to possess it; he obtained the property for a limited time and a limited purpose, just as a courier does. He had no more control over the property than a courier or custodian would have. Unless and until he chose to buy the car, he was obliged to return it.

Disqualified Directors – is the procedure for assessing benefit different?

R v Seager; R v Blatch [2009] All ER (D) 283 (Jun)

The same issue arose in these 2 appeals : how should the court determine the value of the "*benefit*" obtained by an offender who has been guilty of managing a company as a director in contravention of a director's disqualification order or an undertaking not to act as a director? In each of these cases the Crown Court judge had concluded that the benefit obtained as a result of the criminal conduct by the person who had contravened the disqualification order or undertaking was equal to the total turnover of the relevant companies for the period of his contravention. In both cases the Crown Court judges followed the decisions given by the Court of Appeal in *Jennings v CPS [2005] 4 All ER 391* and *R v Neuberg [2008] 1 Cr App R (S) 481.* The resulting confiscation orders were therefore made on that basis.

This was before the House of Lords judgments *R v May [2008] 1 AC 1028; Jennings v CPS [2008] 1 AC 1046* and *R v Green [2008] 1 AC 1053.*

In these 3 cases the House of Lords delivered judgments on the question of how "*benefit*" is to be assessed and what is meant by an offender *"obtaining"* a "*benefit"* in the context of confiscation orders under the proceeds of crime legislation. An important part of the judgment of Laws LJ in the Court of Appeal in *Jennings* was disapproved and it is questionable whether all or part of *R v Neuberg* represents good law.

R v Seager (under the POCA 2002)

This appellant was convicted of an offence of having taken part in the promotion, formation and management of a company ("Tabline") being a person disqualified from doing so by his undertaking to the Court, and doing so without the leave of the Court. The Crown did not allege that he had been dishonest nor did it assert that Tabline had suffered any loss as a result of his actions as a shadow director of the company.

When the judge ruled on the issue of the "*benefit*" obtained by the appellant, he applied the decision of the Court of Appeal in *R v Neuberg [2008] 1 Cr App R (S) 481.* He found that the appellant had played an active part in Tabline since his disqualification and that he was fundamental to the running of the company.

R v Blatch (under the CJA 1988)

This appellant had participated in the running of six associated companies despite a director's disqualification order which forbade him from doing so.

Lord Justice Aikens gave the judgment of the Court:

"**Issue One: Do company director disqualification cases call for a different approach to the confiscation legislation from that adopted by the trio of House of Lords cases?"**

> "… if a defendant has been convicted of contravening a director's disqualification order or undertaking, then in any subsequent confiscation proceedings, the three questions to be asked are no different from that in any other type of crime. They are: (a) has the defendant benefited from the relevant criminal conduct; (b) if so what is the value of the benefit that he has so obtained and (c) what sum is recoverable from him? (See: *R v May at para 48(2)).* There is nothing in either the confiscation legislation nor the *1986 Act* to suggest that any different approach has to be taken in relation to a defendant whose criminal conduct consists of contravening a director's disqualification order or an equivalent undertaking. Nor is there anything in the House of Lords cases themselves or subsequent cases that suggests that a different approach is called for."
>
> The fact that a disqualified director contravenes the disqualification (or who contravenes an undertaking) by working through a company cannot make any difference to the nature of the enquiry for the purposes of confiscation proceedings and orders.
>
> That does not preclude the possibility of piercing the corporate veil in appropriate circumstances in order to ascertain the true answer to the question: to what extent has a defendant who has contravened a director's disqualification order or undertaking benefited from his criminal conduct? …

Issue Two: If the general approach of those cases is to be adopted, how does it apply in relation to director disqualification cases? In this connection, is *R v Neuberg* still good law?

"Lord Bingham stated in both *R v May* (*paragraph 48(3)* and *(4)*) and in *R v Jennings* (*paragraph 13*) that the court must focus on the language of the statute and apply its ordinary meaning to the facts of the case in hand when dealing with confiscation issues in general and in particular when considering what is the value of the "*benefit*" which the defendant has obtained.

Thus, in the case of the *CJA 1988...* the court must ask: has the offender obtained property as a result of or in connection with the commission of the offence of contravening the director's disqualification order or an equivalent undertaking?

In the case of *POCA 2002,* the court must first decide whether the offender has a "*criminal lifestyle*": *section 6(4)(a).* If the answer is "yes", then the court must decide whether the offender has "*benefited from his general criminal conduct*". If the answer to the first question is "no", then the court must decide whether the offender has "*benefited from his particular criminal conduct*": *section 6(4)(b) and (c).*

...Thus, as the House of Lords has made clear, the questions to be asked are essentially the same whether the confiscation proceedings arise under the *CJA 1988* or *POCA 2002,* or indeed the *DTA 1994.*

Two further general principles must apply to an offender who has been found guilty of contravening a director's disqualification order or who has contravened an equivalent undertaking. First, in *R v May,* the House of Lords stated that the benefit gained is the total value of the property (or pecuniary advantage) gained, not the particular defendant's net profit: see *paragraph 48(1).* In *Jennings v CPS* the House of Lords held that "*obtained*" meant obtained by the relevant defendant: see *paragraph 14.* Secondly, however, it is important to recognise that a defendant's acts may contribute significantly to property (or to a pecuniary advantage) being obtained, without the relevant defendant obtaining it himself: *ibid.*

Is *R v Neuberg* still good law? …. In our view it is only necessary to comment on the court's reasoning and decision on the second ground of appeal, viz. that the judge was correct to look at turnover to calculate Mrs Neuberg's "*benefit*", as opposed to looking at her profits from her use of the unlawful name for trading. In our respectful view, the court's decision on that issue is inconsistent with the analysis in the three House of Lords decisions. The judge should have asked the question: what benefit had Mrs Neuberg, as the relevant offender, obtained as a result of or in connection with her offence of trading under a prohibited style without the leave of the court, contrary to the Insolvency Act 1986? It was not correct necessarily to equate the turnover of the business with the benefit that had been obtained by Mrs Neuberg as a result of or in connection with her offence.

On the law as it stands, the benefit obtained by an offender is a question of fact, to be determined by the judge. However, the turnover of any company through which the offender acted may be relevant to ascertaining the benefit obtained by the offender."

Issue Three: If the general approach of the House of Lords trio of cases is to be adopted, then is the corporate veil to be pierced in either of the cases before the court and, if so, on what basis?

"…It is "hornbook" law that a duly formed and registered company is a separate legal entity from those who are its shareholders and it has rights and liabilities that are separate from its shareholders…. A court can "pierce" the carapace of the corporate entity and look at what lies behind it only in certain circumstances. It cannot do so simply because it considers it might be just to do so. Each of these circumstances involves impropriety and dishonesty.

… There was no evidence before the judge that Mr Blatch used the companies as a shield to hide benefits that he had obtained from his offence of contravening the disqualification. … the existence of the companies themselves and the legitimacy of their business cannot be in doubt. No one has said that they are to be disregarded as legitimate legal entities….

in *R v May* Lord Bingham's first proposition is that "*…D ordinarily obtains property if in law he owns it, whether alone or jointly...*". Lord Bingham then states the legal consequences that come with ownership of property, viz. "*...a power of disposition or control...*". But the converse is plainly not the case. Just because a person has a power of disposition or control over property, it does not mean that he owns it. As Toulson LJ pointed out in *R v Allpress and others, paragraph 48,* classically a bailee of property has control of it whilst he is bailee of it. But he does not own the property. Hence, neither a courier nor a guardian of, eg. drugs, would own them by virtue simply of being a courier or guardian.

... Thus, even if Mr Blatch dealt with money or other property on behalf of the companies as a "shadow" director in contravention of his disqualification, he did not own that money or property. It belonged to the company concerned.

… Mr Seager did not use Tabline as a façade to hide benefits from his crime of contravening the undertaking. He did not use the company for other illegal activities. The business of the company was legitimate. Although Mr Seager purported to do acts in the name of the company (eg. enter the lease and operate a bank account in its name), there was no evidence that this was a "sham….Even if Mr Seager did, as a "shadow" director, dispose of property and money on behalf of the company, that would not, by itself, prove that he owned it.

Therefore we conclude that, on the facts as found by the sentencing judges in these cases, there is no basis on which the corporate veil can be pierced."

Issue Four: If the corporate veil is not to be pierced in either case, then how is the amount of the "benefit" to be calculated in the case of Mr Blatch and Mr Seager respectively?

> "…it follows that the conclusion of both judges that the "*benefit*" of the appellants must equal the turnover of the relevant companies was wrong as a matter of law. It also follows that to ascertain the amount of "*benefit*" obtained by each appellant, we must ask the first two of the three questions posed by Lord Bingham in *R v May, paragraph 48(2),* in the light of the findings of fact of the sentencing judges and, if appropriate, the evidence before them:

On the finding of facts regarding Mr Blatch the Court held that there was no theoretical or practical objection to accepting the figures put forward on behalf of the appellant as the amount of his *"benefit"* obtained as a result of or in connection with his offences, in default of any other material i.e. £221,109.81.

In the case of Mr Seager, there was no evidence before the judge of what salary or other "*benefits"* Mr Seager had obtained from Tabline whilst he acted in contravention of the undertaking, so there was no means of ascertaining what "*real benefit*" he obtained. The Court therefore concluded that , having held that the basis of the judge's finding on Mr Seager's "*benefit*" was wrong in law, there was no method by which it could reach any alternative finding of his "*benefit*" on the facts.

Issue Five: Can the conclusion of the judges stand in each case. If not, what figures for "benefit" and confiscation order can this court substitute, if any?

The Court of Appeal concluded that in both cases must be quashed and the appeals allowed.

In the case of Mr Blatch, it found that the benefit obtained by him as a result of or in connection with his offences is £221,109.81. There was no dispute that Mr Blatch had realisable assets of at least that figure and therefore the Court substituted a confiscation order in the sum of £221,109

In the case of Mr Seager, following from the conclusions under Issue Four no other figure could be substituted as the "*benefit*" and the confiscation order was simply be quashed.

Tobacco Smuggling – whose pecuniary advantage

R v White & Ors [2010] All ER (D) 45 (May)

The four appellants appealed confiscation orders made against them in cases (not otherwise linked) involving the smuggling of tobacco into this country for resale.

Under the proceeds of crime schemes if a person obtains a pecuniary advantage as a result of or in connection with an offence (the 1988 Act) or with conduct (the 2002 Act), he is treated, for confiscation purposes, as having received a sum of money equal to the pecuniary advantage. Thus his benefit will be deemed to include a sum of money equal to the pecuniary advantage.

However, the evasion by a smuggler of duty or VAT constitutes, for the purposes of confiscation proceedings, the obtaining of a pecuniary advantage only if he personally owes that duty or VAT. This was established by the House of Lords in *May* [2008] UKHL 28; [2008] 1 AC 1028; [2009] 1 Cr App R (S) 31 and *Jennings* [2008] UKHL 29; [2008] 1 AC 1046; [2008] 2 Cr App R 29 and applied in *Chambers* [2008] EWCA 2467 and *Mitchell* [2009] EWCA Crim 214.

The RCPO carried out a Review to identify cases in which the wrong Regulations had been raised by the prosecution or relied upon by the judge or cases in which the decision of the Court of Appeal in *Rowbotham (John)* [2006] EWCA Crim 747 had been raised by the prosecution or relied upon by the judge. In *Rowbotham* the Court of Appeal, presided over by Rose LJ, Vice-President, had dismissed an appeal relying in part on the 1992 Regulations which, unknown to all concerned, did not apply having been superseded by the 2001 Regulations. That Review has led to a number of applications for leave to appeal which are pending.

The relevant legislation which arose on the appeals included the Customs and Excise Management Act 1979; Tobacco Products Duty Act 1979; the Finance (No 2) Act 1992; the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992, SI 1992/3135 (the 1992 Regulations); and the Tobacco Products Regulations 2001, SI 2201/1712 (the 2001 Regulations). The relevant European Union directive was Council Directive (EEC) 92/12 (on the general arrangement for products subject to excise duty and on the holding, movement and monitoring of such products (the 1992 Directive); and (from 1 April 2010) Council Directive (EC) 2008/118 (concerning the general arrangement for excise duty).

The issues which arose included:

- when excise duty became chargeable on tobacco products smuggled into the UK by sea from a member state;

- whether reg 4(1) of the 1992 Regulations and reg 12(1) of the 2001 Regulations were compatible with art 6(1)(c) of the 1992 Directive;

- who owed the duty;

- whether regs 5(1) and (3) of the 1992 Regulations were compatible with art 7(1)(c) of the 1992 Directive.

LORD JUSTICE HOOPER gave the ruling of the Court:

The effect of both the 1992 and 2001 Regulations and the primary legislation was that the excise duty became chargeable at importation, namely, when the goods were brought by sea, the time when the ship carrying them came within the limits of a port. Article 6(1) of the 1992 Directive provided that excise duty should become chargeable at the time of release for consumption, which, in the case of an irregular importation, was the time of importation. Therefore the domestic law and EU law were consistent in that respect.

Regulation 5(1) of the 1992 Regulations provided that the person liable to pay the duty was the importer of the excise goods. The equivalent provision in the 2001 Regulations was reg 13(1) which provided that the person liable to pay the duty was the person holding the tobacco products at the excise duty point, which, in the case of smuggled tobacco, was the time of importation. Regulation 5(3) of the 1992 Regulations also provided that the person liable to pay the duty should also be any (other) person acting on behalf of the importer of the excise goods in respect of the importation of those goods and any consignee of the excise goods which had been imported into the UK. The effect of reg 5(3)(f) of the 1992 Regulations and reg 13(3)(e) of the 2001 Regulations was also to catch any other person who caused or had caused (1992 Regulations) or who caused (2001 Regulations) the imported goods to reach the point of importation (provided that he retained a connection with the goods at that time).

