

CONFISCATION

A PRACTICAL GUIDE TO ASSIST PRACTITIONERS TASKED WITH CONDUCTING CONFISCATION CASES IN GUYANA



JUNE 2023

(UPDATED AUGUST 2023)

AML/CFT/PF NATIONAL COORDINATION COMMITTEE

Based on the Guyana Asset Recovery Legislation Desk Review.

Caribbean Anti-Crime Program.

Funded by the U.S. Department of State Bureau of International Narcotics and Law Enforcement Affairs Implemented by the National Center for State Courts.

Desk review drafted by the NCSC Financial Crimes Team March 2022.

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Introduction

“The purpose of the legislation is plainly, and has repeatedly been held to be, to impose upon convicted defendants a severe regime for removing from them their proceeds of crime.” R v Waya [2012] UKSC 51; [2013] 1 AC 294

Confiscation remains one of the most effective tools available to prosecutors. There is no better deterrent to criminal activity than stripping offenders of their ill-gotten gains. Conviction and sentence of offenders must routinely extend to separating criminals from their criminally acquired assets.

Guyana has extensive asset recovery legislation. In total, there are three types of conviction-based asset forfeiture, four types of non-conviction-based asset forfeiture one type of civil cash forfeiture, and multiple types of instrumentalities forfeiture legislation. The applicable legislation is as follows –

- *Narcotic Drugs and Psychotropic Substances (Control) Act, Chapter 10:10*
- *Anti-Money Laundering and Countering the Financing of Terrorism Act of 2009*
- *Customs Act, Chapter 82:01*
- *Cybercrime Act No.16 of 2018*
- *Mutual Assistance in Criminal Matters Act No. 38 of 2009*

Confiscation, as prescribed by the legislation, must pursue the aim of:

- prioritising the recovery of assets from serious and organised crime and serious economic crime;
- pursuing the assets of all who profit from crime, when it is proper to do so;
- assisting international colleagues to enforce confiscation orders; and
- ensuring effective enforcement of domestic confiscation orders.

Prosecutors participate in every stage of the confiscation process, including:

- advising on the need for restraint orders and presenting the application before the court;
- advising on the confiscation investigation;
- conducting confiscation proceedings in court;
- obtaining receivership orders in relevant cases;

- recovering assets to satisfy a confiscation order by way of enforcement action; and
- recovering assets on behalf of overseas' jurisdictions in response to requests for Mutual Legal Assistance (MLA) requests.

The purpose of this Guide is to assist prosecutors by providing an overview of the confiscation process and best practice. It has been developed with reference to relevant cases and case scenarios to assist with the understanding, preparation and conduct of cases.

Background to Confiscation Proceedings

Is this a Confiscation Case?

Generally, it will be appropriate to apply for a confiscation order whenever a defendant has obtained a benefit from, or in connection with, his criminal conduct and has **the means to pay a confiscation, or pecuniary penalty order**.

Section 54(3) of the AML/CFT Act (as amended) makes it clear that these orders are conviction-based, because the court is prohibited from making a pecuniary penalty order

- (a) until the period allowed by the rules of court for the lodging of an appeal against conviction has expired without such appeal having been lodged; or
- (b) where an appeal against conviction has been lodged until the appeal lapses in accordance with the rules of court or is finally determined, whichever is the later date.

Under the AML/CFT Act 2009 (as amended), the Director of Public Prosecutions (DPP) or relevant competent authority must make the application for a pecuniary penalty order under section 54(1) to the Court.

CASE AUTHORITY HIGHLIGHT

R v Paulet [2009] EWCA Crim 288 – Court of Appeal found that there may be certain, limited circumstances where it would be inappropriate or oppressive for the Director of Public Prosecutions to apply for confiscation.

The England and Wales Crown Prosecution Service issued guidance in 2009 entitled ‘*Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings*’.

This guidance urges prosecutors to consider their role as ministers of justice when considering whether to institute confiscation proceedings and remember the legitimate aims of confiscation:

- punish convicted offenders;
- deter the commission of further offences; and
- reduce profits available to fund further criminal activity.

Section 55 of the Act sets out how the Court should calculate benefit; the defendant may benefit either from obtaining property, or deriving an advantage as a result of the commission of a serious offense. Where a person obtains property directly or indirectly as the result of, or in connection with the commission of a serious offense, his or her benefit is the value of the property obtained.

This may include income, profits, or other benefits. Where a person derived an advantage as a result of or in connection with the commission of a serious offense, his or her advantage shall be deemed to be a sum of money equal to the value of the advantage so derived.

R v Threapleton [2002] 2 Cr.App.R.(S.) 198 - When proving benefit, the test is objective. Has the defendant in fact obtained property in connection with the offence? Intention is irrelevant.

R v Wilkes [2003] 2 Cr.App.R.(S.) 105 - Benefit may be established despite an offender being prevented from converting property to his own use. A burglar or handler can be said to have benefited even if he is caught red handed and the goods are recovered before they are passed on.

R v Patel [2000] 2 Cr App R (S) 10 - The value of a person's benefit is unaffected by the payments made to the accomplice, because what matters is what the defendant obtains, not what he retains. This is consistent with the approach to be taken in drug trafficking cases where no account is taken of the defendant's costs: a defendant's benefit is his gross rather than net profit.

R v Waya [2012] UKSC 51 considers the principle of proportionality influencing the court's interpretation of benefit obtained. In *Waya*, the Supreme Court held that the court, in making a confiscation order '*may require a defendant to pay the whole of a sum which he has obtained by crime without enabling him to offset the expenses of the crime.*'

The Supreme Court notably gave credit, and potentially preference, to a strict interpretation of the statute. However, the Supreme Court also stated that questions of profit, proportionality and the '*true benefit*' would '*have to be resolved case by case as the need arises*'. This paved the way for a more lenient and arguably common-sense approach to determining benefit. As set out in *Waya*, the courts are now required to give '*careful consideration*' as to whether a confiscation order beyond profit is proportionate; a significant shift and watering down of the traditional approach.

R v Reynolds (Stephen) and others [2017] EWCA Crim 1455 The Court of Appeal concluded that the confiscation

order regime was intended to be severe, but not disproportionate. Its purpose was to deprive wrongdoers of the financial benefit obtained from their crimes. Benefit should not necessarily be confined to loss to the victim. Where business had been obtained by corruption, the pecuniary advantage likely to have been obtained by market distortion, which formed an additional benefit to the wrongdoer, could increase the amount of the order. The correct figure for calculating benefit in this case should reflected the company's turnover minus their expenses. The amount was further reduced by deducting paid VAT/corporation tax.

R v Ahmad & Fields [2014] UKSC 36 the Supreme Court held that when property is obtained as a result of a joint criminal exercise, it will often be appropriate for a court to hold that each of the conspirators obtained the whole of that property. The Supreme Court went on to state that where the evidence disclosed separate obtainings, the court should make that finding.

May, Jennings & Green [2008] 2 W.L.R. 1131 – The decision in **R v Waya [2012] UKSC 51** was not an invitation to reduce the draconian nature of POCA but merely to re-state the fundamental aim of the Proceeds of Crime Act, as stated in *May, Jennings and Green*.

