

**21.19 Step 7 European Convention on Human Rights Article 1**

*R v Reid* 2018 EWCA Crim 628 D was convicted of five money transfer offences. Held. para 20 Proceeds of Crime Act 2002 is framed in broad terms and its language must be given a fair and purposive construction in order to give effect to its legislative policy. The Act must, so far as is possible to do so, be read and given effect in a way which is compatible with Article 1 of the first Protocol of the European Convention. This imports by the rule of fair balance the requirement that there must be a reasonable relationship of proportionality between the means employed by the state in the deprivation of property as a form of penalty and the legitimate aim which is sought to be realised by the deprivation, see *R v Waya* 2012 (above).

Note: The Judge must have meant to say there is a fair balance between rights of the defendant and the two principles listed and not a fair balance between the two principles. Ed.

For more details of the case, see **21.104**.

**21.23a Postponement Cases**

*R v Smith* 2018 EWCA Crim 1351 On 14 January 2015, D pleaded to conspiracy to produce cannabis. On 5 August 2015, the court set a confiscation timetable. No criticism was made for this delay. On 8 September 2015, the prosecution served their section 16 statement. On 16 October 2015, the defence reply was received. On 1 December 2015, there was a mention when neither D nor his representative appeared. On 16 March 2016, the prosecution sent their response. On 14 January 2017, the time limit expired. On 16 February 2017, the prosecution asked for a hearing on 17 February. On that day, directions were given about skeleton arguments. On 29 September 2017, at a hearing, the prosecution did not submit there were exceptional circumstances. The Judge held the prosecution had effectively ignored the application and there was nothing exceptional. He refused to extend the time limit. The prosecution appealed. They said a failure to follow the procedure did not deprive the court of jurisdiction and the issue was whether it would be unfair to make an order. Held. From March 2016, there was 9½ months when the prosecution failed to progress the confiscation procedure. para 13 A procedural defect will not necessarily defeat an application for a confiscation order. However, the prosecution is not entitled to ignore the timetable in section 14 and then simply invite the court to consider whether its delay has caused unfairness. That would wholly defeat the legislative intent of section 14. Such an approach would not only encourage delay, which is inherently both undesirable and prejudicial, but would then add a new type of inquiry: what prejudice has been caused by delay. The present case demonstrates a casual and inefficient approach by the prosecution and the Judge was fully entitled to act as he did. We dismiss the application.

**21.64a Step 7 Determining the benefit and applying the assumptions The second assumption**

*R v Briggs* 2018 EWCA Crim 1135 D pleaded to producing cannabis and abstracting electricity. The Judge made a confiscation order and the defence appealed the inclusion of D's net half share of the property where the police found 20 cannabis plants and 19 cannabis seedlings. Held. The second assumption applies no matter when that property was acquired, because it does not have a 'relevant day' limitation. It applies to a matrimonial home that has been acquired jointly many, many years before the offending in question. Appeal dismissed.

For more details, see **21.78**.

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

*R v Briggs* 2018 EWCA Crim 1135 D pleaded to producing cannabis and abstracting electricity. The Judge made a confiscation order and the defence appealed the inclusion of D's net half share of the

property where the police found 20 cannabis plants and 19 cannabis seedlings, in part, on the basis of proportionality. Held. para 17 This cannot be a complaint. Section 6(5)(b) [see 21.5] does not relate to the assessment of the benefit. Proportionality applies only when the court has assessed a defendant's benefit and when considering the amount of the confiscation order to be made. It relates [only] to the recoverable amount. *R v Waya* 2012 paras 24 and 25 stated the concept of proportionality is not akin to the existence of a general discretion not to make, or to reduce, the confiscation order. Further, section 10(6)(b) [see 21.64] providing [the issue of] serious risk of injustice means that it will only be in extremely unusual circumstances that the court will decline to make a confiscation order on grounds of proportionality, because the assumptions in section 10 will only be applied if they can be applied without serious risk of injustice. The Judge was able to conclude there was no serious risk of injustice under section 10(6)(b) in making the second assumption. Appeal dismissed.

For details about the second assumption and this case, see 21.64a.

#### **21.84 Step 7 Determining the benefit Goods restored to the loser**

*R v Reid* 2018 EWCA Crim 628 D was convicted of five money transfer offences. The issue was what the benefit was in a remortgage fraud. Held. para 21 It will in general terms be disproportionate to make a confiscation order when a defendant has restored to the loser any proceeds of crime which he had ever had, or where restitution is assured or certain, see *R v Waya* 2012 (above) at para 28 and *R v Davenport* 2015 EWCA Crim 1731 at para 66. It would not achieve the statutory objective of removing the proceeds of crime but simply be an additional financial penalty.