As to tobacco smuggling cases of the kind in the instant case, art 7(3) of the 1992 Directive provided that, depending on all the circumstances, the duty should be due from any of the following:

a. the person making the delivery in B for commercial purposes in B; or

b. the person holding the products in B with the intention of delivering them in B for commercial purposes in B; or

c. the person in B receiving the products for use for commercial purposes in B by a trader; or

d. the trader who in B was using the goods for commercial purposes in B.

For the purposes of tobacco smuggling cases, the person who was referred to in reg 5(1) of the 1992 Regulations as the importer had to come within category (b).

There was therefore no incompatibility between Regulation 5(1) and the Directive.

Regulation 13(1) of the 2001 Regulations was concerned, the person holding the tobacco products at the excise duty point (i.e. the point of importation) had also to come within (b) provided that the concept of 'holding' in the Regulations was interpreted in the same way as it was to be interpreted in the Directive (about which there was no guidance in the Directive).

Regulation 5(3)(f) of the 1992 Regulations and reg 13(3)(e) of the 2001 Regulations made a person who caused/had caused the goods to reach the point of importation liable for the duty (provided that he retained a connection with the goods at that point), there would be no incompatibility with art 7(3) if he fitted into any of the categories (a) to (d).

Regulation 5(3) of the 1992 Regulations also made '(b) any other person acting on behalf of the importer of the excise goods in respect of the importation of those goods' liable to pay the duty. That appeared to catch someone acting as an agent of the importer. As an agent he might well also fall within (b) and he was likely to fit into one of the other categories listed in art 7 of the 1992 Directive.

In so far as the 1992 Regulations made 'any consignee of the excise goods which have been imported into the United Kingdom' liable to pay the duty, there was unlikely to be any incompatibility with the Directive because such a person would fall within category (c) above. It followed that there was unlikely to be any incompatibility between those made liable by the Regulations to pay the duty and those made liable by the Directive.

Value of drugs

R v Islam [2009] 3 WLR 1

The defendant had pleaded guilty to two counts of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of goods contrary to s 170(2) of the Customs and Excise Management Act 1979.

In confiscation proceedings the judge held that the heroin had a wholesale value of £71,424, and, by reference to that and other items, assessed the defendant's total benefit at £404,604.69 and made an order in that sum.

The defendant appealed against that decision. The Court of Appeal held that it was bound by its previous decision in *R v Hussain* [2006] All ER (D) 395 (Feb); and on that basis concluded that the heroin did not, for the purposes of s 76(4) and (7), 79(2) and 80(2) of the 2002 Act, have any market value when obtained, since there had been no lawful market for its purchase or sale. The amount of the confiscation order was thus reduced by £71,424.

The Court of Appeal certified a point of law of general importance, namely:

> 'For the purpose of calculating a defendants' benefit, as distinct from the available amount, in confiscation proceedings under the Proceeds of Crime Act 2002, must goods of an illegal nature obtained by him be treated as having no value?'

Leave to appeal was granted by the House of Lords. The issue was whether, when the defendant had obtained in, the heroin had any market value within the meaning of s 80(2) read with section 79(2) of the 2002 Act.

The House of Lords, allowing the appeal, held:

Lord Hope of Craighead at paragraph 18:

> "…I would hold that R v Hussain [2006] EWCACrim 621 was wrongly decided and that it should be overruled. The market that has to be contemplated for the assessment of the available amount under section 9 of POCA 2002 must be taken to be one to which the defendant can resort to realise his assets without acting illegally. But no such restriction applies at the stage of calculating the amount of his benefit under section 8. At that stage the nature of the goods and the market in which they are ordinarily bought and sold will determine the market to which it is proper to go to discover the amount that a willing buyer would pay to a willing seller for them."

Lord Mance at paragraph 49:

> "I consider that it is consistent with both the language and the spirit of the statutory scheme to take account of the black market value of drugs when valuing the benefit obtained by the defendant from their illegal importation, although such drugs have a nil market value after seizure for the purposes of assessing the amount available for confiscation. The contrary decision in R v Hussain [2006] EWCACrim 621, which the Court of Appeal loyally applied in the present case, was wrong and should be overruled, the present appeal should be allowed and the judge's confiscation order restored."

Apportioning Benefit Between Co-Defendants

R v Rooney [2010] All ER (D) 93 (Jan); [2010] EWCA Crim 2

On 22 March 2004, the appellant pleaded guilty to being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a class B controlled drug, namely cannabis resin. The appellant's 5 co-accused were charged with the same offence. They were also charged with other offences. Each of the co-accused pleaded guilty on re-arraignment.

Briefly the facts were that on 23 May 2003 a heavy goods vehicle, driven by Sevastos, arrived at Harwich by ferry from the Netherlands ostensibly carrying flowers. At St Helens the vehicle was met by Robertson with a white box van, Clarke who was in a similar van with a red cab and Hassiakos, who was in a Ford Focus. The heavy goods vehicle was directed to farm premises. Rooney there directed the vehicle where to park and assisted others to move pallets of boxes from the articulated vehicle to the white box van. Rooney also loaded boxes into the red cab van. The two vans together contained a total of 4 metric tonnes of cannabis resin with a "retail value" of £3.6 million and a "street value" at some £9 million. Telephone records showed that Rooney and Hassiakos had been in communication on both 22 and 23 May 2003 and had made calls to Spain.

The Court of Appeal, when reducing Rooney's prison sentence on appeal, concluded that he played an active role. He recruited Clarke. He was in phone contact with Hassiakos on relevant dates and was seen to be directing the articulated vehicle on its arrival. His role was less than that of Hassiakos.

In confiscation proceedings under the Proceeds of Crime Act 2002 HMRC submitted that the appellant had a criminal lifestyle. It said that the estimated "street value" of the cannabis resin was £9,856,000 and the estimated "retail price" (either the price that the conspirators paid for the drugs or the price that they could have obtained for them in the illegal "wholesale" market) was £3,600,000. It was also asserted that the "benefit" obtained by the appellant from his criminal conduct in the case was the value of the property obtained, which was said to be equal to the "retail value" namely £3,600,000.

The judge noted that no one had sought to give evidence for the purposes of the confiscation proceedings on the issue of benefits obtained. There was therefore no evidence before him as to the particular benefits obtained by each co-defendant. He concluded:

> *"In my judgement, the guidance given in the case of Porter and the somewhat difficult circumstances here justify the conclusion, as regards*

count 1, that all the defendants had benefited equally and there will be a certificate that they have equally benefited to the tune of some £600,000."

Judge Steiger made a confiscation order in the sum of £50,000 against the appellant. In doing so he took into account various other small items of benefit and concluded that the overall benefit from the appellant's criminal conduct was £627,975. Having heard submissions on the evidence as to available assets, the judge assessed the recoverable amount as £50,000 and made the confiscation order accordingly.

Two issues arose on this appeal:-

i) Did Crown Court judge mis-apply the law in arriving at his conclusion that the "benefit" figure for this appellant was £627,975?

ii) If the answer to (i) is "yes he did", what should this court do about it in the current circumstances?

The Court of Appeal considered the House of Lords decisions in *R v May, Jennings v CPS* and *R v Green and the relevant* provisions of POCA 2002 (*Sections 6, 8, 76(3)(4)(5)(6)* and *(7)* and *84(1)).*

In dismissing the appeal Lord Justice Aikens giving the judgment noted that in the Crown Court:

iii) there had been no argument that the appellant had not benefited from his criminal conduct in being a conspirator involved in the importation of the cannabis resin, within section 6(4) of POCA.

iv) none of the conspirators challenged the Crown's "retail value" of the drugs at £3.6 million.

v) there was no challenge to that figure being used as the basis for the total "benefit" obtained by all the conspirators.

vi) there was no argument on whether the conspirators either had, or had not, jointly, obtained entitlement to and ownership of the cannabis resin. The prosecutor's statement did not state a positive case that all the conspirators had, jointly, obtained ownership of the drugs.

vii) there was no evidence from the appellant that the *only* "benefit" that he would ever have obtained from his part in the conspiracy was the sum of £200 he was paid for the work he did. He did not give evidence at all, as the judge noted in giving judgment.

Therefore the position before the Crown Court had been:

i) Judge Steiger either did not have the necessary evidence or he declined to find that the cannabis resin had been obtained jointly by all the conspirators.

ii) The judge was entitled, as a matter of law (see Porter, Gibbons and Olubitan as explained in May) and on the evidence before him, to draw the inference that all conspirators had obtained a benefit from their criminal conduct, ie. the conspiracy to import the cannabis resin.

iii) In the absence of any specific evidence to the contrary before him, the judge was entitled to make an equal division of the benefit obtained by the conspirators. It was the fairest solution available in the circumstances. It would have defeated the object of the confiscation legislation if, for want of information from the conspirators, he had been precluded from making an order as to the benefit obtained by each.

The conclusion of Judge Steiger as to the benefit obtained by the appellant was therefore in accordance with the terms of section 76(4) of POCA and the case law. Nothing that had been said in the three House of Lords decisions impugned the basis for the judge's decision.

Assumptions

R v Barry Ward [2008] EWCA Crim 2966[5]

The argument related to a mortgage obtained from a legitimate source i.e. building society and therefore should not be included in his benefit.

Court of Appeal held that it is not sufficient to displace the assumption to show that the money came from a legitimate source. What must be shown in addition is that the property in question (remortgage money) was obtained lawfully and that the defendant's criminal lifestyle was irrelevant to its obtaining.

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[5] [2010] WLR (D) 191. Following this appeal Barry Ward sought a variation of the confiscation order under s.23 of POCA 2002. That application was refused. He appealed to the Court of Appeal Criminal Division who dismissed the appeal ruling that they had no jurisdiction to hear an appeal against a refusal by a judge in the Crown Court, on an application under s 23 of the Proceeds of Crime Act 2002.

In this case it was found that the money was used at the direction of the defendant and therefore he had benefited. Following *In Nadarajah [2007] EWCA Crime 2688*

> "We reject the submission that mortgage money, if on investigation there was a mortgage, was not obtained by the appellant because, at his request and following usual practice, it was probably paid by the mortgage company direct to the vendor. Moreover, on the statutory procedure, there is no need to prove a mortgage fraud. The appellant obtained, on his own evidence ,a substantial sum of £540,000 and, unless shown to be incorrect, the assumption that it was obtained as a result of his general criminal conduct applied."

Looked at alone the judge's reasons which were extremely brief would be inadequate. However, looking at the judgement as a whole, it is clear that the appellant's credibility was comprehensively rejected with the result that he had failed to displace the assumptions required by the Act.

R v Briggs Price [2009] UKHL 19; [2009] 2 WLR 1101

The defendant had been charged with conspiracy to import heroin. The Crown alleged that he had been brought into the conspiracy because he already had a distribution network for the transportation and distribution of cannabis which would be employed to distribute the heroin, but accepted that no heroin was in fact imported.

There was no indictment count in relation to the alleged cannabis distribution network but the Crown adduced evidence at trial in support of the allegation. The defendant was convicted of the conspiracy to import heroin.

In the confiscation to the DTA 1994 it agreed that the provisions for the making of assumptions set out in section 4 of the Act were not to apply.

The judge ruled that on the evidence given at the trial it had been proved to the criminal standard that the defendant had been trafficking in cannabis and that, on the balance of probabilities, he had benefited from that trafficking to the extent of £4m. He accordingly made a confiscation order.

The defendant appealed on the ground that the application of the statutory assumption procedure under section 4, which allowed a defendant to challenge the assumptions, was mandatory and the failure to invoke it invalidated the confiscation order, and that the taking into account of drug trafficking which had not itself been the subject of a charge amounted to the bringing of a new charge against him in violation of the presumption of innocence under article 6(2) of the

Convention for the Protection of Human Rights and Fundamental Freedoms2 or, alternatively, the right to a fair trial under article 6(1).

The Court of Appeal dismissed the appeal. Although the provisions of section 4(3) are mandatory, subject to the exceptions in section 4(4), they are the only way in which the Act permits the court to determine the extent of the defendant's benefit from drug trafficking.

> "The origin of the mandatory assumptions is to be found in section 2 of the Drug Trafficking Offences Act 1986. The assumptions were not, however, mandatory at that stage. Plainly they were not then the exclusive route for determining benefit derived from drug trafficking. They were made mandatory by section 9 of the Criminal Justice Act 1993. This change was directed at making it more difficult for a defendant to avoid confiscation of his property. There is no basis for concluding that its effect was to restrict the evidence that could be relied upon to prove the benefit derived by the defendant."

ECHR

The Court of Appeal was satisfied that where, in confiscation proceedings after a defendant's conviction, the prosecution proves that the defendant possesses or has possessed property and invites the court to assume that this property represents or represented the benefit of criminal activity, this exercise does not involve charging the defendant with a criminal offence so as to engage article 6(2) of the Convention.