The House of Lords decision in **R v May [2008] UKHL 28**, reinforced the need for careful examination of the evidence in confiscation proceedings. The House stated that Crown Court judges presiding in confiscation proceedings had become too penal and presumptive in their outlook. A judicial resolve to determine confiscation proceedings swiftly had caused injustice; defendant's claims that they had not obtained the amount of benefit alleged and thus were not as wealthy as the prosecution claimed were being dismissed too readily. The short-cut of making presumptions had been allowed to supplant a careful examination of the evidence.

May also set out the general principles that 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. 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. The court should proceed by asking three questions:

1. Has the defendant benefited from relevant criminal conduct?
2. If so, what was the value of that benefit that he has so obtained?
3. What sum is recoverable from the defendant?

In determining whether the defendant has obtained property or a pecuniary advantage, the court should 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.

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. 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).

Where more than one defendant has been convicted for his role in a criminal enterprise, the court will have to consider the benefit attributable to each defendant. In deciding this, the court must consider the capacity in which each defendant receives the proceeds of crime.

R v Sivaraman [2009] 1 Cr App R (S) 80 - the court applied the principles of **May, Green and Jennings**, and decided that since the defendant was not a joint purchaser (of 'red deisel') but rather was an employee of the criminal enterprise, he did not obtain a benefit to the total value of pecuniary advantage obtained. The defendant's benefit was restricted to the property that he had obtained, namely the value of the payment he received for his part in the conspiracy, which was £15,000.

R v Olubitan [2004] 2 Cr.App.R.(S.) 14 and the more recent case of **R v Straughan [2009] EWCA (Crim) 955** - It should be noted that if there is no evidence that a defendant actually benefited from an offence, despite being responsible for that offence and all the consequences flowing from it, no confiscation order should be made against that defendant.

CASE STUDY FROM DOMINICA

Rodney Stephenson is a 26-year-old Dominican citizen with no previous convictions. Mr. Stephenson, finding himself unemployed in 2018, having been made redundant from Cave Shepherd in Holetown, was recruited by an Organised Crime Group (OCG) who were involved in a significant narcotic trafficking operation across the Eastern Caribbean and, in some cases, into mainland Europe.

The OCG hired couriers to assist to transport drugs between various Caribbean islands. Mr. Stephenson was recruited as one such courier and was paid a fee of \$1,600 Eastern Caribbean Dollars (XCD) per trip. In total, Mr. Stephenson is known to have crewed on a total of two trips transporting narcotics from Dominica to Barbados.

In April 2019, Mr. Stephenson pleaded guilty and had received a seven-year term of imprisonment for his part in the conspiracy, which involved twenty-two other defendants. Confiscation proceedings were instigated, and the prosecution asserted that, in the absence of clear apportionment of benefit, each co-conspirator should be apportioned the full value of the known benefit. The total benefit amounted to \$32 million XCD.

Was the prosecutor correct to apportion the full value of the benefit to Mr. Stephenson?

The confiscation order against Mr. Stephenson is not proportionate. The correct value of Mr. Stephenson's particular benefit is the amount he obtained from his role in the commission of the offence (\$3,200.00 XCD).

In some cases, where there is no evidence of separate obtainings, it will be appropriate to apportion the full benefit to each coconspirator. In this case, the evidence shows that Mr. Stephenson obtained a specific benefit from the criminal activity and that should be the value of his benefit.

CASE AUTHORITY HIGHLIGHT

R v Green [2008] UKHL 30 - where the defendant has a defined role as a drug courier, their benefit should be the specific amount they received.

Assumptions

Pursuant to section 55 of the Act, the Court is permitted to make certain assumptions to assist in determining whether a person has benefited from the commission of a serious offence. The three assumptions that the Court may make are:

- (a) all property held by the person on the day the application is made; and*
- (b) all property held by the person at any time-*
 - (i) within the period between the day the serious offence, or the earliest serious offence, was committed and the day on which the application is made; or*
 - (ii) within the period of six years immediately before the day on which the application is made, whichever is the longer, to be property that came into the possession or under the control of the person by the reason of the commission of that serious offence or those serious offences for which the person was convicted;*
- (c) any expenditure by the person since the beginning of that period to be expenditure met out of payments received by the person as a result of, or in connection with, the commission of that serious offence or those serious offences.*

The Court may assume that the property obtained by the defendant was obtained by him or her free of any other interest in it. In assessing the value of benefits derived by a person from the commission of a serious offence, the Court may treat as property of the person any property that, in the opinion of the Court, is subject to the effective control of the person, whether or not they have: (a) any legal or equitable interest in the property; or (b) any right, power or privilege in connection with the property.

This may include shareholdings in, debentures or directorships in any company any trust that has a relationship to property. Section 59 sets out how the Court may lift the corporate veil.

Note: The Court must **not** “make an assumption” if it is proven to be incorrect or if made, it would pose a serious risk of injustice. Furthermore, the Court must state the reason for not making one or more of the assumptions.

CASE AUTHORITY HIGHLIGHT

R v Khan, Sakkaravej and Pamarapa

Unreported, February 26, 1996 - States that when looking at the extended benefit, there is no basis for the defence arguing that there must be some evidential connection between the defendant’s property and criminal activity before making an assumption.

R v Croft TLR, July 5, 2000 - Despite the fact that they may appear to be an extremely draconian measure, there can be no leniency when it comes to the application of the assumptions. If a defendant fails to displace the assumption made against him, or relies merely upon bare assertions without documentary evidence to back them up, there is no room for mercy or discretion by the court; the order must be made.

Practical Example

In July 2019, Bob and Julia were stopped by police whilst driving through Georgetown in Bob’s vehicle. Pursuant to a search, 550 grams of cocaine was discovered in the glove

compartment of the vehicle. The cocaine had an estimated street value of \$10 000,000 GYD. It is unclear what role Bob and Julia played in the criminal enterprise or what their individual benefit would have amounted to.

In October 2019, Bob and Julia were convicted of possession with intent to supply a controlled drug. Prior to sentencing, confiscation was mentioned and postponed until the period to lodge an appeal lapsed. No appeal was filed.

Investigations reveal that Bob purchased a Range Rover Evoque vehicle in 2017 for the sum of \$20, 000, 000. GYD. Bob purchased the vehicle WITH cash, the source of which is unknown. The vehicle is registered in the name of Bob's girlfriend, Patricia Dobbs. Bob is registered as having paid the insurance for the vehicle, which is \$800, 000 GYD per year.

When questioned, Bob claimed to be a fisherman. Bob is not known to own a boat and is not registered with the Ministry of Agriculture.

The Guyana Revenue Authority has no record of Bob.

- *What is Bob's benefit from his particular criminal conduct?*
- *What is Bob's benefit from his general criminal conduct?*
- *What should be the total value of Bob's benefit be?*

In this type of case (where individual obtaining is unclear), the court may attribute the full value of the drugs to Bob and Julia. The court will assume (unless the assumption is displaced) that the Range Rover Evoque is property obtained by Bob as a result of his general criminal conduct.

The total value of Bob's particular and extended benefit should therefore be \$30,000, 000 GYD.

What is a Serious Offence?

“Serious offence” is defined broadly, and includes any offence against a provision of:

- (i) any law in Guyana, for which the maximum penalty is death or imprisonment for life or other deprivation of liberty of not less than six months;
- (ii) (ii) any offence listed in Second Schedule (see below); or
- (iii) (iii) a law of a foreign state, in relation to an act or omission, which, had it occurred in Guyana, would have constituted an offence for which the maximum penalty is death, or imprisonment for life or other deprivation of

liberty for a period of not less than six months and includes money laundering and terrorist financing or an offence listed in the Second Schedule.

