25.25a ***Procedural errors do not prevent orders being made***

Proceeds of Crime Act 2002 s 14(11) A confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement.

(12) But subsection (11) does not apply if before it made the confiscation order the court:

a) imposed a fine on the defendant,

b) made an order falling within section 13(3),

c) made an order under Powers of Criminal Courts (Sentencing) Act 2000 s 130 (compensation orders),

ca) made an order under the Criminal Justice Act 2003 s 161A (orders requiring payment of surcharge);

d) made an order under the Prevention of Social Housing Fraud Act 2013 s 4 (unlawful profit orders).

R v Gural 2015 EWCA Crim 305, 2 Cr App R (S) 21 (pg 202) On 12 July 2012, D pleaded to possession with intent to supply and five other counts. He was sentenced to 5 years 4 months and the Judge made a forfeiture order for D's laptop computer, iPhone etc. She postponed confiscation and ordered that D serve an assets statement by 13 August 2012, (which was served on 18 September 2012) and for the prosecution to serve their section 16 statement by 12 October 2012. That did not happen due to claimed staff changes. The case was listed on 7 January 2014, when the prosecution asked for an adjournment because counsel was not adequately instructed. The prosecution was ordered to serve their section 16 statement by 7 February 2014. The Judge also made a £500 wasted costs order against the CPS for the failure to serve a statement and the failure of the officer to attend on the day meaning little could be achieved. The prosecution served their section 16 statement on 15 January 2014 with a revised statement on 25 January 2014. The case was listed on 31 March 2014 when no counsel appeared for the prosecution due a misunderstanding within the CPS. On 30 April 2014, the defence served a skeleton argument contending that due to the delay etc. the confiscation proceedings had lapsed. On 7 May 2014, a Judge ruled against that submission and set down a new timetable for the proceedings. He also made a wasted costs order against the CPS for the hearing on 31 March 2014. On 9 June 2014, a confiscation order was made on agreed figures. The defence appealed saying the failure to have a postponement order and the error in making a forfeiture order on 12 July 2012, meant no confiscation order could be made. The prosecution said the order was made within the 2-year period and confiscation orders should not be struck down on technicalities. Held. We have considered, *R v Knights* 2005 UKHL 50, *R v Soneji and Bullen* 2005 UKHL 49, 2006 1 Cr App R (S) 79 (p 430), *R v Donohoe* 2006 EWCA Crim 2200, 2007 1 Cr App R (S) 88 (p 548), *R v Iqbal* 2010 EWCA Crim 376, 2 Cr App R (S) 72 (p 470), *R v Neish* 2010 EWCA Crim 1011, 2011 1 Cr App R (S) 33 (p 208) and *R v Johal* 2013 EWCA Crim 647. para 44 From these case we note there is clear parliamentary intention that: a) confiscation proceedings should take priority over other proceedings concerning forfeiture, deprivation and orders for payment, b) confiscation proceedings should move forward expeditiously. The various time limits are there to ensure confiscation proceedings do not drift, c) confiscation proceedings should not be invalidated by procedural

errors. Section 14(11) expressly says this but it is qualified by section 14(12), see **25.25d**. para 50 There were lamentable delays by the prosecution. The Judge rightly characterised the failure to apply for a further adjournment as a serious procedural error. Nevertheless, he considered that this error was capable of remedy within the two-year period. We do not agree. Section 14(8) provides that a period of postponement can only be extended if an application for extension is made before the period of postponement has ended. In this case the application to extend was made long after the period of postponement had ended. In the ordinary way that would not be fatal to the prosecution. The saving provision of section 14 (11) would come to the rescue. But section 14 (11) does not apply in the present case. That is because on 12th July 2012 the court had wrongfully made a forfeiture order in breach of section 15 (2).