> "Although I have concluded that the requirements of article 6(2) and 6(3) did not apply in this case, those of article 6(1) were none the less applicable. The requirements of a fair trial in confiscation proceedings are not poles apart from those imposed by article 6(2) and 6(3). Where, as here, the prosecution rely on criminal offending to prove the existence of benefit, they have to prove that offending. The defendant is presumed innocent until proved guilty, albeit by the civil standard of proof…
>
> … The prosecution, as part of their case on the conspiracy to import heroin, gave the defence particulars of evidence that they intended to adduce of other drug offences. The appellant challenged these at his trial and could have challenged them again in the confiscation proceedings. The judge was sure on the evidence that the relevant offences were proved. He deduced the benefit from the proved offending…
>
> …. It is open to the prosecution to prove the derivation of benefit from drug trafficking by proving the commission of drug traffcking not charged on the indictment. In this case they did so."

Hidden Assets

R v McMillan-Smith [2009] EWCA Crim 732

There were two appeals. It is only the first that is relevant for this paper.

Unduly lenient sentence

The Crown argued that the confiscation order made under the DTA 1994 was an unduly lenient sentence. The Court of Appeal agreed and quashed the order holding that the amount of the realisable assets may be quite unrelated to the identifiable proceeds of the particular drug trafficking activities of which the defendant has been convicted. Given that McMillan-Smith appeared to have a history of concealing assets, the judge ought not to have concentrated just on what assets he might still have as a result of the cannabis factory. It was for the defendant to satisfy the judge that his realisable assets were less than the benefit.

McMillan-Smith did not give evidence at the confiscation hearing and had failed in his written reply to meet any of the allegations in the report of the financial investigator that there were hidden assets. Unless there was other evidence from which the judge could be satisfied, on the balance of probabilities, that his realisable assets were less than the benefit, then it is agreed that the judge was obliged to make a confiscation order in the sum of £1,971,923.83, being the figure representing the benefit obtained. The judge in fact made an order that the realisable assets were £273,000 including £50,000 of hidden assets. The judge gave no reasons for deciding that figure of £50,000.

The Court of Appeal said:

> "It seems to us clear that the judge, in a perhaps understandable attempt to alleviate the rigours of the Act, fell into error. The judge said:
>
> > "So there is a tremendous shortfall between what he has actually had and what was able to be identified."
>
> He then went on to say that a lot of what he had received "will have been dissipated but not all of it". Having said that he was convinced that there were hidden assets, he said that a reasonable figure would be £50,000 to represent that which he had hidden.
>
> To put it another way, he has received £500,000 as earnings from the drugs factory, he only has known realisable assets of £223,000, he will have dissipated some of it

but a figure of £50,000 is a reasonable figure to represent the balance after dissipation.

As superficially attractive as that approach might be, it is wrong. In *Barwick* [2001] 1 Cr App R (S) 129, the Court said:

> "37. We stress that the scheme of the Act requires the court to perform two distinct and discrete tasks. First, to determine the benefit. Secondly, to determine the amount that might be realised at the time the order is made, which may be very different. Further, the amount that might be realised may be quite unrelated to the identifiable proceeds of the offence, eg a lottery win, inheritance, or other lawfully acquired property. In the end, the task of the court at the second stage is to determine the amount 'appearing to the court' to be the amount that might be realised. But once the benefit has been proved, it is permissible and ought normally to be the approach of the court, to conclude that the benefit remains available until the defendant proves otherwise … ."

Thus the amount of the realisable assets may be quite unrelated to the identifiable proceeds of the particular drug trafficking activities of which the defendant has been convicted.

Given, in particular, the fact that McMillan-Smith appeared to have a history of concealing assets, the judge ought not to have concentrated just on what assets he might still have as a result of the cannabis factory. It was for the defendant to satisfy the judge that his realisable assets were less than the benefit. This he had singularly failed to do, notwithstanding that he knew that the prosecution were alleging that he had hidden assets."

Note that in the particular circumstances on this case the Court permitted evidence from McMillan-Smith and made a new order

PART II

THE RECOVERABLE AMOUNT

Whittington [2009] EWCA Crim 1641

The issue in this appeal was whether the judge, in determining what the recoverable amount was, had applied the correct burden and standard of proof.

The Court of Appeal stressed the importance of a rigorous, step-by-step approach to the process of determining the recoverable amount for the purpose of s.6(5) of the Proceeds of Crime Act 2002 (the 2002 Act).

> "The starting point must be the undisputed facts as to the existing assets in the possession of the appellant. He had an unexplained amount of £700,000 in his possession. Further, it was not disputed but that he had procured others to launder cash he had obtained. …
>
> In our judgment, the evidence taken as a whole of the existence of £700,000, which could not be explained by virtue of the amphetamine production, coupled with the notebook and shredded pieces of paper, demonstrate that the appellant had obtained assets to the value of £8.8 million at some stage before he was arrested. ...
>
> We are satisfied, on the balance of probabilities, that the prosecution has proved that the defendant had obtained property to the value of £8.8 million of benefit to be added to the undisputed balance, making a total of £9,672,176.92. Once the appellant's evidence is rejected, then the assumptions contained in s.10 are triggered and, in the absence of any further evidence, we conclude that the defendant has benefited from his general criminal conduct to the amount of £9,672,176.92. The assumption has not been shown to be incorrect nor have we identified any serious risk of injustice if the assumption is made…
>
> The next question is whether the defendant has shown that the available amount was less than the amount of the benefit for the purposes of s.6 and ss.7(1) and (2) of the 2002 Act. …
>
> Once we have concluded that the appellant benefited to the amounts revealed in the documents to which we have referred, then in the absence of any evidence as to what has happened to those benefits, or how much profit they represented to him, we are compelled to conclude that the available amount is no less than the amount of the benefit. That, after all, is the purpose of shifting the burden of establishing that the available amount is less onto a defendant. If a defendant chooses to give no explanation or no acceptable explanation of benefits identified by the court he has only himself to blame for the failure to discharge the burden of establishing that a lesser amount is available. This is the risk a defendant runs in disputing the amount of benefit, once the prosecution succeeds in establishing a figure which he disputes. We wish to stress the importance of following the statutory process for establishing the recoverable amount for the purposes of s.6 of the 2002 Act. This process, set out in *May* in its end note, which we have tried to repeat, not only ensures that the court avoids misdirection but also that it sets out its reasons for its conclusion. Unless it does so, this court is faced with the difficulty of identifying the reasons for the court's conclusion and whether it is justified."

Part III

GENERAL

Conditional Discharge and Confiscation Order

R v Wilkinson [2009] All ER (D) 121; [2009] EWCA Crim 2733[6]

This is an appeal against the imposition of a confiscation order. Its imposition was unquestionably harsh, as the judge recognised.

The following facts constituted the basis of plea to possession of criminal property contrary to s.329 of POCA 2002. The prosecution did not dispute them. The appellant was seen by police officers getting into a BMW motorcar. Unknown to the appellant, it had been stolen. A man who wanted to sell it had dropped it at his house so that he could test drive it. The man told the defendant that the car was cheap because it had been "bumped", although there was no evidence of that. The appellant had been in possession of the car for approximately an hour when he was arrested. He had by then suspected that it was stolen. He intended to return it as soon as possible, and he formed the intention not to buy it.

The Crown applied for a confiscation order to be imposed seeking a ruling that the appellant had benefited from his offending and that the value of that benefit was the market value of the car. The learned judge, with considerable reluctance, concluded on the authorities that the argument was correct, and he made an order in the sum of £15,558.84, the market value of the car. The judge made this order before determining the appropriate sentence for the substantive offence. He then turned to the question of sentence and said this:

> "... it is inexpedient to punish you further and so what I am going to do is to impose a sentence of conditional discharge for six months."

On behalf of the appellant it was submitted that given that he was conditionally discharged, the Crown Court had no power to make a confiscation order.

This matter was considered in the case of Clarke [2009] EWCA Crim 1074. The Court of Appeal held that where somebody has been conditionally discharged, it is not possible to impose a confiscation at all.

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[6] See this case also at pages 6 and 45

The court analysed in some detail the history of the legislation relating to absolute and conditional discharges. In the light of that history and having regard in particular to the statutory language in section 12 of the Powers of Criminal Courts (Sentencing) Act 2000, which empowers a court to make absolute or conditional discharges, the court was satisfied that, at least in circumstances where the sentence is imposed before the confiscation order is made, there is no power to impose the confiscation order. Emphasis was placed in particular on section 12(7) of the 2000 Act, which specifically provides that certain orders can be combined with an absolute or conditional discharge, such as cost orders or restitutionary orders, but does not include confiscation orders. As the court noted, however, for other technical reasons it is possible for a court to impose the confiscation order first and then impose a further sentence. This is because section 14(1)(a) of the Proceeds of Crime Act so provides.

It is therefore expressly envisaged that the confiscation order can precede the imposition of the sentence. In paragraph 78 of the judgment in Clarke, Latham LJ said this:

> "Given that a confiscation order can, at least in theory, be made before passing sentence, it would obviously be prudent in those very rare cases where an absolute or conditional discharge is a possibility, to decide upon sentence first."

That advice was not followed in the case of Mr Wilkinson. The confiscation order was made first, and the judge made it clear that he was imposing the sentence of conditional discharge because it was inexpedient to punish the appellant further. The prosecution can see that it was wrong for the judge, when determining the sentence, to have regard to the fact that a confiscation order had been made. That is not relevant to sentence, save in limited circumstances such as where a fine is being considered (see section 12(4) of the 2002 Act).

What is the effect of quashing the confiscation order? The Court held that it simply leaves the sentence in place. In the light of the judge's comments, he may well have imposed a different sentence had he not made the confiscation order. He plainly took the view that that order was punishment enough. But he did not impose a different sentence, and the sentence he passed must stand.

The Court warned that this case demonstrates the importance of the court bearing in mind the advice given by Latham LJ in Clarke that they should sentence independently of a confiscation order, and if an absolute or conditional discharge is envisaged as a possibility, then the sentence should be passed before considering the issue of confiscation.

Part IV

MONEY-LAUNDERING

R v Anwoir [2008] All ER (D) 401 June

Predicate offence

The Court of Appeal considered what it called the "NW ground"

> "This ground is based upon the decision of this court in R v NW, SW, RC and CC [2008] EWCA Crim 2. It is submitted that in that case, this court held that for the purposes of a prosecution under section 328 of POCA the prosecution, whilst it did not have to establish precisely what crime or crimes had generated the property in question, it did have to establish at least the class or type of criminal conduct involved. It is acknowledged on the part of the appellants that this decision would appear to conflict with another decision of this court, R v Craig [2007] EWCA Crim 2913 which does not appear to have been drawn to the attention of the court in NW."

The Court concluded:

> "there are two ways in which the Crown can prove the property derives from crime, a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime. This in our judgment gives proper effect to the decision in Green, and is consistent with the decisions of this court in Gabriel [2007] 2 CAR 11, IK [2007] 2 CAR 10 and, of course, Craig. We consider that it is also consistent with the approach of this court in R v El Kurd (unreported CA 26th July 2000)."

Jurisdiction

The second general ground of appeal, described as the jurisdiction ground, was based on the wording of paragraph 3 of the Proceeds of Crime Act 2002 (Commencement No. 4, Transitional Provisions and Savings) Order 2003 which provides:

> "The new principal money laundering offences shall not
> have effect where the conduct constituting an offence under

> those provisions began before 24th February 2003 [and ended on or after that date] and the old principal money laundering offences shall continue to have effect in such circumstances."

On behalf of the appellants was argued that in relation to counts 1 and 3, evidence was led in relation to matters which occurred before the 24th February 2003, which was the commencement date of the relevant provisions so that the defendants should have been charged under the previous statutory provisions. The Court of Appeal rejected that submission:

> "We reject that submission for the simple reason given by the Crown in the present case, namely that the charges which were drafted to commence on the 24th February 2003 were clearly designed to catch conduct after that date amounting to money laundering. There is no suggestion in the evidence that there was only one transaction which straddled the commencement date. The course of conduct in both counts involved a number of separate transactions, which could therefore be properly charged under POCA, albeit that they were capable of being overt acts evidencing a conspiracy which had begun before the 24th February 2003. We accordingly dismiss this ground of appeal."

Note

In *R v MK & AS [2009] EWCA Crim 962* the Court of Appeal confirmed that the law regarding the predicate in money laundering was correctly stated in Anwoir.

Allpress et al v R [2009] EWCA Crim 8 (20th January 2009); [2009] 1 Lloyds LR (FC) 242

The Court of Appeal commented that the opinion of the judicial committee in *May* contained a broad overview of the legislative schemes in force from time to time and a review of a number of the leading authorities. That review included a comparison of the language of CJA 1988, the Drug Trafficking Act 1994 ("DTA 1994") and the Proceeds of Crime Act 2002 ("POCA 2002"). However, none of the cases before the House of Lords involved money laundering (although some of the cases reviewed in the course of the opinion in *May* did). The judicial committee concluded its opinion in *May* with the caveat that the position of a money launderer might be different from that of a mere courier or custodian of

tangible property who was rewarded by a fee and had no interest in the property or proceeds of sale.

The appeals in Allpress et al all arise from confiscation orders made against defendants who had varying degrees of involvement in the safeguarding or transfer of funds which represented proceeds of crime. They were listed together in order for the court to consider the application of the confiscation legislation to such cases in the light of the recent judgments of the House of Lords In *Sivaraman* [2008] EWCA Crim 1736 where the court had addressed "two misconceptions which subsequent cases suggest may still be common":

(a) In assessing benefit in a conspiracy case each conspirator is to be taken as having jointly obtained the whole benefit obtained by "the conspiracy". A conspiracy is not a legal entity but an agreement or arrangement which people may join or leave at different times. In confiscation proceedings the court is concerned not with the aggregate benefit obtained by all parties to the conspiracy but with the benefit obtained, whether singly or jointly, by the individual conspirator before the court.