The offences listed in the Second Schedule (as amended) are very broad, including: illicit arms and ammunition trafficking, terrorism, including terrorism financing, corruption and bribery, fraud, counterfeiting currency, environmental crime, murder, kidnapping, robbery, theft, smuggling including gold smuggling, extortion, forgery, piracy, proliferation financing insider trading, and market manipulation.

Statements

The prosecutor should submit what is often referred to as a “prosecutor’s statement” under section 56 of the Act. This statement sets out whether the person has benefited from the offence (or from any other serious offence of which the person is convicted in the same proceedings or which is taken into account in determining the person’s sentence), and the assessment of the person’s benefit from those offences.

If the defendant accepts any allegation in the prosecutor’s statement, the Court may treat that acceptance as conclusive in respect to that matter. If the prosecutor’s statement has been served on the defendant, the Court may require the defendant to indicate to what extent they accept or deny the allegations contained in the statement (often referred to as a defence response).

If the defendant denies any allegation made in the prosecutor’s statement, they should indicate the matters they intend to rely upon. The prosecutor’s statement is a powerful document because if the defendant fails to respond to it when directed to do so by the Court, the Court may treat that failure to respond as an acceptance of every allegation contained within the prosecutor’s statement (except any parts to which the defendant has responded). If the defendant files a defence response and the DPP accepts any part of it, the Court may treat that acceptance as conclusive of the matters to which it relates.

Standard of Proof

The standard of proof when determining benefit is not made apparent in the Act. The need to make the burden of proof apparent has been included in the recommendations but in these cases, the burden of proof is usually the civil standard.

Amount of the Pecuniary Penalty Order

A pecuniary penalty order must be the amount that the Court assesses to be the value of the person's benefit from the serious offence, or if more than one, all the offences in respect to which the order may be made. If the Court is satisfied that the order should be made in a lower amount (because of any acceptance by the DPP or for any other reason) they must issue a certificate setting out their reasons for making the order in an amount less than the value of the benefit.

Variation of the Order

The pecuniary penalty order may be varied to include any amount that has become available due to the discontinuation of forfeiture proceedings the allowance of an appeal against a forfeiture order.

Default Sentence

Where the Court orders a person to pay a pecuniary penalty order, that amount shall be treated as if it were a fine imposed upon the person for a conviction for a serious offence, and the Court shall impose a term of imprisonment as default of payment of the order (section 60). The default periods are set out under section 51 of the Act.

Discharge of Pecuniary Penalty Order

A pecuniary penalty order is discharged- (a) if the conviction of the serious offence or offences in reliance on which the order was made is or is taken to be quashed and no conviction for the offence or offences is substituted; (b) if the order is quashed on appeal; or (c) on the satisfaction of the order by payment of the amount due under the order.

Receivers

If the pecuniary penalty order is not paid (and not appealed), the DPP may apply to have a “receiver” appointed to take realised property. The Court may confer the power to possess, manage, and dispose of property to the receiver.

Sections 63(3) and (4) set out the extensive powers that may be conferred.

The sums taken by the receiver must be specifically dispersed:

(a) first, they shall meet the expenses incurred by a person acting as a receiver;

(b) second, they shall be applied in making any payments directed by the Court;

(c) third, they shall be applied on the defendant's behalf towards satisfaction of the pecuniary penalty order.

If any funds remain after payment of the pecuniary penalty order, those funds can be paid to persons who have an interest in the property in such proportions as the Court directs.

Protection for Third Parties

Section 65 protects the interests of third parties. Any person who has an interest in property must be given appropriate notice of proceedings, and have the right to make representations.

The Court or DPP shall return property, proceeds, or instrumentalities to the claimant when it has been demonstrated to the Court's satisfaction that the claimant has a legitimate legal interest in the property, did not participate, collude or become involved in the offence (specified as "the money laundering offence"), lacked knowledge of the illegal use of property, and acquired the property in good faith and not for the purpose of avoiding the eventual subsequent forfeiture of the property.

Recoverable Amount

What is the Recoverable Amount?

The recoverable amount is the amount that may be recovered from the defendant under the confiscation order. The recoverable amount will be an amount equal to the defendant's benefit from the scheduled offence or any other criminal conduct (section 55 of the AML/CFT Act).



Note: In calculating the recoverable amount, we must ignore any property which is under an existing recovery, cash forfeiture, listed asset forfeiture or forfeiture order.

Forfeiture Orders

Section 46 of the AML/CFT Act (as amended) also provides for forfeiture of assets post-conviction. This type of forfeiture vests all tainted property in the State, with exception of property owned by innocent purchasers and bona fide third parties.

Distinction from pecuniary penalty orders

Unlike pecuniary penalty orders under section 54 of the Act, which attach a value of criminal benefit to a defendant, a forfeiture order under section 46 focuses on the property, which must be ‘tainted property’ related to a serious offence for which a person has been convicted.

Therefore, this seizure power operates more like civil forfeiture than criminal confiscation, despite the requirement for a conviction.

The provisions of the Act stipulate that a forfeiture order under section 46 is post-conviction in two ways:

1. Section 46 states that a forfeiture order may be made by the Court if the court that heard the criminal case is satisfied that property is tainted.
2. In determining whether property is tainted property, the Court may infer, in the absence of evidence to the contrary:
 - a) that the property was used in, or in connection with, the commission of a serious offence if it was in the person's possession at the time of, or immediately after the commission of the serious offence for which the person was convicted; or
 - b) that the property was derived, obtained, or realised as a result of the commission of the serious offence, if it was acquired by the person before, during or within six years after the period of the commission of the serious offence of which the person was convicted.

What Can be Forfeited?

The Court may forfeit tainted property. “Tainted property” is property either obtained through or in connection with a serious offence or used in, or in connection with, a serious offence.

Any forfeiture order must specify the amount that it considers to be the value of the property at the time when the order is made (section 46(3)).

Tainted gifts

A person makes a gift to another person if they transfer property to them for either a significant undervalue or no consideration at all.

Case law suggests that for there to be a gift there must be (i) transfer of legal and beneficial ownership in an asset, (ii) acceptance of the gift by the donee, (iii) no intention on the part of the donor that the asset should be returned to him, and (iv) a transfer without consideration or at a significant undervalue.

By way of example, if a defendant owns a car and changes the registered owner to someone else (such as his wife or a friend) but continues to use the car as his own, then it could be argued that there has been no gift as the defendant is still, in reality, the owner of the car. To put this in more formal words, there may have been a transfer of legal ownership but no transfer of beneficial ownership.

Similarly, with a property, the legal title shown at the Land Registry does not necessarily indicate the beneficial ownership of the property.

If the defendant retains beneficial ownership of an asset, then there has been no gift of that asset by him. The same will be true if the defendant transfers an asset to someone to simply look after it for a while and return it to him later, or where the defendant transfers the asset to someone to hold it on trust for him. In these cases, the defendant is to be regarded as still owning the asset in question.

CASE AUTHORITY HIGHLIGHT

Re Somaia [2017] EWHC 2554 (QB) – In the absence of statutory definition of ‘gift’, it should be given its normal, legal meaning.