The decision in *R v Donohoe* 2006 does not [save] the prosecution. In this case, unlike *R v Donohoe* 2006, the prosecution needs the balm of section 14(11) in order to retrieve its position. It is of course right that we must strive to give effect to the objects of POCA and the intention of Parliament. The difficulty for the prosecution, however, is that part of Parliament's intention is now expressed in section 14(12). That is a mandatory prohibition which, as the Lord Chief Justice stated in *R v Neish* 2010, cannot be ignored. Forfeiture orders should not be made when confiscation proceedings are under way. If forfeiture orders are made in such circumstances, then the prosecution will be held more strictly to the time limits contained in section 14. If one applies the test in *R v Soneji and Bullen* 2005 at para 67, it can be seen that there has most certainly not been substantial observance of the time limits by the prosecution. We do not base our decision on the 'substantial performance' test. We merely note that in the present case that test leads to the same results as that indicated above. We acknowledge that in this case, unlike *R v Iqbal* 2010, the two-year period had not expired on the date when the court made its confiscation order. Nevertheless we conclude that the combination of delays and breaches by the prosecution was such as to deprive the court of the power to make a confiscation order. We quash the order.

25.38 *Defendant's qualified right to be present*

See also: *R v Place* 2015 EWCA Crim 1404 (Defendant in prison absent and claiming illness. Judge entitled to consider the hearing was fair.)

25.47a *Evidence* *What if there is none for an important matter?*

R v Eddishaw 2014 EWCA Crim 2783 D pleaded to cheating Revenue and Customs of duty payable on alcoholic products. D was the head of an operation producing counterfeit vodka. He purchased large quantities of denatured alcohol, removed the additives and added water. That was bottled with a fake label of a well-known brand. In confiscation proceedings, the Judge said the benefit was the money he had received for selling the counterfeit vodka. The genuine bottles retailed at £8.65 and the counterfeit bottles at £6.80. The wholesale price of the counterfeit bottles was not known. The Judge found on the balance of probabilities that the wholesale black market value was £5. **Issue 1** (Was there a nexus between the offence and the benefit assessed) see **25.93a**) **Issue 2** The defence contended there was no evidence as to what the wholesale value of the counterfeit vodka was. He contrasted this with the expert evidence about the values of illegal drugs. Defence counsel relied on *Lonsdale v Howard & Hallam* 2007 UKHL 32 and *R v Singh* 2005 EWCA Crim 1448. Prosecution counsel said £5 was a fair estimate and D could have given evidence. Held. There is no obligation on the defence to give a value. It was unfortunate the prosecution made no investigation of the distribution network. It would not be proper for this Court to hear evidence. There was simply no evidence to support the £5 figure. para 97 We quash the order and remit the case back to the Crown Court with a direction that the Court shall not assess the benefit or the available amount more than the amounts in the original order. Although the prosecution could apply to increase the available amount under Proceeds of Crime Act s 22.

25.48 ***Companies Piercing the Corporate veil***

R v McDowell and Singh 2015 EWCA Crim 173, 2 Cr App R (S) 14 (p 137) M and S's cases were not connected but joined because they shared similar points. M was an arms dealer convicted of two counts of supplying goods subject to a prohibition. S pleaded guilty to carrying on a business as a scrap metal dealer without being entered on the Register. M and S carried on their businesses through a company of which they were sole shareholder and director. para 3 Both said it was inappropriate to lift the corporate veil. Held. Merely because a director had control of funds on behalf of a company, it could not be said that he had 'obtained' those funds save in his capacity as the company's employee. We observe that the need to identify the capacity in which a defendant received and handled the proceeds of crime had been emphasised by the court in *R v Sivaraman* 2008 EWCA Crim 1736, 2009 1 Cr App R (S) 80 (p 469), since approved by the Supreme Court in *R v Ahmad and Others* 2014 UKSC 36, 2 Cr App R (S) 75 (p 580). For M, it is not necessary to lift the corporate veil. M did not attempt to hide his trading behind the cloak of his company. As the judge put it he was the *alter ego* of the company. He used it openly as his trading vehicle in the transactions. The Crown Court was entitled to examine the receipts and profits of the company from the criminal conduct of the appellant personally. He was the beneficial owner. For S they were his records so no issue arises.