(b) Anybody who has taken part in a conspiracy in more than a minor way is to be taken as having a joint share in all benefits obtained from the conspiracy. This is to confuse criminal liability and resulting benefit. The more heavily involved a defendant is in a conspiracy, the more severe the penalty which may be merited, but in confiscation proceedings the focus of the inquiry is on the benefit gained by the relevant defendant. In the nature of things there may well be a lack of reliable evidence about the exact benefit obtained by any particular conspirator, and in drawing common sense inferences the role of a particular conspirator may be relevant as a matter of fact, but that is a purely evidential matter.

It was argued in these appeals that because the House of Lords did not overrule Simpson in the May appeals, the ruling in Simpson remains binding on the Court in this appeal. However, the Court of Appeal did not accept that submission stating

> "… It would obviously be otherwise if the House of Lords had positively affirmed the decision in *Simpson,* but the terms in which it referred to the decision were far from an endorsement of its correctness."

It should also be noted that the Court said of money-laundering charges:

> "It would be unsatisfactory if as a result of the prosecution choosing to lay a charge under POCA 2002, s329, the confiscation provisions of the Act would apply differently than if on the same facts the offender had been charged with burglary or handling stolen property."

The conclusions of the Court of Appeal were:-

The cash courier

If D's only role in relation to property connected with his criminal conduct, whether in the form of cash or otherwise, was to act as a courier on behalf of another, such property does not amount to property obtained by him within the meaning of POCA 2002 s80(1) or CJA 1988 s71(4) or to "payment or other reward" within in the meaning of DTA 1994 s2(3).

The cash custodian

The Court came to the same conclusion in relation to a mere custodian of cash for another.

The money launderer through the banking system

In Morris' case the appellant submitted that the same approach should be applied as if he had been a cash courier. He argued that Morris had no personal interest in the monies which went from Viltern and Hocus into the account of Brooks. The money was held in that account in accordance with the Solicitors Accounts Rules 1998. Morris was a mere trustee of the funds, acting at all times on behalf of Woolley and under Woolley's instructions.

The prosecution submitted that the Solicitors Accounts Rules had no relevance since the Brooks account was not being used for a genuine professional purpose, and the use of the firm's client account could give Morris no more protection than if the money had gone into another account opened by Morris. Mr Bird also submitted that the trial judge had been entitled to reject on the evidence before him the argument that the true nature of Morris' connection with the relevant monies was that of a bare trustee.

The Court agreed with the prosecution's submissions. The Solicitors Account Rules are irrelevant in considering the true nature of Morris' interest in the money in circumstances where the firm's account was being used as a mere façade. The account was an account of Morris and his partners with their bank. Payment of monies into that account gave rise to a thing in action in favour of Morris (jointly with his partners).

The starting point (as in *R v Sharma* [2006] EWCA Crim 16, [2006] 2 Crim App R (S) 416), is that this was therefore his property. In *Sharma* the defendant caused the proceeds of a fraud in which he was engaged to be paid into a company account of which he was the sole signatory. It was held that the money in the account was money held for his benefit as the sole signatory on the account, and that decision was approved by the House of Lords in *May* (para 34). In this case the account was not only in the name of the firm of which Morris was a partner, so that he had a thing in action against the bank, but he also had in fact sole operational control over the account.

However, the Court specifically did not exclude the possibility of a case where money is paid into a bank account in the name of D, but which is in reality operated entirely by P for the benefit of P, and where it would be wrong, unusually, to conclude that D obtained monies paid into the account. Although the Court pointed out that this is more likely to arise in a domestic than a commercial context. e.g. a husband or father operating an account in the name of his wife or child, which he treats entirely as his own and in respect of which the

The Postscript however confines this judgement to the types of case under consideration and did not extend it to cover all forms of money laundering.

<u>The FSA has the power to</u>

<u>prosecute money laundering offences</u>

<u>R v Rollins [2010] WLR (D) 210; [2010] UKSC 39</u>

The Supreme Court unanimously dismissed the appeal holding that for all the above reasons in their judgment (summarized below) the FSA has the power to prosecute offences of money laundering contrary to ss.327 and 328 of POCA.

The issue on this appeal was whether the FSA has power to prosecute offences of money laundering contrary to ss.327 and 328 POCA 2002. The FSA had brought charges against the Appellant for offences of insider dealing contrary to s.52 of the Criminal Justice Act 1993 and offences of money laundering contrary to ss.327 and 328 of POCA.

The appellant contended that the FSA's powers to prosecute criminal offences are limited to the offences referred to in ss 401 and 402 of the FSMA 2000 which do not include offences under POCA.

The FSA is a company limited by guarantee. It was incorporated in June 1985 under the name of The Securities and Investments Board ("the SIB"). Its name was changed to the FSA in October 1997.

Sir John Dyson SCJ (delivering the judgment of the court) explained:-

Before the enactment of FSMA the FSA could initiate criminal proceedings for any offence which fell within its objects as defined by its memorandum and articles of association, subject to any restriction or condition that was imposed by the statute which created the offence.

Every person has the right to bring a private prosecution which has been expressly preserved by s.6 f the Prosecution of Offences Act 1985. Nothing in

s.6(1) excludes bodies corporate from the definition of "any person". A corporation may therefore bring a prosecution provided that it is permitted to do so by the instrument that gives it the power to act.

Most statutes which create offences do not specify who may prosecute or on what conditions. Typically, they simply state that a person who is guilty of the offence in question shall be liable to a specified maximum penalty, it being assumed that anybody may bring the prosecution.

It follows that before the enactment of FSMA, the FSA could have prosecuted the appellant for offences contrary to ss.327 and 328 of POCA, if POCA had been in force at that time.

The particular question that arose therefore was whether the effect of ss.1(1), 401 and 402(1) of the FSMA was to deprive the FSA of the general power it previously enjoyed to bring prosecutions and confine it to the power to bring prosecutions falling within ss.401 and 402(1).

S.401 deals with the prosecution of offences under the FSMA itself or any subordinate legislation made under it. The House of Lords agreed with the Court of Appeal that the purpose of this provision is not to *confer* the power to prosecute, but to *limit* the persons who may prosecute for such offences. If the statute had not specified who could prosecute, then any individual could have prosecuted as could any corporate body, provided that it was authorised by its constitution to do so.

It is most unlikely that Parliament would have intended to deprive the FSA (but no-one else) of the power it previously enjoyed to bring prosecutions for offences other than those mentioned and there was no policy reason why Parliament should have intended to do.

Further, if the power of the FSA is limited to the prosecution of offences under ss.401 and 402 then there are consequences which it is unlikely that Parliament intended. For example, it means that, if in the course of its investigations, the FSA discovers evidence which would support a prosecution under ss.401 or 402 of FSMA *and* a prosecution for other offences, it has to refer the question whether to prosecute those other offences to the DPP - a most inefficient and unsatisfactory way of prosecuting crime. It also means that, if the evidence given at trial does not support a count on the indictment which is being prosecuted by the FSA, but it does support a different offence which *ex hypothesi* the FSA cannot prosecute, an application for leave to amend the indictment to add a new count to reflect the evidence cannot be made by the FSA, even though a prosecutor would ordinarily make such an application. Parliament cannot have intended to create such an absurd state of affairs.

Finally, it would mean that the FSA cannot prosecute an offence of conspiracy to commit offences under FSMA, since the offence of conspiracy, whether under

s.1 of the Criminal Law Act 1977 or at common law, falls outside the powers of prosecution expressly conferred by ss.401 and 402.

The technique usually employed by the legislature to indicate an intention to limit the class of persons who may prosecute a particular offence is the obvious one of stating expressly that a particular offence may *only* be prosecuted by a specified person or persons. There is no such provision in FSMA excluding the power of the FSA to prosecute offences which are not mentioned in ss.401 or 402.

Is the property criminal property at the time of the arrangement?

R v Geary [2010] EWCA Crim 1925

On 7th October 2009 in the Crown Court at Leeds before the Recorder of Leeds the appellant pleaded guilty on re-arraignment to entering into or becoming concerned in an arrangement which facilitated the acquisition, retention, use or control of criminal property for or on behalf of another contrary to section 328(1) of the Proceeds of Crime Act 2002 ("the Act"). On 20th November 2009 he was sentenced by the Recorder to 22 months' imprisonment.

The judge had indicated that in his view the facts as alleged by the appellant did not provide him with a defence. The appellant then pleaded guilty on the following basis:

> "I am Michael Geary. I plead guilty to the charges against me on the following basis.
>
> I know Peter Harrington as a friend and as a property developer. In December 2007 Peter Harrington explained that he had matrimonial problems and wished to ensure that his wife did not acquire his assets. Harrington paid me £71,300 on 14th December 2007. Harrington had the majority of the money returned in cash but certain amounts were used to purchase gifts for Harrington, e.g. a mobile phone, a Play Station 3 etc.
>
> On January 2nd a further £52,300 was paid by Harrington and £45,000 cash returned the next day.
>
> In total I received £123,600 from Harrington and paid back £118,278.94
>
> At no time did I believe the monies were the result of criminal activity, but accept that by hiding monies when court proceedings

were, as I was told, and believed due to commence, I am guilty of
the offence as charged."

The grounds of appeal were that the appellant's conviction was unsafe because, on the facts as they were set out in his basis of plea, he was not guilty of the offence with which he was charged.

Lord Justice Moore-Bick gave the judgment of the Court of Appeal:

It was common ground that the actus reus of the offence was established in this case. The only question is whether the appellant had the necessary mens rea to render him guilty.

There are two aspects to the mental element of the offence created by section 328(1):

(i) the defendant must intentionally or recklessly enter into an arrangement which facilitates the acquisition, retention etc. of criminal property by or on behalf of another person;

(ii) he must know or suspect that the arrangement will have that effect. It follows that he must know or suspect that the property to which the arrangement relates is criminal property, that is, property that has been obtained as a result of, or in connection with, crime.

On the face of it the latter requirement was not satisfied in this case, not least because one of the facts set out in the basis of plea. The arrangement was that the appellant would accept the money, hold it for a time and then return it to Harrington. That arrangement applied to money which, as far as the appellant was aware, was money which Harrington had obtained lawfully. The object of the arrangement, as understood by the appellant, may have been unlawful, but the arrangement was to use lawfully acquired money in an unlawful way; it was not to deal with money that had been acquired unlawfully.

The Crown sought to overcome that objection in two ways:

(i) If the money had been transferred by Harrington to the appellant pursuant to a conspiracy to pervert the course of justice it would have become criminal property as soon as, or even before, it reached the appellant and that therefore the arrangement, viewed as a whole, was one that facilitated the retention, use or control of criminal property by Harrington.

(ii) Alternatively, the fact that the money had been transferred pursuant to a conspiracy to pervert the course of justice would have meant that it became criminal property in the hands of the appellant (having been acquired by him in connection with criminal conduct), that the appellant knew that, and that by retaining it and later returning it the appellant

would have entered into or became concerned in an arrangement to facilitate its use or control by Harrington.

Two important questions arise, each of which concerns one aspect of the actus reus of the offence created by section 328(1):

(i) whether it is necessary for the property which is the subject of the arrangement to be criminal property at the time when the arrangement attaches to it;

(ii) whether it is permissible for these purposes to separate out different aspects of the arrangement so that its implementation can be treated as both criminalising the property and then as facilitating its retention, use or control in its newly acquired criminal character, thus constituting the offence.

The natural and ordinary meaning of section 328(1) is that the arrangement to which it refers must be one which relates to property which is criminal property at the time when the arrangement begins to operate on it. It does not extend to property which was originally legitimate but became criminal only as a result of carrying out the arrangement.

Part 7 of the Act is concerned with money laundering and sections 327, 328 and 329 are all directed to dealing with criminal property. In each case the natural meaning of the statutory language is that the property in question must have become criminal property as a result of some conduct which occurred prior to the act which is alleged to constitute the offence, whether that be concealing, disguising, converting, transferring or removing it contrary to section 327 or entering into or becoming concerned in an arrangement which facilitates its acquisition, retention, use or control by another contrary to section 328. The same must be true of acquiring, using or having possession of criminal property contrary to section 329(1). Moreover, the only authorities directly in point on the interpretation of sections 327 and 328 support that conclusion.

The facts set out in the basis of plea had to be accepted as proved for the purposes of the appeal. One of the facts set out in the basis of plea was that at no time did the appellant believe that the money he received from Harrington was the result of criminal activity (and in our view belief must for these purposes be taken to include suspicion). It is difficult to see, therefore, how the appellant could have had the necessary mens rea to commit the offence simply by receiving the money from Harrington, even if, contrary to the opinion expressed earlier, the mere receipt was sufficient to render it criminal property for the purposes of the arrangement which they had entered into.

However, on the assumption that the purpose for which the money was transferred to the appellant involved perverting the course of justice, so that it became criminal property in his hands, the appellant, who knew the purpose for

which it had been transferred to him, did know or suspect that he was then dealing with criminal property. For the reasons we have already given, we do not think that simply holding the money and returning the bulk of it to Harrington (together with the goods he had purchased with part of it) was sufficient to constitute the actus reus of the offence with which he was charged, but he could in our view have been charged with an offence of converting or transferring criminal property contrary to section 327(1)(c) or (d). It is unnecessary and undesirable to give a strained and unduly broad interpretation to section 328(1) in order to bring within it conduct that falls within other sections of this Part of the Act.