R v Hayes [2018] EWCA Crim 682: the purchase of a property in the joint names of the husband and wife, in circumstances where the wife had not made any financial contribution to the purchase price, was found by the court to be a tainted gift.

Take a close look at paragraph 58 in which the Court of Appeal set out a six-step process for identifying whether a disposition is a tainted gift.

What is a tainted gift?

To meet the definition of a tainted gift, there must first be a gift from the defendant. Once that is established, whether the gift is a tainted gift will in most cases depend on the date on which the gift was made or the provenance of the gift.

According to section 46, there is a limitation period of six years with regard to calculating benefits from a conviction-based forfeiture order. However, a gift, including a gift made before the commencement of this Act, is caught by the Act by sections 66 and 66A of the AML/CFT Act (as amended) where it states that the provisions of sections 38 to 64 (inclusive) apply to any property determined by the Court to be tainted property or the proceeds of crime, and For the purposes of determining whether property was recoverable at any time, including times before the commencement date of this Act, this Part is deemed to have been in force at that time and at any other relevant time.

Therefore, as the court determines that it is relevant, the consideration can go beyond the 6 year limitation in section 46.

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CASE AUTHORITY HIGHLIGHT

R v Morrison [2019] EWCA Crim 351 – in this case the court found that the requirement for proportionality “does not call for nor does it permit a general balancing exercise in which various interests are weighed on each side of a balance, including the potential hardship or injustice that may be caused to third parties by the making of an order that includes a tainted gift.” The Court of Appeal concluded that a family home, which was gifted to the defendant’s partner could be included as a realisable asset even in circumstances where a family would be rendered homeless.

PRACTICAL CASE STUDY

Peter is charged with a money laundering offence on 17 October 2018. He has no previous convictions. On 4 April 2013, Peter transferred a vehicle to his sister, Maria. Maria paid no consideration for the vehicle. She keeps the vehicle in her possession, maintains and insures it and is clear that Peter intended for her to keep the vehicle.

Peter claims that the vehicle should not form part of his benefit as he made a genuine gift to his sister Maria and he is no longer the legal or beneficial owner of the vehicle.

Is Peter correct? If so, does Maria keep the vehicle?

The vehicle is a tainted gift as it was made after the relevant date. The value of the vehicle would not be included in the benefit amount but would be included in the recoverable amount when calculating Peter's confiscation order. If Peter had insufficient means to pay the confiscation order, the vehicle should be realised to pay Peter's confiscation order.

What effect will a finding of tainted gifts have on the interests of a defendant in confiscation proceedings?

When dealing with assets and money that belong to the defendant, the court will require the defendant to pay back what he has available to him, although it may revisit this on application by the prosecution if the defendant later has demonstrably more money available.

If, however, it can be proven on the balance of probabilities that a tainted gift was given, the value of that gift at the time of the transfer will be added to the defendant's available amount, irrespective of whether the gift has been dissipated entirely.

What effect will an adverse finding against the defendant have on the recipient of the tainted gift?

The court will first look to the defendant to satisfy the amount payable under the confiscation order, including any amount that represents tainted gifts.

Enforcement action will be taken against the defendant who could be ordered to serve a sentence in default of payment of the ordered amount.

If, however, monies ordered to be paid remain outstanding, the court can appoint a receiver to recover assets from the recipient of the gift. The court cannot confer this power without first giving the recipient the opportunity to make representations.

CASE AUTHORITY HIGHLIGHT

R v Richards [2008] EWCA Crim 1841 – The Court of Appeal considered the application of gift provisions. Five properties were transferred to Richards from Rogers. Rogers was convicted of drugs offences and had a confiscation order made against him. Richards was subsequently also convicted of money laundering. The judge included the five properties in the benefit and recoverable amount for both Rogers and Richards.

At the confiscation hearing, Richards had given evidence that although he was the legal owner of the properties, it was Rogers who was the beneficial owner.

The Court of Appeal held that Richards held the legal ownership but was not the beneficial owner as he was only holding the properties for Rogers. The confiscation order against Richards was quashed. The confiscation order against Rogers included the properties as part of his benefit and recoverable amount.

R v Tighe [1996] Crim LR 69 – The Court of

Appeal held that Parliament had contemplated that money might continue to be realisable even if it has been made the subject of a gift (or gifts) by the defendant.

R v Gor [2017] ALL ER (D) 79 (Jan) - Before the assumption applies the prosecution must establish the fact of the transfer to the defendant; where the transfer was to somebody else the prosecution must, therefore, prove that

that other person was the defendant's nominee so that the transfer was effectively to the defendant.

R v Bevan [2020] EWCA Crim 1345 - The Court of Appeal considered the appropriateness of reducing a third-party's interest in property where that third-party has knowledge of the criminality.

Applicant and Appropriate Court

The application for a forfeiture order must be made by the DPP or relevant competent authority (section 46).

Sections 46(2) – (5) and the remaining sections relating to forfeiture orders refer to the Court, indicating the High Court is the appropriate court for these cases.

What is a Serious Offence?

According to the Anti-Money Laundering and Countering the Financing of Terrorism Act of 2009, “serious offence” is defined the same as for pecuniary penalty orders (see above).

Conditions

In considering whether a forfeiture order should be made under subsection 46(1), the Court shall consider:

- (a) the rights and interests, if any, of third parties in the property;
- (b) the gravity of the serious offence concerned;
- (c) any hardship that may reasonably be expected to be caused to any person by the operation of the order; and
- (d) the use that is ordinarily made of the property, or the use to which the property was intended to be put.

Vesting of Assets

By virtue of section 47 of the Act, forfeited property vests with the State. Registerable property (property the title to which is passed by registration in accordance with the provisions of the Land Registry Act or the Deeds Registry Act) only vests with the State after the applicable registration requirements have been complied with.

After property vests with the State, it may not be disposed of, except with the leave of the Court, until after the relevant appeal date. The relevant appeal date means:

- (a) the date on which time period for lodging an appeal against a person's conviction (or for the lodging of an appeal against the making of a forfeiture order) expires without an appeal having been lodged, whichever is the latter; or
- (b) where an appeal against a person's conviction or against the making of a forfeiture order is lodged, the date on which the appeal lapses in accordance with the rules of court, or the date on which the appeal is finally determined, whichever is the latter.

After the relevant appeal date, if the order has not been discharged, the property may be disposed of and the proceeds applied or otherwise dealt with in accordance with the directions of the DPP.

Innocent Purchasers

Innocent purchasers are protected by section 40 of the Act. The Court may void any transfer that was made after property was seized or a restraint order was granted (provided the order was served on the parties) unless the transfer was for value, without notice, and in good faith.

Protection for Third Parties

Any person who has an interest in property may apply to the Court for an order declaring the nature, extent, and value of the person's interest at the time the order is made. The court will make such an order if they are satisfied that the following factors have been met, with respect to each piece of property:

- (a) the person was not in any way involved in the commission of the serious offence; and
- (b) where the person acquired the interest during or after the commission of the serious offence, that the person acquired the interest-
 - (i) for sufficient consideration; and
 - (ii) without knowing, and in circumstances not giving rise to a reasonable suspicion that the property was tainted property at the time the person acquired it.