For more details, see 21.104.

#### **21.86 Step 7 etc. Conspiracies etc.**

See also: *R v Strange* 2018 EWCA Crim 118 (LCJ D pleaded to conspiracy to supply drugs. D's role was limited to dealing with the money. P, a co-defendant, handed over 1.18 kilos of cocaine to a courier. P met D in a car park. About £124,000 was placed in P's car. D claimed he was returning cash to P. The Judge said the benefit was the 9 kilos of cocaine seized in all (£378,000). Held. All conspirators are to be taken to [have] obtained property that any of them obtain, subject to the clear exceptions of those taking only a small or insignificant role. Order upheld.)

#### **21.96 Step 7 etc. Drugs, Unlawful**

See also: *R v Strange* 2018 EWCA Crim 118 (LCJ D pleaded to conspiracy to supply drugs. D's role was limited to dealing with the money. P, a co-defendant, handed over 1.18 kilos of cocaine to a courier. P met D in a car park. About £124,000 was placed in P's car. D claimed he was returning cash to P. The Judge said the benefit was the 9 kilos of cocaine seized in all (£378,000). Held. All conspirators are to be taken to [have] obtained property that any of them obtain, subject to the clear exceptions of those taking only a small or insignificant role. Order upheld.)

#### **21.104 Step 7 Determining the benefit Mortgages and remortgages obtained by deception**

*R v Reid* 2018 EWCA Crim 628 D was convicted of five money transfer offences. The issue was what the benefit was in a remortgage fraud involving three buy-to-let properties. Held. para 21 It will in general terms be disproportionate to make a confiscation order when a defendant has restored to the loser any proceeds of crime which he had ever had, or where restitution is assured or certain, see *R v Waya* 2012 at para 28 and *R v Davenport* 2015 EWCA Crim 1731 at para 66. It would not achieve the statutory objective of removing the proceeds of crime but simply be an additional financial penalty. *R v Waya* 2012 in no way precludes a confiscation order ever being made in respect of a fraudulently obtained loan subsequently repaid. Whether or not it would be proportionate to do so depends on the facts of each case. As this case demonstrates, there is nothing unduly complex in identifying that amount [the benefit] by reference to the amount of the loan and the increase in value of the property over the relevant period. para 26 It would be counter-intuitive to decide that the benefit figures on these three

properties should be nil because the loan had been repaid or was shortly to be repaid, and to ignore D's financial gain concerning the properties maintained as a result of or in connection with his fraudulent activities. D had clearly benefited in each [remortgage] for about a decade by the increase in the properties' values. para 32 The benefits from a remortgage can be treated in the same way as the benefits from a mortgage. Thus, absent other property obtained, the benefit is likely to be the proportion of the increased value of the property represented by the amount of the remortgage plus any rent earned since the remortgage, again on a proportionate basis. D's declared willingness to pay or actual repayment does not extinguish the benefit here. para 31 The benefit figure for one of the properties should be limited to the proportionate increase in equity value, as was the case for the other two properties. para 31 Except for that, the Judge's order was not disproportionate to the nature and extent of D's offending.

### **21.112 *The available amount Step 9 Tainted gifts etc.***

*R v Box* 2018 EWCA Crim 542 D pleaded to nine frauds and two counts of making a false instrument. She caused a loss of about £4,085,000 to many people by abusing her position as a solicitor and chancellor of a diocese. She received 7 years' imprisonment. In confiscation proceedings, D called no evidence. The Judge reduced the prosecution's tainted gifts figure by considering whether there was some legal or moral basis on which D could recover the gift. The prosecution appealed. Held. All cases are different but it is hard to conceive a case where it would be proper to reduce the tainted gifts figure without hearing evidence. para 15 Section 81(1) operates to require the court to take the greater of the value of the property given at the date of the gift or the value of property 'found', as defined in section 81(2). Once it is clear that the value of the property at the time of the gift is greater than any 'found' property it is not necessary to consider further what property may exist which in any way represents the original gift. The order could not be held to be disproportionate. The Judge was persuaded to embark on a process almost akin to tracing the stolen assets, and to find that if no assets could be found which represented the gift then that gift should not be included in the recoverable amount. This is not the way the tainted gifts scheme works. It operates as an incentive for him or her to recover the proceeds of her crime from persons to whom she has passed them by whatever means are available to her. What those persons have done with them, or whether they received them knowing of their criminal origin, are likely to be largely irrelevant factors. We increase the tainted gifts figures to the prosecution's original amounts.