The appellant's basis of plea does not disclose an offence contrary to section 328(1) of the Act - the appeal was allowed.

The Crown should have given more thought to the implications of the appellant's account and, if necessary, sought leave to amend the indictment to include an additional count which more accurately reflected the appellant's state of mind as reflected in the basis of plea.

The Court considered the cases of *R v Loizou* [2004] EWCA Crim 1579, [2005] 2 Cr.App.R. 37. In *Kensington International Ltd v Republic of Congo* [2008] 1 W.L.R. 1144; R *v Izekor* [2008] EWCA Crim 828 (unreported); *R v Fazal* [2009] EWCA Crim 1697, [2010] 1 W.L.R. 694. *R v Gabriel* [2006] EWCA Crim 229, [2007] 1 W.L.R. 2272; *R v I K* [2007] EWCA Crim 491, [2007] 1 W.L.R. 2262.

Part V

ABUSE OF PROCESS

Morgan & Bygraves [2009] 1 CrAppR (S) 60; [2008] EWCA Crim 1323

The Court considered whether it had been oppressive to make a confiscation order where defendant was willing and able to pay compensation.

The Court held that it would be oppressive in a limited category of cases where it is clear that the defendant benefited from an identifiable victim in an amount that can be accurately assessed and is willing and able to pay that compensation.

It would not be oppressive if e.g. the defendant had made substantial sums out of the funds obtained; if the defendant was not realistically in a position to pay compensation:

> "where demonstrably (i) the defendant's crimes are limited to offences causing loss to one or more identifiable loser(s), (ii) his benefit is limited to those crimes, (iii) the loser has neither brought nor intends any civil proceedings to recover the loss, but (iv) the defendant either has repaid the loser, or stands ready willing and able immediately to repay him, the full amount of the loss."
>
> "In those cases, the Crown accepts, and we hold, that it may amount to an abuse of process for the Crown to seek a confiscation order which would result in an oppressive order to pay up to double the full restitution which the defendant has made or is willing immediately to make, and which would thus deter him from making it. In particular, although the confiscation jurisdiction is rightly described as draconian and often as penal in nature, we do not accept the contention that it is a sufficient justification for seeking a confiscation order in the limited class of cases which we are here dealing with that the Crown wishes to inflict an additional financial penalty upon the defendant. Whilst confiscation may well be draconian or penal in effect, it does not, as the House of Lords observed in *R v May*, at paragraph 48(1), operate as a fine. Whether an application for confiscation is or is not oppressive in the limited class of cases we are considering will fall to be considered by the trial judge individually on the facts of each case. The jurisdiction to stay may be exercised either in advance of the confiscation hearing or during it if it becomes clear that the making of an order would be oppressive for the reasons here discussed."

The Court referred to the comment in the Criminal Law Review on this decision pointed out "the scope for an application to stay as identified in this judgment is extremely narrow." The court then set out at paragraph 31 the circumstances in which it would not be oppressive to seek such a confiscation order and decided that in that case the abuse of process application failed.

<u>R v Shabir [2009] 1 CrAppR (S) 84; [2008] EWCA Crim 1809</u>

(See also Benefit issues see above)

The Defendant dishonestly inflated his monthly claims to the Health Service. The total received above what he was legitimately entitled was about £464.00. A confiscation order was made in the sum of £212,464.17 the s10 assumptions having applied.

Oppression:

Appeal: the enormous disparity between the excess claim (£464) and the confiscation order (£212,000) – order is oppressive.

Court held: the disparity of itself may or may not be oppressive depending on whether there is a criminal lifestyle. (i) In this case the criminal lifestyle provisions could not have applied if the charges had reflected the fact that the defendant's crimes involved fraud to an extent very much less than the threshold of £5,000. (ii) to advance the contention that the defendant had benefited to the tune of over £179,000 when in ordinary language his claims were dishonestly inflated by only a few hundred pounds. We are clear that without oppression the assumptions could not be brought into play and are thus irrelevant. Decision made on the very unusual and exceptional facts of this case.

As this was apparently the first case in which this jurisdiction has been exercised in the Court of Appeal or the exercise of the jurisdiction by the Crown Court approved by this the Court of Appeal. The Court identified the combination of two particular features of the proceedings which gave rise to the decision to stay making clear that this was an unusual and exceptional case. At paragraph 24, the Court observed:

> "This jurisdiction must be exercised with considerable caution, indeed sparingly. It must be confined to cases of true oppression. In particular, it cannot be exercised simply on the ground that the judge disagrees with the decision of the Crown to pursue confiscation or the way it puts its case on the topic. A specific example of this principle is that it is clearly **not** sufficient to establish oppression, and thus abuse of process, that the effect of the confiscation will be to extract from a defendant a sum greater than his net profit from his crime(s). That is inherent in the statutory scheme. The well known general observations of Lord Salmon in DPP v Humphrys [1977] AC 1 at 46 apply to a confiscation case as they do to any other application to stay on grounds of abuse of process …"

R v Baden Lowe [2009] All ER (D) 166 (Feb)

The Court of Appeal referred to the cases of Morgan & Bygrave and Shabir and stated that contrary to the fears of some (as for example set out in [2008] Crim LR 991 at 995) it will not be difficult to know when the jurisdiction to stay is applicable. The cases in which it is likely to be applicable are very rare and that if the principles set out in *Morgan and Bygrave* are observed by prosecutors, it may never arise. By way of example, it would not be an abuse of process to seek to recover more than a defendant has profited from his crime nor where he has made restitution outside the very narrow circumstances identified in *Morgan and Byegrave.* If it were otherwise the case and the jurisdiction exercised more widely, the court would be defeating the clear decision of Parliament, by enacting the legislation in the terms in which it did, not only to impose a draconian policy

but also to remove the discretion of the court to avoid those consequences, save in a case where abuse was established.

The Court stated:-

> "The circumstances of this case are illustrative of circumstances where the suggestion of abuse could not remotely arise.
>
> iv) The appellant made no offer to restore the property. It would have been restored by operation of the provision of the Insolvency Act if his co-director Mr Lloyd had not entered into an agreement to restore it.
>
> v) This was not a course of criminal conduct limited to one or more identifiable losers; the fraudulent transfer was made to strip an asset out of his company to the detriment of every creditor.
>
> vi) There can be no suggestion of an abuse or oppression. The decision to seek a confiscation order is one that can be seen as simply carrying out the decision of Parliament.
>
> It can make no difference in our view that another Government agency, Her Majesty's Customs and Revenue, have a policy of not seeking a confiscation order which would have the effect of imposing on a defendant a further order where the amount the Revenue had lost had been restored: see *Dimsey & Allen* [2000] 1 Cr. App. R. (S.) 497 and paragraph 12(6) of the judgment in *Farquhar.* There may be good policy reasons for that policy, but another Government Department, BERR, have taken the view in this type of case where directors set up small companies and seek to strip out the assets of the company, there should be no relaxation of what Parliament provided for in the Act."

In a Postscript to this case the Court stated:

> **The court should focus on the language of the statute**
>
> "In *R v May* [2008] UKHL 28, the opinion of the Appellate Committee of the House of Lords delivered by Lord Bingham emphasised at paragraph 48 (4) that the court should in applying the provisions of the Act to the facts of a case focus very closely on the language of the statute and view any judicial exegesis with caution; that guidance should be found in the statutory language rather than in the proliferating case law.
>
> There are two points which were evident in this appeal and which are evident in other appeals to which that observation is important:
>
> **The judge's ruling:**
>
> i) It is essential that the court hearing the proceedings finds and sets out all the relevant facts in its ruling (or judgment), including the facts that are agreed before

it. It is evident that many confiscation hearings are not prepared in advance as they should be. There are many complaints that Defence Statements are inadequate. Timetables set out in the Criminal Procedure Rules or the court's directions frequently slip. Sometimes it is only at the last minute, either immediately before the court sits or even in the course of a hearing, that some matters are agreed and the real issues emerge, considerably burdening the task of the judge hearing the proceedings. If identifying the issues is left to the last minute, then insufficient attention is paid to ensuring that any procedural steps needed for the evidence to be admissible are taken. In an occasional case, where difficult issues arise, it may be the case that counsel with more experience of such issues is needed. Difficulties are from time to time compounded by a lack of a properly paginated bundle. It is, in the experience of many in this court, that, for reasons such as those we have outlined, it is not always clear from the ruling (or judgment) below what the facts were on which the issues which arose were determined. As the task of the court hearing the confiscation proceedings is to apply the statutory provisions to the facts (as agreed or found), it is essential that the ruling (or judgment) sets out all the relevant facts, as agreed and as found.

Too many authorities:

ii) Too many authorities are cited to courts. Advocates should bear the observations in *May* at paragraph 48 (4) clearly in mind before any authority is cited to the judge hearing the proceedings or in this court."

R v Nelson, R v Pathak; R v Paulet [2009] WLR (D) ;[2009] EWCA Crim 1573;

The judgement as given by the Lord Chief Justice states:

"….Crown Courts … are concerned about the possible consequences of the draconian legislation provided by the developing confiscation regime set out in the Criminal Justice Act 1988 as amended, the Drug Trafficking Act 1994, and the Proceeds of Crime Act 2002. Indeed we detect that orders staying confiscation proceedings are perhaps too readily being made in Crown Courts.

Abuses of the confiscation process may occur and, when they do, the appropriate remedy will normally be a stay of proceedings. However an abuse of process argument cannot be founded on the basis that the consequences of the proper application of the legislative structure may produce an "oppressive" result with which the judge may be unhappy. Although the court may, of its own initiative, invoke the confiscation process, the responsibility for deciding whether properly to seek a confiscation order is effectively vested in the Crown. When it does so, the court lacks any corresponding discretion to interfere with that decision if it has been

made in accordance with the statute. The just result of these proceedings is the result produced by the proper application of the statutory provisions as interpreted in the House of Lords and in this court. However to conclude that proceedings properly taken in accordance with statutory provisions constitute an abuse of process is tantamount to asserting a power in the court to dispense with the statute.

As a matter of principle, that is impermissible, and this court has said so. Thus in *R v Shabir* [2009] 1 CAR (S) 497, it was observed:

> "This jurisdiction must be exercised with considerable caution, indeed sparingly. It must be confined to cases of true oppression. In particular, it cannot be exercised simply on the grounds that the judge disagrees with the decision of the Crown to pursue confiscation, or with the way it puts its case on that topic."

We repeat what was said in this court at an earlier hearing involving Paulet.

> "The abuse of process jurisdiction is one which needs to be exercised with great circumspection. The jurisdiction cannot be converted on a case by case basis into a structure which involves, on proper analysis, something like wholesale undermining of the statutory provisions. It is not easy to conclude that it is an abuse of process for those responsible for enforcing legislation to see that it is indeed properly enforced."

The Court concluded:

"… the principle is that the court is under a duty to deprive a convicted defendant of the "benefits" of his crimes. Following the principle identified by the House of Lords in *R v Smith (David Cadman)* [2002] 1 WLR 54, in *R v Forte* [2004] EWCA Crim 3188 this court, exemplifying a consistent line of authority, such as *R v Wilkes* [2003] EWCA Crim 848, *R v Stanley* [2007] EWCA Crim 2857 and *R v Rose and Whitman* [2008] EWCA Crim 239, observed:

> "…the critical time at which the court looks to ascertain whether a benefit has been obtained is the date when the offence is committed. It is not for the court, as the House of Lords have said, to have regard to the subsequent consequences of the crime or events which may befall the property".

The "benefits" are to be assessed in accordance with the statutory provisions, and in the light of the statutory assumptions. The assessment having been made, the defendant must be ordered to fund the confiscation order from the proceeds of his

crime if they are available, or, if he has dissipated the proceeds, from funds lawfully available to him."

CPS Guidance

Following an earlier hearing in Paulet the CPS issued a "Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceeds". The Court found this to be "a useful working document" but specifically did not make the guidance part of the judgement of the court or suggest that it may or could add to, alter or amend the statute.

> "It is not formal guidance within section 10 of the Prosecution of Offences Act 1985 or section 2A of the Proceeds of Crime Act 2002. In reality it represents a fair analysis of the effect of the decisions in this court and the House of Lords reflecting the concerns expressed to date about different aspects of the confiscation regime, and the continuing requirement that within the statutory context, prosecutorial decisions should continue to reflect the interests of justice. It may and no doubt will be amended in the light of experience as well as any later decisions in this court. In the end, if an abuse of process argument can be sustained at all, it must be based on abuse of process principles, as defined and explained in the authorities.
>
> … As the guidance itself demonstrates, the true facts may be unclear, and may need examination in the context of confiscation proceedings. Where, following the initiation of proceedings, it emerges on investigation that the prosecutorial discretion would not have been exercised in favour of proceedings if the full facts had been known, the prosecutor should normally discontinue them, a jurisdiction similar to and derived from the right of the prosecutor to offer no further evidence in a criminal case. The confiscation process should not continue merely because it has been set in motion, and if only for the sake of consistency, it should be discontinued on the later emergence of facts which, had they been known at the outset would have led to a prosecutorial decision not to proceed."

The Court clearly had concerns about some aspects of the Guidance and stressed that it is a document that will evolve. At paragraph 40 the Court doubts the correctness of the following example:

> "…where a defendant has obtained paid employment by a false representation to his employer" and the extent of the defendant's benefit may simply be his wages, it may be that, following the argument in this case, this fourth situation will be re-examined. And, of course, yet further considerations may yet arise which will justify inclusion within the ambit of this guidance."