Pursuant to sections 49(3) and 49(4), in certain circumstances a third party can claim an interest in property up to six months after the forfeiture order has been made. The DPP must be served with a copy of the application and will be a party to the proceedings.

Standard of Proof

Any person seeking an order declaring an interest in property must do so according to the civil standard of proof; the balance of probabilities. Section 57A of the AML/CFT Act 2009 (as amended) indicates that the Court shall determine any question arising under sections 54-57 on a balance of probabilities.

CASE AUTHORITY HIGHLIGHT

R v Barwick (2001) 1 Cr App R(S) – D pleaded to 21 counts of theft and one deception offence. The benefit figure adjusted for inflation was just over £600,000. The police were unable to find any significant assets or trace where the stolen money had gone. D claimed he had lost a lot in gambling. The casinos D named only recorded a low value of gambling by him. There was no evidence of D living an extravagant lifestyle. D gave evidence and the Judge found him to be about the most unconvincing witness it would be possible to imagine. The Judge acknowledged that some of the money would have gone and reduced the benefit figure by £150,000. He made the confiscation order for £450,000. The Court of Appeal held that in confiscation proceedings, it was for the prosecution to establish that the defendant had benefitted from an offence and the value of the benefit. Once that benefit was established, it was for the defendant to prove, on the balance of probabilities, that the amount that might be realized was less than the value of the calculated benefit.

R v Barnham [2005] Crim LR 657, [2006] 1 Cr App R (S) 83 – held that once the prosecution has established the benefit there is no requirement on it to provide a *prima facie* case. At the second stage, the burden of proof shifts to the defendant to establish, if he or she can, their realisable assets to the satisfaction of the court. It is for the defendant to show why the confiscation order should not be equal to the value of his or her benefit.

Grayson and Barnham v UK 2008 23/12/2008 ECtHR D was convicted of possession of 28 kilos of heroin with intent to supply. The Judge found D had failed to rebut the assumption that his assets were less than the benefit figure. D appealed and the Court dismissed his appeal. He and another with a similar point appealed to the European Court. Held. It was not unreasonable to expect D to explain what had happened to all the money shown by the prosecution to have been in his possession, any more than it was unreasonable at the first stage of the procedure to expect them to show the legitimacy of the source of such money or assets. The rights of the defence were protected by the safeguards built into the system, namely that it was a public hearing, there was advance disclosure, the defence could adduce documentary evidence and call evidence. The placing of the onus on the defendant was not incompatible with article 6.

Confiscation is a part of sentencing. Making an application for confiscation after the defendant has otherwise been sentenced for an offence, without first advising the court and defendant of the prosecutor's intention to do so, may be challenged on the grounds that the defendant is entitled to a legitimate expectation to know the full extent of the penalty he/she faces at the time of sentence. A failure to mention confiscation prior to sentence, whilst not best practice, is unlikely to be fatal to the prosecution's application (see **R v Soneji and Bullen (2005) UKHL 49, [2006] 1 AC 340** in case highlights below).

CASE AUTHORITY HIGHLIGHT

R v Benjafield [2002] UKHL 2 – Confiscation is not a criminal charge but a part of the sentencing process.

CPS Swansea v Gilleeney [2009] EWCA Crim 193 – Although confiscation must be instituted before sentencing the defendant for the offence, the defendant may be sentenced before the making of the confiscation order. The judge must make clear, before sentencing the defendant, whether they are proceeding immediately to confiscation or whether confiscation will be postponed.

R v Soneji and Bullen [2005] UKHL 49, [2006] 1 AC 340 – Confiscation orders must not be quashed on the sole ground that there was a defect or omission in the procedure.

R v Varna [2013] 1 All ER 129 – Where the sentence has been a conditional or absolute discharge, the court must proceed to confiscation, if applied for, overruling **The Queen v Clarke [2009] 4 All ER 298**.

Discharge of a Forfeiture Order

Where the Court makes a forfeiture order against property in reliance on a person's conviction of a serious offence and the conviction is subsequently quashed, the quashing of the conviction discharges the order. In such cases, or where a person successfully appeals against the forfeiture order, all property must be returned.

Payment Instead of a Forfeiture Order

In certain circumstances, the Court may accept payment of an amount equal to the value of the property that is the subject of the order, in lieu of the property itself. This may be appropriate if the property cannot be located, is located outside of Guyana or has been diminished or rendered valueless (section 51).

Failure to pay the amount may result in the Court imposing a term of imprisonment in default.

Note: Care should be taken when drafting and agreeing to basis of pleas. In some circumstances, the basis of a plea may have a significant effect upon confiscation, especially where the defendant pleads guilty on the basis that his benefit from the criminal activity was limited to a certain amount or his offending behaviour was limited to a certain period of time.

CASE AUTHORITY HIGHLIGHT

R v Chambers [2008] EWCA Crim 2467 – Court of Appeal held that where the Crown accepts a basis of plea, then the court

considering confiscation is bound by that. Where the basis of plea is not accepted, the court considering confiscation must hear evidence and reach its own conclusion on the defendant's role.

R v Lunnon (2005) 1 Cr App E(S) 24 and R v Lazarus [2005] Crim LR 64 – The Court of Appeal stated '*In some cases the Crown may be in a position to make the kind of express acknowledgement that...the indicated offence is the defendant's first involvement in relevant crime and do so knowing that that acknowledgement will be carried forward into confiscation proceedings. In other cases...the Crown may be able to say no more than that for the purpose of sentence it cannot dispute a particular assertion made by the defendant, but that it cannot say what information may arise in any subsequent confiscation proceedings. We have no doubt that the Crown ought, as a matter of good practice, when responding to a basis of plea which is advanced in a case where confiscation proceedings might follow, to bear in mind the question of whether it will be asking for a confiscation enquiry to be made and, if so, what, if any, admission is now being made which will apply to that enquiry.*

Forfeiture When a Person Absconds or Dies

A court may still grant a forfeiture order even where a person dies or absconds in connection with a serious offence, provided the Court is satisfied that:

- (a) any property is tainted property with respect to the serious offence;
- (b) proceedings related to a serious offence committed in relation to that property were commenced; and
- (c) the accused charged with the offence has died or absconded.

Restraint of Property Pending a Forfeiture Order or Pecuniary Penalty Order

Section 38 of the Act provides for restraint of 'realisable property of the accused' or 'specified realisable property held by a person other than the accused' (section 38).

The applicant for restraint should be the DPP or relevant competent authority, and can be made ex parte.