### **21.112a *The available amount Step 9 Tainted gifts when considering the recoverable amount and matrimonial property***

*R v Hayes* 2018 EWCA Crim 682, 2 Cr App R (S) 27 (p 239) D was convicted of various counts of conspiracy to defraud. He agreed to manipulate the Yen LIBOR system for illegal profit. In 2007, D met his wife, W. They lived together and in 2010 she gave up her job. Later that year, they married and D paid £995,000 for a home in Shoreditch and it was placed in their joint names. W made no contribution to the purchase price. In December 2011, D bought a second home outright in Surrey for just over £1.2m and put it in their joint names. A declaration of trust was made that they were joint beneficial tenants. D also paid for major renovation works. The Shoreditch home was sold (at no profit). W looked after the house and their baby. In December 2012, D was arrested in the UK. He had earlier been investigated in the US and in December 2012 he was charged there with similar offences to the ones he had just been arrested for. In May 2013, W returned to work. In June 2013, D was charged in the UK. In July 2013, D transferred to W his entire interest (legal and beneficial) in their house, for £250,000. W took out a mortgage on the property for £350,000 of which it seems that £250,000 was then paid to D to assist with his large legal bills. In 2015, D was convicted and sentenced [see 266.26 in Volume 2]. In 2016, in confiscation proceedings, the Judge found that: a) the acquisition of the home where W obtained a joint beneficial interest, and b) the 2013 disposal to W, were both tainted gifts. The first ruling was challenged on appeal. D's benefit was assessed at just over £850,000. The available amount was assessed at just over £1,760,000, which included the value of their Surrey home. A confiscation order for just over £850,000 was made. Later the house was sold for about £1.6m. From the sale proceeds about £780,000 was paid out for the confiscation order. After the mortgage was paid off the rest was given to W. Held. para 25 The wide reach of these tainted gifts provisions is explained

by Parliament's evident determination that: a) convicted criminals should be required, by all practicable means, to disgorge the proceeds of their criminality, and b) [the need] to deter attempts to gift away assets. Section 77(2) is capable of applying to gifts both of property which [themselves were] obtained from criminal conduct and also (if made after the relevant day) of property which was not. para 34 The 2002 Act provides no definition, as such, of the word 'gift' or the word 'consideration'. It is plain from section 78(1): a) that the value of the property is to be assessed at the time of transfer; b) that the consideration must have value and must have value in the sense of being capable of being assessed in money terms in a way which can then, as necessary, be utilised in accordance with the mathematical approach stipulated in section 78(2); and c), that while at common law the adequacy of any consideration provided under an agreement is rarely to be investigated by the courts, such a matter is precisely the subject of focus for the purpose of section 78(1). If the consideration is of a value significantly less than the value of the property transferred then section 78(1) deems there to have been a 'gift'.

para 42 The essential question was: what was the consideration provided in this case? The consideration must be at a value not being significantly less than the value of the property at the time of transfer, so the tainted gift provisions require an investigation into that. In short, they are drafted in terms of money or money's worth, to be objectively assessed. para 47 Aspects of the defence arguments as to 'value' seemed at stages to reflect arguments of a kind that might perhaps be raised in the Family Court but [those] arguments have no part to play in deciding tainted gifts issues. The Family Court is concerned to decide as to what is the fair and just division of assets and the needs of any children and so on. That, most emphatically, is not the function of the Crown Court in making its assessment under sections 77 and 78. para 48 Nor is there any great assistance in considering cases relating to proprietary or equitable interests. The court is not concerned to ascertain from the parties' conduct what the shared intention was with regard to ownership of the house at the time of transfer. That is because the parties have in the transfer expressly declared their shared intention and agreement: that is, of joint legal and beneficial entitlement. As between themselves, therefore, that is decisive. Since no one could allege, or has alleged, that the acquisition of the house involved a sham, it follows that D and W were, legally and beneficially, joint owners. On any sale, they would together have been entitled to the net proceeds. It is irrelevant for that purpose that W had made no financial contribution to the original acquisition. It is irrelevant, as a matter of property law, just because that is what the two of them had intended and agreed: as evidenced by the written declaration of trust. para 49 In determining the impact of section 78 of the 2002 Act *Gibson v Revenue and Customs* 2008 EWCA Civ 645 [see 21.112] is readily distinguishable from this case. So too is *R v Usoro* 2015 EWCA Crim 1958 [see 21.112], where the payments were for the children's maintenance and support. para 55 It is clear from the statutory wording that such valuation has to be made objectively and in monetary terms, on an evidenced basis. Each case was 'fact sensitive'. What 'family services' (itself a rather open-ended phrase) actually involve can vary between cases. In this context, it would be wrong to commit to a wholly inflexible purported statement of principle. In any event, *Gibson v Revenue and Customs* 2008 is one illustration, albeit on its own facts, that there is no inflexible principle. *R v Usoro* 2015 is another illustration. Moreover, we note that in *R v Thompson* 2015 EWCA Crim 1820 [see 21.121], the Judge had apparently made an allowance of 10% "in respect of family life" (not further defined or explained in the judgment). That was a finding which, albeit not debated in the Court of Appeal, attracted no adverse comment from the Court. On the facts, disappointment in not having children and the giving up of employment by the wife did not constitute valuable consideration for the purposes of section 78(1).