Section 6(6) – power not duty

The Court confirmed that s. 7(3) does not create a broad discretion providing the judge with an opportunity to disapply the statutory provisions in orderto achieve what he considers just. It is limited to the cases identified in section 6(6). The

exercise of the court's power to do what it believes to be just must be seen in the context of the statute and its purpose to deprive criminals of the benefits of their crimes.

The Court considered the apparent conundrum that a defendant would be better off not to seek to make good the consequences of his offences until the victim has started civil proceedings or given some clear indication of his intention to do so i.e. that a defendant who made voluntary reparation would be worse off than the defendant who waited for the victim to start civil proceedings.

> "…It is clear therefore that section 6(6) does not state expressly, and does not appear to provide, that compensation paid to the victim in advance of civil proceedings or an expressed intention to take them, reduces the duty to make a confiscation order to a power, notwithstanding that a defendant has in reality fulfilled this desirable statutory purpose before being impelled to do so by the threat or fact of civil proceedings. What we perceive to be a gap in the statutory process is recognised in the guidance. Where the facts demonstrate that the defendant has voluntarily repaid the proceeds of his crime to his victim and has thus deprived himself of any profit from his crimes, we endorse the guidance relating to voluntary repayment of full compensation in a simple benefit case where the proceeds of the crime have not been used to the defendant's wider financial advantage as consistent with the interests of justice within the statutory context. In such a case the statutory purpose that the defendant should not enjoy the fruits of his offence(s) will have been achieved."

Prosecution's Entitlement to Appeal

The Court considered submissions on behalf of Pathak whether the prosecution was entitled to appeal against the decision of the Crown Court that confiscation proceedings must be stayed. Held:

> "The absence of any previous decision confirming the prosecution's entitlement to appeal following an order staying the proceedings is neither here nor there. A prosecutor may appeal under section 31(2) "if the Crown Court decides not to make a confiscation order". The language is clear and simple. The decisions of the Crown Court in *Nelson* and *Pathak* were that confiscation order should not be made: so they were not made. The language is plain enough. Authority is not needed. If it were needed, this decision establishes it."

The Individual Appeals:

Nelson

In the Crown Court the judge concluded that the respondent was "an active participant" and that "but for the provision of this false identity for the vehicle the enterprise would probably not have got off the ground". He was as liable as any for its theft. The judge was satisfied that the application for a confiscation order made by the prosecution was "properly made". However he stayed the

proceedings as an abuse of process reasoning that although he accepted that Nelson had obtained property from his criminal conduct he had not benefited from it. He had received no payment, but more important, as the digger had not been shipped to Holland, and was recovered, undamaged, by its owner, a confiscation order against Nelson would have amounted to a fine.

The Lord Chief Justice giving the judgment of the Court of Appeal said:

> "The confiscation proceedings were properly brought by the prosecution. The decision to stay the proceedings was wrong. Nelson had benefited from his criminal conduct. ….. The fact that the police recovered the digger before Nelson was able to send it on its way to Holland did not reduce nor alter the court's duty to make an appropriate order. ….. in his judgment the recorder referred to an observation in the opinion of the House of Lords in *R v May* [2008] 1 AC 1028 at para 48 where Lord Bingham pointed out that the legislation did not operate "by way of fine". To appreciate the true impact of that observation, however, it is essential to refer to the opinion of the House of Lords in *Jennings v CPS* [2008] 1 AC 1046 at para 13. It was pointed out:
>
> > "There is a real danger in judicial exegesis of an expression with a plain English meaning, since the exegesis may be substituted for the language of the legislation. It is, however, relevant to remember that the object of the legislation is to deprive the defendant of The product of his crime or its equivalent, not to operate by way of fine. The rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent. He cannot, and should not, be deprived of what he has never obtained or its equivalent, because that is a fine. This must ordinarily mean that he has obtained property so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else".
>
> Within the present context, the confiscation order did not amount to a fine."

The appeal by the prosecutor was allowed and because Nelson had sufficient recoverable assets to meet the full extent of his benefit the confiscation order was be made in the sum of £14,337.75.

Pathak

During the confiscation proceedings in the Crown Court the judge addressed the effect of section 6(6) of the 2002 Act and concluded that as the question of compensation to the victim had been "settled and determined", the authorities required him to address the confiscation proceedings in what he described as their "most stringent form", making due allowance for compensation already paid

when assessing the realisable amount. He was troubled that Pathak would have been in a better position if he had withheld payment of compensation until the confiscation proceedings were concluded. In those circumstances it would be "unjustly oppressive" to subject Pathak to the confiscation mechanism

The question for decision of the Court of Appeal was whether in the context of the evidence and the areas of disputed evidence the judge was right to regard the confiscation proceedings as an abuse of process.

The conclusion of the Court of Appeal was that the confiscation proceedings did not constitute an abuse of process nor were they unjustly oppressive the following were the relevant considerations:-

1. The proceedings were properly brought;

2. There was ample evidence to suggest Pathak's benefit far exceeded the loss suffered by his employers and the reparation he had made to them;

3. The prosecution was entitled to ask for the benefit and recoverable amount to be examined and assessed in the necessary detail;

4. Even if the repayment by Pathak after the institution of proceedings by his former employers had altered the function of the court from a duty into a power, the "just" order required to be made by the court was not an open ended broad discretion, but involved the application of the principles relating to confiscation orders, the assessment of benefit received by Pathak resulting from his criminal activities with appropriate allowance for the sums actually paid to his former employers by Pathak, no more no less.

Paulet

It had been submitted on behalf of Paulet that his wages were paid to him in consideration of the efficient performance by him of his duties, and that they did not constitute a pecuniary advantage derived from the misrepresentations that he was entitled to take up remunerative employment in this country when he was not. The Court concluded:

> "…where you obtain an opportunity to work from an offer of employment being made to you, and the offer has been induced by a false representation that you are entitled to work, then the false representation continues thereafter for the benefit of the offender who, permitting the representation to continue, is able to obtain employment. Once made, it continues to have effect throughout the employment which has been taken up. At any stage, had the representation been corrected, it is plain that the employment would have ceased.
>
> … His earnings, of course, reflected the fact that he had done the necessary work, as we shall assume, to the satisfaction of his various employers. But the opportunity for him to do so, that is the pecuniary advantage, was unlawfully

obtained. If the employee worked to his employer's satisfaction, and he paid his tax and National Insurance contributions on his earnings, and his deception either lacked any significant wider public interest, or, perhaps because of the passage of time, but for whatever reason, had ceased to have any meaningful effect on his employers decision to continue his employment, the resolution of the issue might well be different. As it is there was here a wider public interest. The appellant was deliberately circumventing the prohibition against him seeking remunerative employment in this country in any capacity. No basis for interfering with the order made in the Crown Court has been shown. In our judgment the appropriate link between the appellant's earnings and his criminal offences, in the context of the wider public interest, was plainly established. The appeal therefore fails. We suggest that the guidance should be reconsidered in the light of these observations."

R v Wilkinson [2009] All ER (D) 121; [2009] EWCA Crim 2733[7]

This was an appeal against the imposition of a confiscation order made under POCA 2002.

The Court summed up the basic principles relating to the imposition of confiscation orders. A confiscation order may be imposed where a criminal defendant has obtained property "as a result of or in connection with criminal conduct". The amount to be recovered will be the value of the property so acquired, unless the defendant can show, the onus being on him, that the value of the assets available to him is less than the benefit acquired, in which case the amount recovered will be that lower sum.

The following facts constituted the basis of plea to possession of criminal property contrary to s.329 of POCA 2002 which the prosecution did not dispute. The appellant was seen by police officers getting into a BMW motorcar. Unknown to the appellant, it had been stolen. A man who wanted to sell it had dropped it at his house so that he could test drive it. The man told the defendant that the car was cheap because it had been "bumped", although there was no evidence of that. The appellant had been in possession of the car for approximately an hour when he was arrested. He had by then suspected that it was stolen. He intended to return it as soon as possible, and he formed the intention not to buy it.

The Crown applied for a confiscation order seeking a ruling that the appellant had benefited from his offending and that the value of that benefit was the market value of the car. The learned judge, with considerable reluctance, concluded on the authorities that the argument was correct, and he made an order in the sum of £15,558.84, the market value of the car months."

[7] See this case also at pages 6 and 24

This ground of appeal relies upon a case in this court, Shabir [2008] EWCA Crim 1809, in which the court confirmed, as had been accepted in some earlier authorities, that there is in principle a power to stay confiscation proceedings, as there is for any other criminal process where it amounts to an abuse of process. The court may in an appropriate case conclude that the prosecution is acting oppressively in seeking an order of confiscation, or in seeking such an order on a particular basis.

In Shabir Hughes LJ pointed out that if, as is arguably the case, a confiscation order is capable in exceptional circumstances of infringing Article 1 of the First Protocol of the European Convention on Human Rights as an unlawful dispossession of property, then the court's power to stay proceedings for oppression constitutes a remedy. In Shabir the confiscation order made by the judge was in the region of £180,000, although the actual benefit which he derived was less than £500. The court found that, applying the appropriate legal principles, the judge had not erred in fixing the sum that he did, but they were wholly satisfied that this was a case of oppression. It was an abuse of process for the prosecution to seek confiscation at this draconian level.

The Court of Appeal considered whether that principle applied in Mr Wilkinson's case. As was emphasised by Hughes LJ, and repeated more recently by the Lord Chief Justice, Lord Judge, in the case of Paulet [2009] EWCA Crim 1573. The Lord Chief Justice said this at paragraph 35:

> "... to conclude that proceedings properly taken in accordance with statutory provisions constitute an abuse of process is tantamount to asserting a power in the court to dispense with the statute."

The Court noted those observations and that a successful abuse of process argument must be based upon traditional abuse of process principles. In giving judge the Court expressed surprise that the Crown thought it fit to pursue this application, particularly against someone of previous good character, but stated that this would not justify a conclusion that it was oppressive and an abuse of process. It was also to be remembered that the sums involved here were nowhere near as extreme as in the Shabir case. The Court of Appeal concluded

> "… even if Shabir can apply to stay confiscation proceedings merely on the ground that the sum to be recovered under the order seems wholly disproportionate to the true benefit received, it would not be appropriate to apply it here. These are not sufficiently exceptional circumstances to warrant a stay of proceedings."

Part VI

RESTRAINT ORDERS

Stapleton, R (on the application of) v Revenue & Customs Prosecution Office [2008] EWHC 1968 (QB) (25 July 2008)

The prosecution submitted that the money the third party used to purchase the property was in reality her father's own money. **Held:** If prosecution and Revenue and Customs are right, N has been guilty of being involved in money laundering for her father and has perjured herself in affidavits and in the witness box.

The Court held that it was not prepared to reach that conclusion. **There is no evidence of any substance to compel such a conclusion. Suspicion alone is not good enough. There must be some factual foundation for the inference that she is dishonest, and there is none.** The most that can be said against her is that she had become embroiled, through no choice of her own, in one sense, in her father's affairs.

The Serious Fraud Office v Lexi Holding PLC (In Administration) and M [2009] 1 All ER 586; [2008] EWCA Crim 1443

This appeal concerned the approach to be adopted by the courts to restraint orders made under the Proceeds of Crime Act 2002 when a third party raises claims which would reduce the amount of the restrained assets. The Court took the opportunity to consider the position of unsecured third party creditors and also commented on some procedural issues.

Lexi's interest in the restrained funds:

The facts of this particular case relate to whether or not the interest of Lexi Holdings PLC in the restrained property amounted to an equitable charge, and if so, whether that extended over all of the property or only that to which it could be shown that the misappropriated funds had been applied. The Court stated at paragraph 55:

On the fact of this case the Court found that at the very time the £625,000 entered M's two bank accounts in January and February 2006 Lexi, had it then known the true position, could at its option have either asserted a claim to beneficial ownership of those monies in the account (or, more formally, the chose

in action representing the same) or asserted a claim to an equitable charge over the accounts for the amounts misappropriated. Whether or not it asserted such a claim had no impact. What was relevant was is its entitlement to do so:

The Court found that Lexi had an equitable charge, and thus an "interest" for the purposes of the 2002 Act, over the two bank accounts securing the payment to it of the misappropriated monies and interest. But no equitable charge over any other assets held by M had been established. The result being that in respect of the shortfall between the amounts in the two bank accounts and the total amount of the judgment debt Lexi is to be regarded as an unsecured creditor.

The Position of Unsecured Third Party Creditors:

The Court described this topic as raising the most important issue of principle in this case.

The treatment of unsecured creditors under the legislation before the 2002 Act produced a number of judicial decisions, not all of which were reconcilable with each other. However because there have been a number of changes to the statutory provisions concerning restraint orders as a result of the 2002 Act, the Court was required look carefully at the reasoning in those cases dealing with restraint orders made under the Criminal Justice Act 1988 and the Drug Trafficking Act 1994.

On the face of it, section 69(2)(c) does require the courts to ignore any debt owed by the restrained person to an unsecured third party creditor, so that the existence of such a debt would not empower the court to vary a restraint order unless there was no conflict "with the object of satisfying any confiscation order. The object of this provision is to *satisfy* any confiscation order, i.e. providing a sufficient quantum of assets to meet the sum identified, already or in due course, in a confiscation order.