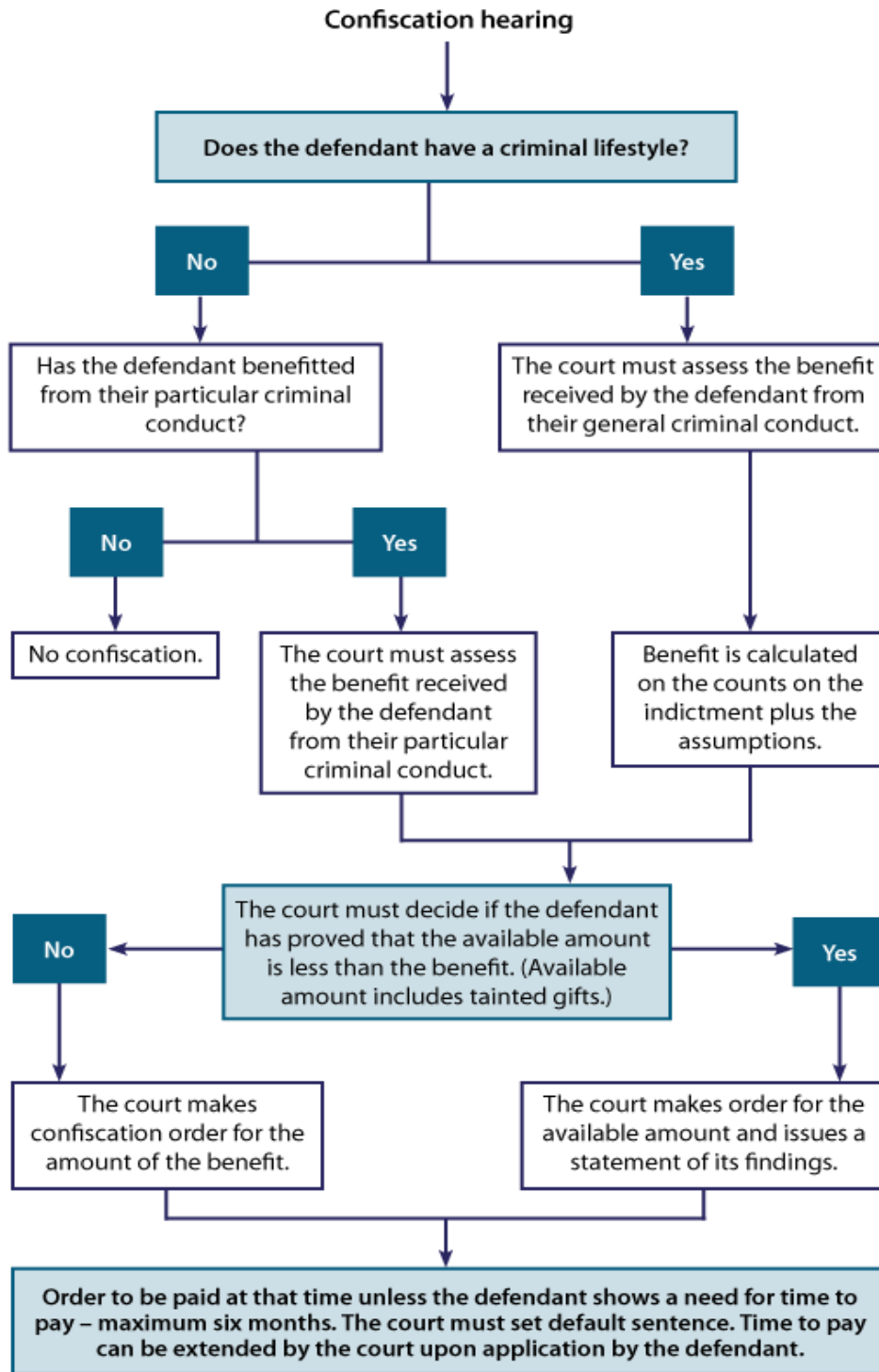
Section 38 provides for pre-charge or post-charge restraint. Section 38(2) sets out what the affidavit in support of the application should include, namely: the charge or conviction against the accused, a description of the property, the name of the person in possession of the property, and the reason for belief that the property is tainted or that the accused derived a benefit from the commission of the offence.

The affidavit must also set out the DPP's grounds for believing that a forfeiture order or pecuniary penalty order is likely to be made. If the court is satisfied as to the matters addressed in the affidavit (and set out in section 39 of the Act), the Court may make the restraint order.

Section 39(2) of the Act states that the Court may make the restraint order subject to any conditions necessary to provide for reasonable living and legal expenses of any person affected by the order. This may also include certain debts incurred by a person in good faith.

Section 40 of the Act requires that the restraint order be served on any person affected by the order. A person who has an interest in property that is subject to the restraint order may apply to the court at any time for the order to be revoked or varied. Section 40 refers to living and legal expenses, but goes further to protect lawful owners of property who are innocent of any complicity in any offence.

The restraint order will remain in place until it is discharged, or a forfeiture order or pecuniary penalty order is made with respect to the property to which the order relates (section 43).



Principles of Inadequacy

The propositions set out by Mr. David Holgate Q.C. in **B [2008] EWHC 3217** provide a helpful starting point when considering any application for inadequacy.

1. The burden lies on the applicant to prove, on the balance of probabilities, that his realisable property is inadequate for the payment of the confiscation order (see **Re O'Donoghue [2004] EWCA Civ 1800**).
2. The reference to realisable property must be to whatever are his realisable assets as a whole at the time he applies for the certificate of inadequacy. If they include assets he did not have when the confiscation order was made, that is by no means a reason for leaving such fresh assets out of consideration (see **Re Phillips [2006] EWHC 623 (Admin)**).
3. An application for inadequacy cannot be used to go behind a finding made at the confiscation hearing or embodied in the confiscation order as to the amount of the defendant's realisable assets. Such a finding can only be challenged by way of an appeal against the confiscation order (see **Gokal v SFO [2001] EWCA Civ 368**). Nor is the application to be used as a “second bite of the cherry”. It is not an opportunity to adduce evidence or to present arguments which could have been put before the Crown Court judge at the confiscation hearing.
4. It is insufficient for a defendant to say that his assets are inadequate to meet the confiscation order, unless at the same time he condescends to demonstrate what has happened since the making of the order to realisable property found by the judge to have existed when the order was made.
5. The confiscation hearing provides an opportunity for the defendant to show that his realisable property was worth less than the prosecution alleged. It also enables the defendant to identify any specific assets which he contends should be treated as the only realisable property. The inadequacy

procedure is intended to be used only where there has been a genuine change in the defendant's financial circumstances. It is a safety net intended to provide for postconfiscation order events. (See McKinsley v CPS [2006] EWCA Civ 1092).

CASE AUTHORITY HIGHLIGHT

Price v CPS [2016] EWHC 455 (Admin) - Although the principles set out by Mr. Holgate Q.C. provide a helpful starting point, they are not to be construed as statutory rules and must be applied whilst '*maintaining a sense of justice and proportion*'. The burden of proof will still be on the defendant, but an applicant is entitled to try to persuade the court that his identified assets have diminished in value and that as a result he is not able to pay the amount outstanding. It is a matter for the judgment of the court, on the facts of an individual case, whether the applicant has made out such a case.

R v Comiskey (1991) 93 Cr App R 227 – The Court of Appeal held that once the prosecution has proved benefit, the burden passes to the Defendant to show, on the balance of probabilities, that the value of his assets is less than this sum.

Walbrook and Glasgow [1994] Crim LR 613 – Court of Appeal held that where Defendant wants to show the amount of his assets is less than the benefit, he must produce clear and cogent evidence. The Court of Appeal states "*vague and generalized assertions unsupported by evidence would rarely, if ever, be sufficient*".

Gokal v SFO [2001] EWCA Civ 368 – If the defendant intends to apply to vary the confiscation order on the basis that his assets are inadequate to pay the order, he must demonstrate to the court clear, firm evidence of his reduced circumstances. An application cannot be used to go behind a finding made at the confiscation hearing or embodied in the confiscation order as to the amount of the defendant's realisable assets. Such a finding can only be challenged by way of an appeal against the confiscation order.