25.60 ***Step 5 'Obtains property as a result of or in connection with the conduct' Meaning of***

R v Moss 2015 EWCA Crim 713 LCJ D pleaded to three record keeping offences and one charge of failing to dispose of a cow's carcass. The prosecution case was that D had unlawfully slaughtered and/or butchered 209 unaccounted for cattle. His benefit was £1,000 per item. The prosecution suggested that D had a criminal lifestyle because two of the offences were committed over six months and D had benefitted by £5,000 or more. The defence said that had not been charged. The Judge found that D had been involved in the unlawful slaughter and butchery of 116 cattle. He calculated the benefit at £83,000, which was less than his realizable assets. Held. Taken in isolation [none] of the offences involved the obtaining of any property or pecuniary advantage. paras 57 and 11 The Judge was wrong to find D had benefitted from the offences, so order quashed.

25.61a ***Step 5 Statutory provisions for determining benefit The section 8(4) bar to amendment***

R v Chahal and Another 2014 EWCA Crim 101, 2 Cr App R (S) 35 (p 288) D and C was convicted of money laundering and other counts in 2008. It was a banking fraud exploiting defective banking procedures. In 2010, the Judge made a confiscation order having determined D's and C's benefit from general criminal conduct was about £140,300. D's order was for nearly £22,700 and C's order was for just over £34,000. In 2011, D was convicted of a missing trader fraud with a loss to the revenue of £22+m. He had been awaiting trial for this fraud when the first confiscation order was made and C had already been convicted of it. The second Judge made confiscation orders which were limited to the benefit determined by the Judge in the first confiscation proceedings. The explanatory notes to the Proceeds of Crime Act 2002 states that section 8(4) 'ensures that a calculation of benefit once made in relation to an offence will apply for the purposes of any subsequent calculation of benefit in respect of general criminal conduct'. The prosecution appealed. Held. Each defendant has engaged in sustained and major criminality. The purpose of section 8(4) is clear enough without referring to the explanatory notes. The earlier findings as to benefit were conclusive as to the benefit from general criminal conduct. If authority was needed it can be found in *R v Barnett* 2011 EWCA Crim 2936. The Judge was right to so limit the benefit. To do otherwise was to drive a coach and horses through the statutory provisions. This result is not attributable to a deficiency in the statutory provisions. It is attributable to the unwise decision of the prosecution to proceed with the first confiscation proceedings and to agree the benefit. Quite why the prosecution didn't adjourn the first confiscation proceeding has not been explained to us.

25.79 *Step 7 Determining the benefit Benefit figure must be proportionate*

R v McDowell and Singh 2015 EWCA Crim 173 M and S's cases were not connected but joined because they shared similar points. M was an arms dealer convicted of two counts of supplying goods subject to a prohibition. His company was agent in an aircraft sale to Ghana. para 14 The gross profits of the company were in 2006-7 about £530,000, in 2007-8 about £400,000 and in 2008-9 about £340,000. M had received emoluments of about £170,000 per year. The benefit was assessed as just over £2.55m. The benefit figure included a commission payment of nearly £2m. The available amount was almost £292,500. The confiscation order was made in that sum. M was sentenced to a 2-year suspended sentence. S pleaded guilty to carrying on a business as a scrap metal dealer without being entered on the Register. The Judge based the benefit on the receipts of the company which was nearly £966,000. The available amount was just over £176,000. The confiscation order was made in that sum. S was fined £350. Both M and S argued that the benefit figure was disproportionate and relied on Article 1. Held. para 44 The test of proportionality is applied to the benefit. para 51 The application of the proportionality assessment requires examination (as in *R v Sale* 2013 EWCA Crim 1306, 2014 1 Cr App R (S) 60 (p 381)) as to whether the finding of benefit the defendant is liable to repay is a proportionate means of achieving the legitimate objective of depriving him of the proceeds of his criminal conduct. The judge may need to examine both causation under section 76(4) (para 34 of *R v Sale* 2013) and the certainty of double recovery (para 29 of *R v Sale* 2013). We agree with the approach in *R v Sale* 2013, where the underlying transactions producing the appellant's receipts were lawful and not criminal. The cost of those transactions to the defendant may, on the grounds of proportionality, properly be treated as consideration given by the appellant for the benefit 'obtained'. There may be no 'loser' as contemplated in *R v Waya* 2012 and in *R v Jawad* 2013. The underlying principle is the same, the defendant has not gained by his conduct to the extent that he has given value for his receipts. Each case must be decided according to its particular facts. For M it was proportionate. para 64 For S, the Judge determined that the entire business was criminal. S's contentions about the finances of the business were not substantiated. The burden was on S and his argument failed [the test].