The Court considering section 69(2)(c) said that latter part of paragraph (c) indicates merely that if the court can see that a confiscation order, existing or prospective, relates to an amount which the defendant has ample assets to meet, <u>then it may be</u> that a debt to a third party creditor can properly be allowed to be paid from the restrained assets.

But what if there is a conflict with the object of satisfying a confiscation order, a situation which will regularly arise? The wording of section 69(2)(c) appears to mean that the court cannot vary the restraint order to enable a debt to a third party to be paid. However, it is necessary to see section 69(2)(c) in the wider context of the 2002 Act as a whole. If one does that, then a number of considerations emerge:-

(1) A restraint order, like the other orders possible under the powers to which section 69 relates, is essentially a <u>temporary measure</u>. It is preserving the position pending other matters being dealt with, very often pending criminal

proceedings being instituted and/or concluded. As Lord Donaldson MR commented in *In Re Peters*, the court in such a case

> "is concerned solely with the preservation of assets at a time when it cannot know whether the accused will or will not be convicted." (page 879E).

A restraint order is therefore performing a holding operation. It has to be acknowledged that that operation may, and has been known to, last a considerable time. Nonetheless, the limited duration of restraint orders is a relevant factor when considering its adverse effects on third party creditors and when seeking to ascertain the intention of Parliament. The restraint order will eventually be discharged and either replaced by some other order such as a confiscation order or not replaced at all.

(2) The potential harshness of section 69(2)(c) to innocent creditors is to some extent softened by the powers which the Crown Court has:-

(a) If the offender is eventually convicted; if he is acquitted, then the restraint order is in any event discharged.

(b) The court has the power under section 130 of the Sentencing Act to make a compensation order in favour of a person who has suffered loss resulting from the offence or any other offence which is taken into consideration.

Such a compensation order takes priority over a confiscation order: see section 13(5) and (6) of the 2002 Act.

Although not every creditor will be helped by this provision, since he may not qualify under the terms of section 130, some should be assisted because of section 6(6) which enables a court to make no confiscation order at all if a victim of the defendant's criminal conduct has started or intends to start civil proceedings against him "in respect of loss, injury or damage sustained in connection with the conduct".

The Court added that the criminal conduct leading to "loss, injury or damage" may be *general* criminal conduct if the defendant has a criminal lifestyle and not merely the *particular* criminal conduct covered by the offences in question (plus those taken into consideration), thus a considerable number of persons may qualify as "victims" for this purpose.

(3) Those who have suffered losses from that criminal conduct and who do qualify for a compensation order are only going to benefit from section 130 if the defendant's assets are preserved in the meantime to a sufficient degree.

(4) The Court found it particularly significant that the payment of third party creditors at the restraint order stage would be inconsistent with the position

which obtains at the confiscation order stage. When the court decides on the amount to be specified in the confiscation order, it has to use the total of the values of the property the defendant holds, less only "priority" obligations, such as fines and preferential debts. The existence of obligations owed to ordinary third party creditors is to be disregarded when a confiscation order is made. The Court regarded it "wholly illogical for the legislature to have decided to allow third party debts to be paid during the period when assets are supposedly being preserved by a restraint order when such debts are to be left out of account at the stage when the confiscation order is made".

The Court concluded that the natural meaning of section 69(2)(c) gains support from the statutory framework in which it is to be found. The intention of the legislature that restraint orders should be made and subsequently be maintained without regard to debts owed to third party unsecured creditors is evident.

The statutory provisions have changed significantly since the pre-2002 Act legislation and *In re X* would be decided differently today. Unless there is no conflict with the object of satisfying any confiscation order that has been or may be made, a restraint order should not be varied so as to allow for the payment of a debt to an unsecured creditor.

Delay :

A submission was made on behalf of Lexi that the restraint order in this case should be varied because of delay on the part of the SFO. The argument on this was that the restraint order was made on the basis that a criminal investigation had been started and the terms of section 40(2) satisfied but that two years later no prosecution has been begun. The Court did not consider that a reasonable time had elapsed stating

> "…From the material we have seen, it appears that the investigation being conducted by the SFO is one of some complexity – indeed, it is described in a witness statement by Tanvir Tehal, dated 4 July 2007, as "very complex". A witness statement made by Paul Joseph Fleming dated 20 June 2007 and filed on behalf of Lexi refers to a major fraud involving losses of £10 million (paragraph 5). Beyond that it is difficult to go in describing the detailed facts relevant to delay, because the evidence is not before us, no doubt because delay was not a ground on which the application to Judge Hone to vary the restraint order was made. We are in no position to conclude that a reasonable time within which criminal proceedings should have begun has elapsed."

Procedural Matters:

The Court expressed it concerns about listing complex variation order hearings in the Crown Court and the impact of Section 58.

Listing in the Crown Court:-

The issues which arose in this case concerning beneficial interests, equitable charges and tracing were far from straightforward. They are not part of the daily work of most Crown Court judges, and indeed this constitution of the Court of Appeal Criminal Division was deliberately arranged so as to ensure that appropriate expertise in matters normally falling within the jurisdiction of the Chancery Division was available. Sometimes issues may arise in restraint order proceedings about equitable interests which are not unduly complicated and can readily be dealt with in the Crown Court. In other cases the sums involved may not warrant any unusual steps. But there may be other times when the complexities are such that it may not be wise for the Crown Court judge to embark on seeking to decide those issues.

In such a case where a relaxation of a restraint order is sought, consideration should be given to adjourning those variation proceedings to enable the issues to be determined in proceedings before a specialist Chancery Circuit judge or High Court judge of the Chancery Division.

Alternatively, those arranging the listing of such cases in the Crown Court should seek to ensure that they are heard by a judge with the relevant experience and expertise.

The impact of Section 58 on all courts

The provisions of section 58(5) and (6), require *any* court in which proceedings are pending in respect of any property, in respect of which a restraint order has been made or applied for, to give an opportunity to be heard to the applicant for the restraint order (i.e. the Crown in some manifestation) and to any receiver appointed under the 2002 Act, and to do so before it decides whether or not to stay the proceedings or to allow them to continue. Those provisions clearly applied to the proceedings brought by Lexi against M in the Chancery Division. We have been told that, although some of the judges dealing with those proceedings were made aware that a restraint order was in existence, their attention was never drawn to section 58 of the 2002 Act. It should have been. One consequence was that the SFO did not seek to intervene in the Chancery proceedings.

Steps need to be taken to ensure that the terms of section 58 are observed. Some thought might usefully be given to the possibility of creating a register of restraint orders and applications for such orders, though that would not have cured the problem in the present case, since all involved were aware of the existence of the restraint order. The SFO and other prosecuting authorities could usefully publicise more widely the general tenor of section 58, to increase the awareness of it in the legal profession, and no doubt the relevant Bar Associations could also play a role.

In addition, judges themselves should be alerted to its significance, perhaps through the training provided by the Judicial Studies Board. This is not just a

matter for the criminal courts and criminal lawyers: **the duty under section 58 applies to all courts** in which proceedings about such property take place, and very often those will be the civil courts. We shall direct that a copy of this judgment, together with a note drawing attention to this postscript, be sent to the Chairman of the Judicial Studies Board and to the Family and Civil Procedure Rules Committees.

Release of funds for legal expenses

Anselm Peries & UMBS Online Limited v CPS [2007] EWCA Crim 3128

The question for the Court of Appeal to consider in these cases was whether or not section 41(4) of POCA is compatible with the appellants' rights under Article 1 of the First Protocol to European Convention on Human Rights which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one should be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

In Peries the Court held that an important point is that a restraint order relates to funds which the prosecution believe could well be the proceeds of crime. To permit, therefore, monies which could well be the proceeds of crime being used to pay lawyers for the benefit of the defendant who is either suspected of being, or has been found to be, a criminal raises a clear social issue. Parliament is entitled to take the view that funds which may have criminal origins should not be so used. Parliament had to take into account the consequences, namely that other means would have to be provided to enable defendants to have legal representation during restraint and confiscation proceedings. The course adopted was to provide state aid.

As to the adequacy of the aid provided, the problem in this appellant's case arises out of the fact that the level of payment in relation to confiscation proceedings is based on the premise that counsel will have been instructed for the purposes of the criminal trial and so been appropriately remunerated at that stage. Whereas in his case there has in fact been discontinuity in the representation. The level of fees paid on the grant of representation orders is

now substantially greater than the level payable on the representation order granted in the appellant's case. The problem is not that Parliament has failed to provide, in carrying out the balance to be struck between depriving the defendant of the right to use his own funds, and the provision of State funds, a disproportionate solution; the problem is that in some, atypical cases, the level of funding provided under the state aid scheme does not, on the judge's findings, attract counsel of the requisite seniority. That issue may have to be addressed when the proceedings are heard, in the light of the appellant's rights under Article 6.

The fact that there may be hard cases as a result of a measure does not mean that that measure is incompatible with any Convention rights: see *Poplar Housing Association Ltd –v- Donoghue* [2002] QB48. The task of the court is best described by Lord Nicholls in *R (Wilson) –v- First County Trust Ltd(No 2)* [2003] 3WLR 568. That case was concerned with consumer credit and the effects of a failure by a creditor to comply with certain statutory obligations. Having stated that inherent in Article 1 of the First Protocol is the need to hold a fair balance between the public interest and the protection of fundamental rights of, in that case creditors, he continued at paragraphs 69 & 70:-

> "There must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The means chosen to cure the social mischief must be appropriate and not disproportionate in its adverse impact.
>
> In approaching this issue … courts should bear in mind that theirs is a reviewing role. Parliament is charged with the primary responsibility of deciding whether the means chosen to deal with the social problem is necessary and appropriate. Assessment of the advantages and disadvantages of the various legislative alternatives is primarily a matter for Parliament. The possible existence of alternative solutions does not in itself render the contested legislation unjustified: see The Rent Act case of *Mellacher –v- Austria* (1989) 12 EHRR 391, 411, para 53. The Court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's Convention right. The readiness of a court to depart from the views of the legislature depends upon the circumstances, one of which is the subject matter of the legislation. The more the legislation is concerned with matters of broad social policy the less ready will be a court to intervene."

UMBS

The appellant company which describes itself as a money transmitting business, transferred 7m Euros on behalf of clients to the account of a company called Currency Solutions Ltd at the Laiki Bank in the United Kingdom. On the 6th February 2007, Currency Solutions made a disclosure report to the Serious Organised Crime Agency requesting consent to continue to provide facilities to

the appellant company. This consent was granted on the 14th February. On the 16th February 2007, Laiki Bank sought permission to continue to provide such facilities. On the 21st February 2007 that request was refused. The Agency was asked to reconsider that refusal. It refused to do so. The appellant company lodged an application for judicial review of both of the Agency's decisions.

The appellants applied to set aside the restraint order, alternatively for a variation permitting them to make payments from the restrained funds for the purposes of legal proceedings, that is the proceedings relating to the restraint order and the judicial review proceedings. The judge ruled that no funds could be released in relation to the restraint order as that was precluded by Section 41(4) of the POCA; he ruled, however, that money could be released from the fund in relation to the judicial review proceedings. On the fact of this case the Court found that the judicial review proceedings did relate to an offence within section 41(4)

The appeal was dismissed the court stating:

> "We accept that Article 6(1) is engaged. But it is to be noticed that the rights of access guaranteed by Article 6(1) are significantly less stringent than those required under Article 6(3). The question is whether or not the litigant has effectively been prevented from being able to present his or her case. Whilst we were provided with detailed submissions upon this right, together with the effect of the concept of "equality of arms", the fact is that the appellant's have been able to exercise their rights under Article 6(1) fully in the litigation up until now. Bearing in mind, however, the fact that, as we noted in Mr Peries' appeal, state aid will not be available to the appellant company, questions may arise in the future as to whether or not the proceedings may have to be stayed because of potential unfairness. That situation has not yet arisen. The appellants appeal is dismissed."

But the Court also stated that since state funding which had been available as discussed in Peries would not be available to the appellant company.
"..<u>questions may arise in the future as to whether or not the proceedings may have to be stayed because of potential unfairness."</u>

All this is to be viewed in the light of the funding changes introduced at the end of August 2009 for the purposes of giving advocates who appear in confiscation hearings an enhanced fee for that purpose if the amount of paperwork exceeds 50 pages.

<u>External Request for a Restraint Order – jurisdiction of the Crown Court</u>

<u>King v SFO [2009] 1 WLR 718</u>

The applicant, a British national who was a long-term resident in South Africa,

had been charged in South Africa with numerous offences financial offences.

In 2006 the South African prosecuting authority made an external request to the UK for assistance in obtaining restraint and disclosure orders in respect of property belonging to the applicant and to specified companies of which he was alleged to be the alter ego.

Pursuant to article 6(2)(3) of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 the request was referred to the Director of the SFO.

The SFO applied to the Crown Court, ex parte and without notice to the applicant, for both orders under article 8(1)(4) of the Order. The judge granted the orders in respect of all property held by the applicant and the specified companies, including property held outside England and Wales. He refused the applicant's subsequent application to discharge the orders and held, in reliance on the definition of "property" in section 447(4) of the Proceeds of Crime Act 2002 as "all property wherever situated" that where the condition in article 7(3) of the Order was satisfied, (i.e. that that relevant property in England and Wales was identified in the external request) the Crown Court had power under article 8 of the Order also to restrain assets outside the jurisdiction.

The Court of Appeal allowed the applicant's appeal holding that the scope of the orders was restricted to relevant property located within England and Wales.