O'Connor v Crown Prosecution Service [2021] EWHC 2900

(Admin) - The case provides a useful summary and reminder of the legal principles involved in applications to vary confiscation orders on behalf of defendants. In particular, the case demonstrates the significant difficulty faced by defendants whose confiscation orders include an element of 'hidden assets'. The defendant cannot simply state that he no longer has such assets, but has to explain what happened to them. A defendant who does not provide an explanation is unlikely to be able to obtain a certificate, even if their other known assets have been realised.

Case Study

The Financial Crimes Investigative Unit (FCIU) has been gathering intelligence relating to Robert since 2016. Based upon their investigations, the FCIU believes that Robert is a key figure in an responsible for narcotics and firearms trafficking.

In October 2017, Robert is convicted of a drug trafficking offence. The prosecution applied for confiscation prior to sentence. When preparing the Statement of Information, it becomes apparent that although Robert's benefit amount would be in excess of \$100 million GYD, Robert has no identifiable assets.

If the court is not able to identify any assets, is it worth going through the process of confiscation or am I wasting the court's time?

In some cases, prosecutors will be faced with making a decision that takes into account the nature of the offending or offender; amount of recoverable assets available for confiscation and resources involved in conducting a confiscation case. There may be some cases, such as the case above, where the profile of the offender merits the making of a confiscation order, even if it is only for a nominal amount. In the event that any assets belonging to Robert are identified in the future, the prosecution may apply to the court for a reconsideration of the available amount.

Proportionality

Origin

The test when considering the imposition of a criminal confiscation order is one of proportionality.

The principle of proportionality requires that there be a reasonable relationship between the objective which is sought to be achieved and the means used to achieve that end. Proportionality is an overarching principle in the Commonwealth Caribbean constitutions which was first articulated in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69*, a case from Antigua and Barbuda.

The Test

1. At a confiscation hearing the court must determine the recoverable amount. Once the recoverable amount is determined, the court must then make a confiscation order for the recoverable amount. The court should, however, not make a confiscation order if it would be disproportionate to do so.
2. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69* the Judicial Committee of the Privy Council held that although the Constitution

created exceptions to the right to freedom of expression that limitation must not be excessive or arbitrary. In determining whether a limitation on the right is arbitrary or excessive the court should ask itself the following questions:

- (i) whether the legislative objective is sufficiently important to justify limiting a fundamental right;*
- (ii) whether the measures designed to meet the legislative objective are rationally connected to it; and*
- (iii) whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.*

3. The Board also stated that the third criterion raised the question of proportionality. Under the principle of proportionality, the content and form of any law must not exceed what is necessary to achieve the legislative objectives. This principle must be applied to every law that creates an exception to any of the rights. A restraint order is draconian in nature therefore consideration must be given to whether the order is arbitrary or excessive. There must be a reasonable relationship of proportionality between the means employed by the State in, inter alia, the deprivation of property and the legitimate aim which is sought to be realised by the deprivation.

4. The approach to proportionality was recently articulated and extended by Lord Sumption, in ***Bank Mellat v HM Treasury (No 2)*** [2013] UKSC 39; [2014] AC 700 at para 20:

“... the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.”

5. Importantly, in *Ahmed Williams v The Supervisory Authority of Antigua and Barbuda* [2020] UKPC 15 the Privy Council adopted the approach to the question of proportionality set out in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 as including “(iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community”.

CASE AUTHORITY HIGHLIGHT

R v Waya - [2012] All ER (D) 166 (Nov) - In 2003, the defendant purchased a flat in London for £775,000. Part of the purchase price, namely £310,000, came from his own resources and the balance of £465,000 (the loan) was provided by a mortgage lender (the original lender). In order to obtain the loan, the defendant made false statements about his employment record and his earnings. The purchase and mortgage were completed in the usual way, with the lender putting the defendant's solicitor in funds shortly before completion. The funds were then held in his client account, in trust for and to the order of the lender, until they were paid direct to the vendor's solicitor on completion (the legal machinery).

In April 2005, the mortgage in favour of the original lender was redeemed and the flat was re-mortgaged to another lender. By the re-mortgage, the defendant realised additional liquid funds of about £360,000, up to £150,000 of which was assumed to have been spent on the flat. However, there was no evidence of what happened to the balance of £210,000 (the re-mortgage balance). In November, the defendant was arrested and was subsequently convicted of obtaining a money transfer by deception. He was sentenced to 80 hours community punishment and, in January 2008, a confiscation order in the sum of £1.54m (the order) was made. That amounted to the then market value of the flat, less the £310,000 'untainted money' paid by the defendant on the original purchase.

The Court of Appeal subsequently reduced the amount of the order to £1,110,000, which was 60% of the market value of the flat. That represented a rateable split of the value, since the loan obtained had been 60% of the original purchase price of £775,000. The Court of Appeal

certified a point of law of general public importance for consideration by the Supreme Court.

The issues for determination were: (i) whether the application of the rules under the Proceeds of Crime Act 2002 (the 2002 Act) for the calculation of benefit might, in some circumstances, give rise to a contravention of rights under the European Convention on Human Rights and in particular, art 1 of the First Protocol to the Convention (A1P1); and (ii) where a person had obtained a money transfer by deception and thereby caused a lending institution to transfer funds for the purpose of a mortgage advance to enable the purchase by that person of a residential property, whether; (a) that person had obtained a benefit from his conduct in the form of property within the meaning of Pt 2 of the 2002 Act; (b) if so, whether the property so obtained was the value of the loan advanced to purchase the property or the person's interest in the property or some other property; and (c) if not, whether the person had obtained a pecuniary advantage within the meaning of Pt 2 of the 2002 Act. Consideration was given, amongst other things, to the Human Rights Act 1998 (the 1998 Act) and to ss 76(4), 79(3) and 80(3) of the 2002 Act.

The appeal was allowed.

On the issue of proportionality the Court held that “*a confiscation order which did not conform to the test of proportionality would constitute such a violation and it was incumbent upon the domestic court to provide a remedy for any such violation*”.

Andrewes [2020] EWCA Crim 1055: In October 2004, the appellant applied for the post of Chief Executive Officer at St Margaret's Hospice, Taunton. His application contained a number of false and misleading statements as to his qualifications. He was given the post and remained there until 2015. In July 2015, the appellant was appointed as Chair of the Royal Cornwall NHS Hospital Trust. He subsequently resigned when he was challenged about his academic history. He pleaded guilty to obtaining a pecuniary advantage by deception, and to two counts of fraud relating to the two applications. He was sentenced to two years' imprisonment.

In confiscation proceedings in the Crown Court, the Recorder assessed benefit in the sum of £643,602.91.

That represented the amount of pay (net of Income Tax and National Insurance Contributions) received by the appellant in the years of his employment and appointments before his dishonesty was discovered and he was dismissed. The available amount was assessed in the sum of £96,737.24. The recoverable amount was thus assessed in the latter sum: and the Recorder decided that it would not be disproportionate to order the appellant to pay that sum. A term of one year's imprisonment in default of payment was set. He appealed and the appeal was allowed.