See also: *R v Awan* 2014 EWCA Crim 2496 (Convicted of conspiracy to evade excise duty. The confiscation order was made on a limited basis. Held. No confiscation hearing is complete without some reference to *R v Waya* 2012 and without some citations from the judgments.)

25.82 *Step 7 Determining the benefit Tainted gifts*

R v Lehair 2015 EWCA Crim 1324 D robbed a bank and on the same day, she deposited £1,200 into her account and transferred £1,100 from her account into her husband's account. The Judge found she did not have a criminal life-style and the transfer was assessed as a tainted gift. The defence said this was not permissible as Proceeds of Crime 2002 s 77(5)(a) required the gift to be made 'at any time after the date on which the offence was committed' when in fact it was made on the same day. Held. A literal translation of the Act is anomalous with the explicit purpose of the Act. It could not have been intended that criminals should have a day's grace to dispose of their assets. Without wishing to define 'date' the order stands.

25.87 *Step 7 Determining the benefit Conspiracies/Joint enterprises/Apportionment*

R v Dad and Others 2014 EWCA Crim 2478 D and others were convicted of conspiracy to defraud and money laundering. They made a series of bogus insurance claims. The Judge found although the defendants held separate bank accounts and assets, the assets were regarded by the defendants as all part of a family pot. Nevertheless he apportioned the benefit equally because otherwise it would be disproportionate and unfair. Held. It is easy to see why the Judge did that but *R v Waya* 2012 UKSC 51,

2013 2 Cr App R (S) 20 (p 87) had not displaced *R v May* 2008 UKHL 28, 2009 1 Cr App R (S) 31 (p 162) about apportionment. The Judge was wrong to do so, so prosecution appeal allowed. Where the Judge had not apportioned, appeal dismissed.

R v Smith 2014 EWCA Crim 2707, 2015 1 Cr App R (S) 43 (p 315) D pleaded to conspiracy to defraud. He made a false insurance claim for a claimed collision of his car and a Range Rover driven by W. D accepted liability and both made claims. D received £5,800 and W £17,028. Experts discovered the accident was staged. The prosecution in confiscation proceedings added the two pay outs together for the benefit figure and adjusted that for inflation. The Judge agreed. D's assets were £28,000. D claimed his benefit should be assessed at £5,800. Held. para 23 The fraud was undoubtedly joint. That does not necessarily mean the benefit was joint. That there must have been a pre-concert is obvious. But there were separate claims. On the evidence neither received the full sum. There was no evidence of pooling. There were separate payments made. There is an inference that D and W made an adjustment because if D just received payment for his car then he had little or nothing to gain. However a 'kick back' would not have been sufficient for a finding of the joint figure for the benefit. As prosecution counsel concedes the Judge's reasoning was unsatisfactory and as counsel was not able to make any concession, we accept the proper course is to quash the order and remit the matter to the Crown Court for the matter to be properly explored.

25.91b ***Step 7 Determining the benefit Dealers obtaining money when not registered***