On appeal by the Director of the SFO the House of Lords dismissed the appeal holding:-

> "…These provisions amount to a clear and coherent scheme. From first to last, the powers conferred by that part of the Order that relates to England and Wales can only be exercised in relation to property in England and Wales. Furthermore, no machinery is provided for exercise of those powers outside England and Wales. In this respect there is a significant distinction between POCA, which deals with domestic orders, and the Order, which deals with external orders. Section 74 of POCA provides that if the prosecutor believes that there is realisable property situated in a country outside the United Kingdom he can ask the Secretary of State to forward a request for assistance in restraining dealing with the property or in realising the property. Had it been intended that external restraint orders or external orders should take effect outside the jurisdiction the Order would surely have made provision similar to that in section 74 of the Act….
>
> The disclosure order
>
> The disclosure order was made pursuant to article 8(4) which provides that the court may make such order as it believes is appropriate for the purpose of ensuring that the restraint order is effective. It follows, as Mr Mitchell conceded before the Court

of Appeal, that if the restraint order must be restricted to property within England and Wales there can be no justification for a worldwide disclosure order."

Guidance for POCA Restraint Orders

In re Stanford International Bank Ltd (in liquidation) [2010] WLR (D) 55

SIB, a bank incorporated in Antigua and Barbuda, had allegedly been involved in a fraudulent "Ponzi" scheme, operated by Sir Allen Stanford and his associates, which had collapsed in 2009. The US Securities and Exchange Commission had filed complaints in Texas against Sir Allen and SIB, alleging crimes including fraudulent breaches of securities laws, and a receiver had been appointed. Three days later the Financial Services Regulatory Commission of Antigua and Barbuda had appointed Antiguan liquidators. Freezing orders had been granted in Antigua to the liquidators against SIB and an associate company. Both the US receiver and the Antiguan liquidators made recognition applications to the High Court. However when he had heard that application the judge had been unaware that the Crown Court had made a restraint order on an ex parte application by the SFO under POCA 2002. This application following a Letter of equest from the US Department of Justice.

These various proceedings generated four appeals to the Court of Appeal. The Lord Chancellor delivered the judgment of the Court dealing with the specific issues arising in the appeal. These included a ruling that there had been a substantial misrepresentation and non-disclosure of material matters when the ex parte application was made for a restraint order.

<u>The following guidance as to the practice for the future was given by Hughes LJ at paragraphs in 204 to 213 of his judgment.</u>

"This case is a good example, but by no means the only one, of the manner in which an application for a restraint order under POCA 2002 may interlock with complex issues which arise in other litigation. It provides an opportunity to consider the best methods of managing such applications.

2. Prior to POCA 2002 all applications for restraint orders under either the Criminal Justice Act 1988 or the Drug Trafficking act 1994 had to be made in the High Court. Now, by sections 40-41 of POCA the jurisdiction is committed to the Crown Court. The same court has the only jurisdiction to vary or discharge a restraint order once made: see section 42. Subsections 58(5) and (6) plainly contemplate that other litigation relating

to property which is subject to a restraint order may, as a result of the order, need to be stayed or permitted to proceed only on terms. Accordingly the initiative is firmly in the hands of the Crown Court.

3. It does not follow that efforts should not be made to achieve two aims where possible. The first is to do what is practicable to match suitable judicial expertise to the case. The second is to manage restraint order applications and associated litigation, so far as can be accomplished, in a co-ordinated manner.

4. Many applications for restraint orders are made in circumstances of some urgency and initially *ex parte*. They must be made to whichever judge is currently available in a convenient Crown Court. In London there is a special expertise at Southwark Crown Court which justifies making complicated applications there where possible, but it will not always be practicable. Elsewhere in the country there may also be particular Crown Court judges well used to dealing with such applications; similarly, allocation to them by listing officers is desirable, but will not always be possible.

5. In SFO v Lexi Holdings plc [2008] EWCA Crim 1443; [2009] 2 WLR 905 this court said this at paragraph 92:

> "..there can be no doubt that the issues which arose in this case concerning beneficial interests, equitable charges and tracing were far from straightforward. They are not part of the daily work of most Crown Court judges, and indeed this constitution of the Court of Appeal (Criminal Division) was deliberately arranged so as to ensure that appropriate expertise in matters normally falling within the jurisdiction of the Chancery Division was available. Sometimes issues may arise in restraint order proceedings about equitable interests which are not unduly complicated and can readily be dealt with in the Crown Court. In other cases the sums involved may not warrant any unusual steps. But there may be other times when the complexities are such that it may not be wise for the Crown Court judge to embark on seeking to decide those issues."

Those far-sighted words are well borne out by the present case involving an apparent fraud running into several billions of dollars, a contested Antiguan winding up, an American court-appointed receiver, separate American prosecutors, competing applications for cross-border recognition of insolvency administrations, and concurrent proceedings in Canada if not also elsewhere. Crown Court judges should not of course shrink from deciding issues of civil law where they properly can, even if they are less familiar to them than is the daily round of the criminal jurisdiction. But

there will be a few cases where the complexities are such that a Crown Court judge should not fear to explore the possibility of onward allocation to another judge. The legal complexities may be of property law or equity, as in Lexi Holdings, but are not limited to those issues. They may be of insolvency and cross-border recognition, as here. In some cases they may relate to tax law or the law of matrimonial property and ancillary relief.

6. Even in such a case, the Crown Court judge will ordinarily have to deal with the initial application. If it is apparent that the case is one of the few which require special expertise, he may, depending on the circumstances, either adjourn the application without making any order or make a restraint order for a limited period and appoint a relatively short return date for a fuller hearing. In other cases, the potential for complexity may arise only on application for variation or discharge. At whichever stage the need for consideration of special expertise arises, it is open to the judge to seek the assistance of his Circuit's Presiding Judge in exploring the question of whether a judge of suitably mixed expertise can be found to deal with the case from that point on.

7. Section 8 Senior Courts Act 1981 provides that:

> "8(1) The jurisdiction of the Crown Court shall be exercisable by –
>
> (a) any judge of the High Court; or
>
> (b) any Circuit Judge, Recorder or District Judge (Magistrates' Courts);
>
> …..
>
> and any such persons when exercising the jurisdiction of the Crown Court shall be judges of the Crown Court."

8. The judge eventually hearing the restraint order proceedings should ordinarily have some experience of criminal cases, the nature of the confiscation regime, and the manner in which prosecutions and the defence thereto proceed. But there is no reason why a judge of the High Court should not sit in the Crown Court to deal with a complex restraint order case. He or she may be from the Queen's Bench, Chancery or Family Division, or Commercial Court, according to need and availability. Some cases may be suitable for hearing by a specialist mercantile or chancery senior circuit judge. The Presiding Judge will be in a position to consult the appropriate Head of Division (in London) or Liaison Judge (on circuit) in order to explore availability. It will need to be remembered that the availability of the relatively few judges of suitable mixed expertise will be quite limited and calls upon it need to be judged carefully. The

decisions involved are matters of pure case management and are most unlikely to generate appealable rulings.

9. The process described is quite different from one in which an application is made uninvited by a party to a High Court judge and coupled with a request that he constitute himself a judge of the Crown Court without reference to the court where restraint proceedings are in process. Such latter procedure is not appropriate, as Sir Mark Potter P held in T v B & RCPO [2009] 1 FLR 1231.

10. The need for this procedure to work properly in the few cases where it will be called for underlines still further the essential requirement that applicants for restraint orders make full disclosure to the initial judge of potential complications. The present case is a vivid illustration. The failure of the prosecution to discover and reveal the pending and all too patent Antiguan winding up proceedings, and to tell the judge what was happening in the equally patent civil freezing order proceedings, was inexcusable, wherever the responsibility for it lay. It was equally inexcusable that notice of the lengthy proceedings before Lewison J was never given to the prosecutors, nor was that judge's attention drawn to Article 17(5) of the ERO."

Part VII

VARIATION OF CONFISCATION ORDERS

PROSECUTOR'S APPEAL

R v Modjiri [2010] All ER (D) 146 (Apr)

This appeal concerns the valuation of a beneficial interest held by the defendant in property where that beneficial interest cannot be realised separately from the property. The respondent contended that for the purposes of POCA in such circumstances a defendant's interest has no value. The appellant (the Crown) contends that the value to be attributed to a defendant's interest is that proportion of the market value of the property that his beneficial interest bears to the whole of the property.

Facts

The defendant was sentenced to imprisonment in respect of an offence of possession of cocaine with intent to supply. Confiscation proceedings were instituted, pursuant to POCA 2002. The defendant, his brother and his sister were the registered legal owners of the long lease of a second floor flat which had purchased legitimately by the defendant's sister in 1998 with her own money. Out of familial duty and generosity she caused the property to be conveyed into the joint names of the three siblings. A declaration of trust was executed which provided:

> "(1) The Registered Proprietors hereby declare that henceforward they hold the Property upon trust for themselves beneficially as tenants in common in the following shares:
>
> (a) as to 50% for Neda Modjiri absolutely
>
> (b) as to 25% for Amir Hossein Modjiri absolutely
>
> (c) as to 25% for Amir Hassan Modjiri [i.e., the respondent] absolutely
>
> (2) The Registered Proprietors hereby declare that the Property shall not be assigned nor shall any mortgage charge or lease be granted without the consent of all the Registered Proprietors."

In the confiscation proceedings the judge determined that his benefit from his criminal conduct was £83,958.46. In assessing the available amount it was agreed that the respondent had £6,128.14 in respect of other property.

The prosecution contended that his 25 per cent beneficial interest in the 2nd floor flat should be included in the available amount at 25 per cent of the market value of the flat. The respondent contended that his 25 per cent interest would be impossible to sell, by reason of the prohibition against realisation contained in the Trust Deed. His siblings were unwilling to agree to the sale of the Property. It followed, he submitted, that its value was nil.

Making the confiscation order the Crown Court judge held that the beneficial interest in the flat had no value for the purposes of POCA, unless and until the three siblings agreed that the Property should be and it was sold. It followed that the available amount was only £6,128.14.

Judgment

The prosecutor's appeal was allowed. Stanley Burnton gave the judgment of the Court of Appeal:

Section 79(3) of POCA is not concerned with the realisation of property. It does not require the court to assume that a beneficial interest has to be sold separately as such. The court must proceed on the basis that the defendant can obtain an order under TLATA for the sale of the property as a whole, and that he will on a sale receive his due proportion of the proceeds of sale. A house does not have a market value of nil because a beneficial owner may not readily be able to obtain an order for its sale in order to realise its value. The same applies to the market value of a beneficial interest in the house. The suggestion that the market value of the beneficial interest is nil confuses market value (for the purposes of a valuation under POCA) with an individual's personal difficulty in putting the house on the market or otherwise realising his interest in it. However, the costs of obtaining the order may be relevant.

If a defendant proves that it is impossible to realise an asset, what is contended as its value cannot be included in the defendant's recoverable amount: see, e.g., *Houssam Ali* [2002] EWCA Civ 1450 at paragraph 11; *Chen* [2009] EWCA Crim 2669 at paragraph 27. But that was not so this case. Such impossibility may justify a variation of the order under section 23.

CERTIFICATE OF INADEQUACY AND HIDDEN ASSETS

Re G [2009] EWHC 3179 (Admin)

This decision is being appealed by the Crown but no update is available at the time of writing.

This was an application by G for a certificate of inadequacy in relation to a confiscation order which was made by the Crown Court following his conviction in December 2005 for conspiracy to defraud.

The Crown Court heard evidence given on both sides as to what was available for the purpose of assessing his realisable assets. The total sum assessed was £145,000 which was made up of ten identified assets, which were said to have a total value of about £122,000-odd, and hidden assets to the value of £22,634.50.

The defendant denied at the confiscation hearing and maintained his denial, that there ever were any hidden assets arguing that he had spent the profits that he had made from his fraud.

This application was made in the context of what is said to have been a real attempt to pay the order, despite his contention that there were no hidden assets. The matrimonial home and other assets had been sold and the defendant had been paying by instalments various amounts out of his earnings since his release from prison.

There was a balance between the £22,000-odd which the defendant was deemed to have to find and the amount of shortfall - £14,000 or thereabouts.

Mr Justice Collins confirmed that the court cannot go behind the finding that the Crown Court made on the balance of probabilities that hidden assets existed. But he said that it was open to the defendant to produce, if he could, material showing that the present situation was that he did not make any gain further profits in respect of interest on or further investments from those assets. If he could show that he made no profit from those assets which the Crown Court has found on the balance of probabilities to exist, he may be able to show that the overall position now is that he does not have sufficient amount. He said at paragraph 140:-

> "…he [the defendant] can, and should be able to, establish that he has made nothing out of those hidden assets, even if his assertion is that they never actually existed, provided that he produces sufficient evidence before the court, and the court is satisfied that he has been honest in showing that he did not actually make anything out of those presumed hidden assets. In my judgment, that would be entirely unfair, and would lead to this being a punishment as opposed to an asset stripping exercise if he were liable to be sent to prison on the basis that he had made a profit, which in this case is over 50 per cent of the assets which were found against him, simply because he has not accepted and has never accepted that those assets existed.
>
> It will be a very difficult task for any defendant in his position to persuade the court, if he has not co-operated in the past and has not appealed against the finding of the Crown Court, that that is indeed the position. But he cannot, in my judgment, be precluded from undertaking that exercise, and if but only if the court is persuaded that that is now the position will it be appropriate for a certificate to be granted in whatever sum is appropriate. But that, in my judgment, is a matter that is open to a defendant in circumstances such as this."

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Compiled by Linda Saunt