“The appellant made dishonest representations causative of his obtaining remunerative employment and appointments. He thereby benefited as a result of or in connection with his particular conduct. But throughout, as is to be taken, he properly performed his duties. Further, whilst he had obtained the positions dishonestly, they were positions which he was otherwise lawfully entitled to hold. There was, for example, no legal bar on his being employed or appointed as he was, and indeed no legal bar in principle on the hospice and Trusts waiving their requirements as to what they considered to be essential or desirable attributes. In all the circumstances, he is, in our judgment, to be taken as having given full value for his remuneration. He thereby is to be taken to have made full restoration. A confiscation order would accordingly be disproportionate to the aim of the 2002 Act: it would involve a double penalty.”

R v Harvey [2016] 4 All ER 521: The appellant ran a plant hire business through a company, JHL. While some of the business was legitimate, some of it involved hiring out stolen plant machinery. H was convicted of, among other things, nine counts of handling stolen goods. A hearing took place to assess the extent to which he had benefited over the relevant period from his 'general criminal conduct'. The court found that the benefit obtained by H had been around £2.275m, comprising £1,960,754.40 from general criminal conduct and a further £314,700 from particular criminal conduct. The sum of £1,960,754.40 was determined in the following way: (i) JHL's aggregate turnover for the relevant period was £5,159,880 (inclusive of VAT); (ii) the proportion of stolen items to the total stock over that period was 38%; (iii) the benefit from general criminal conduct was therefore 38% of £5,159,880, namely £1,960,754.40. On further appeal to the UK Supreme Court.

The Supreme Court allowed the appeal and held that it would be disproportionate under Article 1, Protocol 1 ECHR to make a confiscation order where VAT has been paid or accounted for to HMRC. In confiscation proceedings, any VAT paid by from the proceeds of crime cannot be included in any calculations as to the defendant's benefit.

Payment under Confiscation Order

Time to pay

7.1.1 The confiscation order should be paid immediately upon the making of the order. If the defendant proves that he/she needs more time to pay, the court may extend the time to pay but that period must not extend past six (6) months commencing on the date the confiscation order was made (section 60A of the AML/CFT Act as amended).

7.1.2 This period may be further extended on an application by the defendant, if the court believes there are exceptional circumstances for doing so (s60A). Any such request to extend the time to pay beyond 6 months may be made after the original six-month extension but must be made before the end of a 12-month period after the date the confiscation order was made (section 60A).

7.1.3 The defendant may apply within the specified period to the High Court for the period to be extended under exceptional circumstances. This request may be granted at the Court's discretion but the Court must first give the DPP the opportunity to be heard (s60A(8)).

Enforcement of confiscation order

Non-compliance of a defendant by failure to pay the confiscation order within the granted time frame may, on the application of the DPP, result in a term of imprisonment(s60C(2)).

Statement of Information and Defendant's Response

What is a Statement of Information?

1. A Statement of Information is a document which is prepared by the financial investigator and prosecutor to assist the court with information relating to the value of the particular benefit, value of the defendant's benefit from general criminal conduct and recoverable amount.

a. The Statement of Information should set out:

- i. an outline of the nature of the
- ii. offence(s) that the defendant has been convicted of, together with references to the indictment, the factual background, the date of conviction, any sentence that has been passed, and the timetable for confiscation;
- iii. a portrait of the defendant himself, including age, address, marital status, and dependents. This will also include reference to previous occupations, income derived from the same, and any previous relevant convictions;
- iv. the history of any restraint order proceedings, including whether a receiver has been appointed;
- v. the extent of the particular benefit alleged. This will often include reference to admissions made at trial or the evidence given. It may
- vi. also extend to relevant sentencing remarks and the basis of plea;
- vii. details of the assumptions that the court is being invited to draw and the value of the extended benefit;
- viii. the nature of the assets the prosecutor maintains are realisable. Whilst there is no duty upon the prosecutor to prove the

- available amount it is clearly helpful if it refers to what is known in terms of the defendant's property and wealth; and
- ix. the extent of any allegation of hidden assets and the basis for such a belief.

Defendant's Response

1. It is best practice for the defendant to tender a statement in response to the Statement of Information, however, the Defendant's Response is not mandatory. However, by section 57B (3) of the AML/CFT Act (as amended), if the defendant fails without reasonable excuse to comply with an order under this section the Court may draw such inference as it believes is appropriate.
 - a. Where the prosecutor gives the court a Statement of Information, and a copy is served on the defendant, the court may order the defendant:
 - i. to indicate, within the period it orders, the extent to which he accepts each allegation in the statement; and
 - ii. so far as he does not accept such an allegation, to give particulars of any matters he proposes to rely on.

The purpose of a Defendant's Response is to identify areas of dispute for the confiscation hearing, so that evidence may be adduced only in relation to the disputed points, thus narrowing the issues and saving court time.

Where the defendant accepts to any extent an allegation in a Statement of Information, the court may treat his acceptance as conclusive of the matters to which it relates for the purpose of deciding the issues referred to in section 19(2), as the case may be.

1. If the defendant fails to respond to each or any allegation made in the Statement of

Information when ordered to do so, the Court may draw inference (57B (3) as above).

2. It must be noted that if no timetable is set or other order made by the court, the defendant is not obliged to respond to the Prosecutor's Statement and nothing can be implied by their failure to do so.
3. For the purposes of the Defendant's Response under section 57B of the Act, an allegation may be accepted or particulars may be given in a manner ordered by the Court.

If I tender a Defendant's Response, am I incriminating myself in criminal proceedings?

No acceptance under this section that the defendant has benefited from criminal conduct, is admissible in evidence in proceedings for an offence (section 57B(8)).

Is the Court Limited to the Contents of the Prosecutor's Statement?

1. The court is not limited to what is set out in the Statement of Information. The Act is unambiguous in its terms that it is the court who must determine the defendant's benefit and realisable amount, not the prosecutor.
2. Similarly, the court is not limited to the offences for which the defendant has been charged, as long as they are satisfied, beyond reasonable doubt, that other criminal conduct has been committed (**R v Briggs- Price [2009] UKHL**).
3. Importantly, it was later stressed by the Court of Appeal that the case of **BriggsPrice** should

not be taken as authority for the proposition that the only way of making out the assumptions was to prove past criminal offences (**R v Whittington (2009) EWCA Crim 1641.**)

CASE AUTHORITY HIGHLIGHT

R v Lavode (Unreported, CA, 12 March 1993) - The defendant failed to respond to the Prosecutor's Statement or give evidence at the confiscation hearing. The Court of Appeal dismissed the defendant's appeal against the confiscation order. McPhearson J, in delivering the judgment of the court, observed that: *'If the judge was wrong about the realisable assets and the bank accounts, the Appellant had nobody but himself to blame in this regard.'*

R v Walbrook and Glasgow [1994] Crim LR 613, the Court of Appeal held that where a defendant wanted to show that the amount of his realisable assets available for confiscation was less than the amount of his benefit as certified by the court, he had to produce clear and cogent evidence. They stated that *'Vague and generalized assertions unsupported by evidence would rarely if ever be sufficient'*.

CASE AUTHORITY HIGHLIGHT

Padda [2013] EWCA Crim 2330: In assessing what is 'just', the judge should consider the amount outstanding, the additional amount available, the passage of time since the original confiscation order and the impact on the defendant, together with the legislative policy in favour of maximising the recovery of the proceeds of crime and afteracquired assets, even those acquired through legitimate work. The correct test on appeal is whether the new order is wrong in principle or manifestly excessive and not whether it is 'Wednesbury unreasonable'

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