R v McDowell and Singh 2015 EWCA Crim 173 M and S's cases were not connected but joined because they shared similar points. M was an arms dealer convicted of two counts of supplying goods subject to a prohibition. His company was agent in an aircraft sale to Ghana. S pleaded guilty to carrying on a business as a scrap metal dealer without being entered on the Register. Held. para 32 This Court has held that trading in criminal breach of a prohibition is criminal conduct from which benefit can be derived, *R v Del Basso* 2010 EWCA Crim 1119, 2011 1 Cr App R (S) 41 (p 268). That case and *R v Sumal & Sons (Properties) Ltd* 2012 EWCA Crim 1840 demonstrate the importance of identifying the criminal conduct of the offender at the first stage of the assessment. It is not sufficient to treat 'regulatory' offences as creating a single category of offence to which POCA is uniformly applied. There is a narrow but critical distinction to be made between an offence that prohibits and makes criminal the very activity admitted by the offender or proved against him (as in *R v Del Basso* 2010) and an offence comprised in the failure to obtain a licence to carry out an activity otherwise lawful (*R v Sumal & Sons (Properties) Ltd* 2012). para 53 For M the underlying transactions were prohibited and unlawful. It is not arguable that the he did not benefit from his criminal conduct. Neither is it arguable that, because commission payments were received after a licence was applied for or granted, they did not comprise benefit from criminal conduct under the Act. para 60 For S, his trading activity was not criminal conduct from which benefit accrued. The criminal conduct was the failure to register before carrying on business. However, S's trading receipts were obtained as a result of or in connection with trading activity that was lawful in itself and not from the failure to register the particulars of the business that comprised the criminal offence. We derive some support for our identification of the nature of the criminal conduct from the alternative means by which the offence may be committed: failing to notify a change of circumstances in breach of section 1(5). It would be an odd and inconsistent result if one means of committing the offence attracted a POCA benefit finding while the other did not. Confiscation order quashed.

25.93a ***Step 7 Determining the benefit Duty evasion (alcohol smuggling etc.)***

R v Eddishaw 2014 EWCA Crim 2783 D pleaded to cheating Revenue and Customs of duty payable on alcoholic products. D was the head of an operation producing counterfeit vodka. He purchased large quantities of denatured alcohol, removed the additives and added water. That was bottled with a fake label

of a well-known brand. In confiscation proceedings, the Judge said the benefit was the money he had received for selling the counterfeit vodka. The genuine bottles retailed at £8.65 and the counterfeit bottles at £6.80. The wholesale price of the counterfeit bottles was not known. The Judge found on the balance of probabilities that the wholesale black market value was £5. The Court considered Alcoholic Liquor and Duties Act 1979 s 4 and 78 and Finance Act 1995 s 5. **Issue 1** The Judge found that there was sufficient nexus between the cheat offence and the value of the vodka D was selling. The defence argued no duty was ever due. Held. para 33 This case is on all fours with *R v Louca* 2013 EWCA Crim 2090, 2014 2 Cr App R (S) 9 (p 49) (see **25.94**). para 30 One cannot take too narrow a view of Proceeds of Crime Act 2002 s 76(4) (see **25.60**). When *bona fide* vodka is sold in the shops a very large part of the purchase price is referable to duty. The whole objective was to produce something very similar to vodka and to evade the payment of any duty. The vodka was indeed obtained as a result of or in connection with the conspiracy to cheat Revenue & Customs. **Issue 2** (Guessing an amount for the wholesale value of the counterfeit vodka see **25.47a**)

25.96a ***Step 7 Determining the benefit Loan sharks***

R v Chapman 2015 EWCA Crim 694 D pleaded to eight counts of breaching Consumer Credit Act 1974 s 39(1) by carrying on an unlicensed money lending business. He charged interest well above standard rates. He loaned a total of about £137,000 and received repayments of about £221,000. The defence said the repayments were from lawful loan agreements and if that failed the benefit should just be the profit. The Judge took the £221,000 figure as the benefit and made a confiscation order for about £177,500. On appeal the defence said the confiscation order was a penalty within Consumer Act 1974 s 170 and so barred. Also that confiscation did not apply because all D had done was not to obtain a licence. Held. Section 170 was limited in scope so did not apply. Relying on *Hampshire CC v Beazley* 2013 EWCA Crim 567, the order was entirely proportionate.