para 58 In this difficult area of tainted gifts, we suggest (without intending in any way to be either exhaustive or prescriptive):

(1) The approach required under section 78(1) involves the following steps:

(i) place a value upon the property transferred, at the time of transfer;

(ii) assess whether consideration has been provided by the recipient of the property and (if it has) assess the value of the consideration provided;

(iii) assess whether the value (if any) of that consideration (if any) is significantly less than the value of the property transferred, at the time of transfer; and

(iv) if there is found to be a significant difference apply the calculation prescribed in section 78(2); thereafter also applying the provisions of section 81 as appropriate.

(2) Each of steps (i), (ii) and (iii) above must always be undertaken objectively and on an evidence based approach. There is no room, in this context, for ‘plucking a figure out of the air’ or anything like that.

(3) Where the consideration which is asserted to have been provided by the recipient of the property is not in the form of a direct financial contribution or contributions, then it is necessary to examine the evidence rigorously and closely to see if the asserted consideration (whether by way of ‘services’ or otherwise) is capable of being assessed as consideration of value and (if it is) to what extent.

(4) Any consideration which is asserted to have been provided must be attributable to the transfer of property in question.

(5) Any consideration which is asserted to have been provided must, for the purposes of section 78(1), be capable of being ascribed a value in monetary terms.

(6) Each case, ultimately, will depend on its own facts and circumstances.

para 59 Here W made no financial contributions at all, directly or indirectly, towards the purchase [of the house]. Their marriage for around a year,<sup>1</sup> and their son’s birth in October 2011, cannot of [themselves] involve ‘consideration’ of ‘value’ which could to any extent, let alone the asserted 50%, come within section 78(1). When the house in Surrey was purchased the family continued to live in Shoreditch, a property jointly owned. Furthermore, everything that W did as wife and mother at that time is also to be put into the context of D paying all the household expenses and other outgoings: and so what she did, as the Judge found, can properly be attributed to, and set against, that in any event. The prosecution, very fairly, never sought to argue that payment by D of all the household expenses and other ‘regular’ outgoings constituted a tainted gift within the ambit of section 78(1). The Judge’s conclusion was wholly justified.

para 35 The defence was right to abandon the suggestion that W had no interest to transfer to W. He only acquired such an interest at exactly the same time as W: that being their shared intent.

Note: The date of sentence in the summary was taken from D’s earlier Court of Appeal case, *R v Hayes* 2015 EWCA 1944, 2016 1 Cr App R (S) 63 (p 449), see 266.26 in Volume 2. The date of D’s arrest and the charges in the US were taken from Wikipedia. Ed.

### **21.150 Appeals      Defendant claims agreed assets/figures are wrong**

*R v Yaqob* 2018 EWCA Crim 1728 D pleaded to supplying class A drugs as a courier. The case was adjourned. The prosecution said there was a £200,000 benefit. D had a new counsel who thought that that figure had been agreed. The figure was formally agreed. Held. It is only in very exceptional circumstances that this Court will go back on an agreed figure. However, here the prosecution say the

---

<sup>1</sup> The year seems to refer to how long the marriage had lasted before the transfer, not that the marriage was only a year long. There were difficulties with the marriage which would not have impacted on the decision.

figure was wrong, it should not have been agreed and the appropriate figure is what the defence say it is. There are exceptional circumstances, so we substitute £2,000, the correct figure.