25.99a ***Step 7 Determing the benefit VAT frauds***

R v Chahal and Another 2015 EWCA Crim 816 C and S were convicted of cheating the public revenue in a missing trader VAT fraud. The total trading exceeded £181.5m. C was a director and 50% shareholder of Letting Solutions which was largely a buffer company. S was a director/manager of another such company. Each were party to the making of false claims. Held. para 23 It is an important matter that the fraud operated by the presentation of apparently genuine claims for inputs which were actually part and parcel of the fraud. para 38 The buffer and export traders' receipt of a credit or payment in respect of the input claims, amounts to a pecuniary advantage within the terms Proceeds of Crime Act 2002 s 76(5); see *R v Dimsey and Allen* 2000 1 Cr App R (S) 497. Indeed, if the input claims had not been made, then the relevant trader would have owed HMRC a very substantial sum indeed for output tax charged on its sales. para 39. The total turnover of the transactions (i.e. upon which VAT was calculated) represented the benefit obtained. It was appropriate that the Crown limit its claim to the amounts of VAT which had been claimed. para 40. For the VAT inputs i) the court is not concerned under the POCA code to determine the amount of profit made, as calculated in an accounting exercise. It is no less a benefit received because he has not, in the event, seen the full fruits of it because he elected to use it in the next part of the fraud. ii) equally, the exercise is not concerned with limiting the benefit obtained by reference to the loss caused to another. The effect of the Code is not to limit the recovery of benefit generated by criminal conduct by reference to whether it is equivalent to the actual loss caused to another: see *R v Dimsey and Allen* 2000 at p 501. The offender cannot set off his expenses. There was no need to moderate the application of Proceeds of Crime Act 200 s 10(6). Appeal dismissed.

25.105a ***Step 8 The available amount Expenses***

R v Yu and Another 2015 EWCA Crim 1076 D and his wife pleaded to four Trade Mark offences. During the confiscation hearing the Judge was unable to accept their account due to inconsistencies. She found the pair had failed to satisfy her that the available amount was less than the benefit. The main issue on appeal was how the court should deal with expenses when considering the available amount. Held. para 30 Dating back certainly to *R v Comiskey* 1991 93 Cr App R 227, expenses are capable of being taken into account when calculating the available amount. It was said at page 233 that, "the court cannot close its eyes to the obvious and cannot ignore the fact that some expenses must have been incurred" and that must be read subject to the burden of proof on the defendant contained in Proceeds of Crime Acts 2002 s 7(2), see **25.119**. A defendant who fails to satisfy that burden will not succeed in reducing the recoverable amount beneath the value of his benefit. Appeal dismissed.

25.108 ***Step 8 The available amount Joint assets***

R v Ahmad and Others 2014 UKSC 36, 2 Cr App R (S) 75 (p 580) Supreme Court The Court considered two unconnected appeals. The Ahmad defendants had engaged in an MTIC fraud, fraudulently claiming £12.6m of VAT. The Fields defendants were convicted of conspiracy to defraud in relation to goods and services supplied to a company which had forged its accounts. £1.4m was jointly acquired. Neither set of defendants challenged the quantification of the recoverable amounts (£16.1m when adjusted for inflation for the Ahmad defendants and £1.6m for the Fields defendants), or the finding that they obtained that amount jointly. The Court considered whether it was right that the state could claim the same benefit for a number of defendants because they were each held to be responsible for the whole benefit. Held. para 72 We accept to take the same proceeds twice over would not serve the legitimate aim of the legislation and, even if that were not so, it would be disproportionate. The violation of [European Convention on Human Rights art 1] would occur at the time when the state sought to enforce an order for the confiscation of proceeds of crime which have already been paid to the state. The appropriate way of avoiding such a violation would be for the confiscation order made against each defendant to be subject to a condition which would prevent that occurrence. para 73. This approach may appear to risk producing inequity between criminal conspirators, on the basis that some of them may well obtain a 'windfall' because the amount of the confiscation order will be paid by another. However, that is an inherent feature of joint criminality. If the victim of a fraud were to sue the conspirators and to obtain judgments against them, he would be entitled to enforce against whichever defendant he most easily could. The losses must lie where they fall, and there is nothing surprising, let alone wrong, in the criminal courts adopting that approach. Where a finding of joint obtaining is made, whether against a single defendant or more than one, the confiscation order should be made for the whole value of the benefit thus obtained, but should provide that it is not to be enforced to the extent that a sum has been recovered by way of satisfaction of another confiscation order made in relation to the same joint benefit. A subsequent confiscation order made against a later-tried defendant in relation to the same benefit may well be such an order. In theory a court might therefore need to consider whether to stay the enforcement of a confiscation order made against one or more defendants to await the outcome of a later criminal trial against other defendants in respect of the same criminal conspiracy. However, except perhaps when a second trial is imminent. this would not normally be appropriate bearing in mind the purpose of the 2002 Act and the statutory stipulation for a speedy hearing (see para 10 of this judgment). Orders made on the basis of lifestyle assumptions will require special consideration on their facts. Confiscation orders amended accordingly. For more detail see **25.87**.

R v Dad and Others 2014 EWCA Crim 2478 D and others were convicted of conspiracy to defraud and money laundering. They made a series of bogus insurance claims. The Judge found although the defendants held separate bank accounts and assets, the assets were regarded by the defendants as all part of a family pot. Nevertheless he apportioned the benefit equally because otherwise it would be

disproportionate and unfair. Held. It is easy to see why the Judge did that but *R v Waya* 2012 UKSC 51, 2013 2 Cr App R (S) 20 (p 87) had not displaced *R v May* 2008 UKHL 28, 2009 1 Cr App R (S) 31 (p 162) about apportionment. The Judge was wrong to do so, so prosecution appeal allowed. Where the Judge had not apportioned, appeal dismissed.

The Court also considered whether the adjustment for the available amount in *R v Ahmad and Others* 2014 UKSC 36, 2 Cr App R (S) 75 (p 580) (see above) applied. Held. para 56 The last sentence of para 74 of the case makes clear that [an adjustment] may not be required in cases of lifestyle assumption. It all depends on the circumstances. No such adjustment is required here as [the individual confiscation orders do not equal the total of the benefit and we can discount a lottery win adjustment occurring.]

25.112 ***Step 8 The available amount Matrimonial property***

R v Parkinson 2015 EWCA Crim 1448 D pleaded to theft. He stole brass parts worth just over £64,620 from his employer. The prosecution applied for a confiscation order and a compensation order. It was agreed the benefit was about £39,330 and the available assets was just under £14,690 which was his share of the matrimonial home. The Judge accepted that this order would make it likely the home would have to be sold. Held. para 21 D's share in the matrimonial home constituted free property and part of the available amount for the purposes of section 9. Further, [the fact] that another person may also have a beneficial interest in such property has no impact, for the purposes of a confiscation order, on that outcome. para 22 If a confiscation order alone had been sought the order could properly [utilise] D's share in the matrimonial home. para 30 A Judge, when considering whether or not to make a compensation order, may take the [fact] that the property was a matrimonial home into account. para 32 Making both orders might raise issues of the proportionality, applying *R v Waya* 2012 UKSC 51, 2013 2 Cr App R (S) 20 (p 87) and *R v Jawad* 2013 EWCA Crim 644, 2014 1 Cr App R (S) 16 (p 85) (see **25.79**). para 36 *R v Beaumont* 2014 (see above) is a decision on its own facts. Whilst a potential consequential forced sale of the family home is a matter to be taken into account, it is not to be taken as some kind of trump card in resisting the making of a compensation order or a section 13(6) direction, let alone with regard to the making of the confiscation order itself. para 38 Crown Court Judges should nowadays be a little careful, in the course of confiscation or compensation proceedings, in too readily assuming that the making of a compensation order in such circumstances inevitably will require a jointly owned property to be sold. That may well be the consequence. But under modern jurisprudence there is at least some prospect for a spouse or partner having the remaining beneficial share in the family home, and perhaps also where there are dependent young children, at least raising an opposing argument as to sale or possession: such arguments being potentially available in the course of enforcement proceedings in the courts which have been subsequently undertaken to realise the value of the defendant's beneficial interest. Such arguments in opposition are capable of placing reliance on the considerations arising under article 8 of the Convention or on wider equitable principles. If the enforcing court in subsequent sale and possession proceedings does not consider it in any particular case to be unjust or disproportionate to order sale and possession, then that is suggestive of it not having been unjust or disproportionate to have made the original compensation order. para 39. We endorse the judge's approach. Appeal dismissed.

25.118 ***Step 8 The available amount Trusts/contracts Assets bound by***

See also: *R v Dad and Others* 2014 EWCA Crim 2478 (Applying section 79(3), the Judge was wrong to include a property which was placed in the defendant's name on trust for his brother who had mental issues, *R v Harriot* 2012 EWCA Crim 2294.)

25.119a ***Step 8 The available amount Hidden assets***

R v Yu and Another 2015 EWCA Crim 1076 D and his wife, W, pleaded to four Trade Mark offences. During the confiscation hearing the Judge was unable to accept their account due to inconsistencies. She found the pair had failed to satisfy her that the available amount was less than the benefit. Held. para 35

The Judge did not move directly from disbelieving D and W to finding not only that they had hidden assets but that these were necessarily in the same amount as their benefit. The Judge was amply entitled to reject the various tangled and inconsistent explanations offered by D and W. If there was nothing other than the evidence which was disbelieved, there was no or no proper basis for the Judge concluding that the value of the appellants' realisable property was less than the value of their benefit. Having regard to the burden of proof resting on the appellants and once having disbelieved them, there was no proper evidential foundation for the Judge [to accept the defence's suggestions about the finances]. The Judge was both entitled and bound to reach the conclusion to which she came. Confiscation order upheld.

25.131 ***Step 15 Compensation, fines, forfeiture and deprivation orders Cases***

R v Davenport 2015 EWCA Crim 1731 D was convicted of conspiracy to defraud. He ran companies which purported to offer finance but in fact just extracted fees from the victims. The benefit was agreed at £12m. The available amount was about £13.94m. The Judge made a confiscation order for £12m and a compensation for £1.94m, the difference between the two amounts. The defence said that was disproportionate. Held. [The Judge had failed to properly apply] the principles in *R v Waya* 2012 and *R v Jawad* 2013. The confiscation order was disproportionate. para 66. One of the essential points of *R v Jawad* 2013 is that restitution to the victims must be 'assured' or 'certain'. The making of a compensation order does not in itself ensure restitution. Moreover, the availability of (ostensibly) sufficient assets may not necessarily give such assurance: for example, those (not infrequent) cases where the defendant is adjudged to have hidden assets but where their whereabouts are unknown and their nature nebulous. Further, Micawberish's promises of 'money tomorrow' will, as Jawad makes clear, likely be disregarded. But here D had assets [with the sale of a property more than the Judge had estimated]. The Judge had given too much weight to what Mr Mitchell called "a temporal requirement" and insufficient weight to the reality of forthcoming restitution in full. We quash the order.

para 75 Where the Crown seeks both a compensation order and a confiscation order in circumstances where sections 13(5) and (6) are not applicable, we think that judges may wish, irrespective of whether or not they are proceeding under s. 6(6), to bear in mind the following points:

1) The Court is empowered to make both a confiscation order and a compensation order.

2) However, the court should be alert to any risk of double counting inherent in such a combination of orders and should be alert to the risk of making a confiscation order which is disproportionate.

3) The court ordinarily should not make both a compensation order and a confiscation order representing the full amount of the benefit where there has been actual restitution to the victims prior to the date of the confiscation hearing, see *R v Waya* 2012 and *R v Jawad* 2013.

4) Where it is asserted by a defendant that there will be restitution made after the date of the hearing then the court should scrutinise very carefully and critically the evidence and arguments raised in support of such assertion.

5) If the court remains uncertain whether the victims will be repaid under the compensation order then a confiscation order which includes that amount will not ordinarily be disproportionate, see *R v Jawad* 2013.

6) However, mathematical certainty of restitution is not required. The court should approach matters in a practical and realistic way in deciding whether restitution is assured.

7) Restitution to the victims in the future is capable of being properly assessed as assured, depending on the particular circumstances, notwithstanding that such restitution will not be immediate, or almost immediate, at the time of the confiscation hearing. Obviously the longer the time frame the greater force there will be to an argument that restitution is not assured: but a prospective period of delay in realisation is not of itself necessarily a conclusive reason for proceeding to make a combination of such orders without adjusting the amount of the confiscation order.

8) Whilst a defendant who is truly intent on making restitution in full to his victims ordinarily should be expected to have arranged such restitution prior to the date of the confiscation hearing, there may sometimes be cases where that is not possible. If, in such a case, the court has firm and evidence-based grounds for believing that restitution may nevertheless be forthcoming, albeit that cannot be taken as 'assured' at the time of the hearing, the court has power in its discretion to order an adjournment to enable matters to be ascertained.