No: 9603139/S2-9604173/S2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Friday 20th February 1998

B E F O R E :

THE VICE PRESIDENT
(LORD JUSTICE ROSE)

MR JUSTICE HOLLAND
and
MRS JUSTICE SMITH

- - - - - - - - - - - -

R E G I N A

- v -

ELLIS ANTHONY MARTIN
JAMES ROBERT WHITE

- - - - - - - - - - - -

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MR LAWSON QC and MR A LLOYD-ELEY appeared on behalf of the Appellant MARTIN
MR D COCKS QC and MR D WILLIAMS appeared on behalf of the Appellant WHITE
MR SELLS QC appeared on behalf of the Crown

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JUDGMENT

(As Approved by the Court)

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Friday 20th February 1998

THE VICE PRESIDENT: On 3rd April 1996 at Southwark Crown Court, following a 3 month trial before Her Honour Judge Pearlman, the appellants were convicted of 2 offences, counts 1A and 1B, of being knowingly concerned in the fraudulent evasion of duty chargeable on alcoholic drinks. Martin was convicted on 3 further counts of fraudulent evasion of VAT. Subsequently, White was sentenced to 4 years' imprisonment on each count concurrently, a confiscation order in the sum of £20,000 was made under section 71 of the Criminal Justice Act 1988 with 12 months' imprisonment consecutively in default and he was disqualified for 7 years under section 2 of the Company Directors Disqualification Act 1986. Martin was sentenced to 5 years' imprisonment on count 1A and on each of the three VAT offences and 82 months' imprisonment on count 1B, all concurrently, making a total sentence of 6 years 10 months. A confiscation order in the sum of £3,320,000 was made under section 71 with 4 years' imprisonment consecutively in default. He was also ordered to pay £146,000 towards the prosecution costs and he was disqualified for 10 years under section 2.

Following refusal of leave by the Single Judge, both appellants appeal against conviction with leave of the Full Court, who referred applications for leave to appeal against sentence to this Court.

In the original indictment, count 1 charged a single offence of fraudulent evasion between November 1993 and June 1994 contrary to section 170(2) of the Customs and Excise Management Act 1979. The prosecution opened the case on the basis that there were two methods of evasion, referred to as A and B. No objection was taken to the form of the indictment on behalf of either of the appellants, or the two co-accused called Suki Vindar Singh and Julie Court who were ultimately acquitted, until 2 months into the trial when Martin's defence case had been completed. At that stage, prior to the opening of White's defence, Mr Cocks QC submitted on White's behalf that the count was duplicitous and that the allegation should be charged in individual counts relating to each of the importations which had taken place. No such submission was made on behalf of Martin. On the contrary, leading counsel then appearing for Martin resisted Mr Cocks' application on the ground that it was too late for amendment. The judge ruled that the count was not duplicitous but ordered that count 1 be split into 1A and 1B, the former relating to method A in relation to beer between 1st November 1993 and 31st January 1994 and the latter to method B in relation to beer and wine between 1st January and 30th June 1994. The form of the indictment gives rise to the single ground of appeal advanced on behalf of White, in submissions adopted on behalf of Martin, and we shall return to this matter later.

The prosecution case, which the jury clearly accepted, was that between November 1993 and June 1994 Martin, with the help of White, obtained large quantities of beer and wine from bond and sold it without paying duty or VAT. The total loss to the Revenue was approximately £5 million of which some £3.5 million was attributable to duty.

By method A, Martins company EA Martin & Company arranged for 27 loads of beer to go from Whittals bonded warehouse in Walsall to Medway Bond, where White was Managing Director. Instead of going to Medway Bond, the beer went straight to Martin's Dagenham premises or to cash & carry outlets as respectively directed by EA Martin & Company. Medway Bond, at White's behest, created the necessary false documentation to make it appear that the goods had gone via Medway Bond to France. Martin's defence was that, although the goods emanating from Walsall went to the destinations alleged by the Crown, he had also supplied mirror loads of goods which were exported to various European countries so that there was no revenue loss.

Method B involved a company in Calais, Euro Beers and Wines which had been acquired by Martin. Beers and wines were exported to France and other countries and then re-imported into the United Kingdom

without duty being paid at any stage. There were 227 such loads. Martin's explanation was much the same as in relation to method A, save that it did not involve the use of White's Medway Bond warehouse.

The documentation in relation to 201 of the 227 loads named Medway Bond as the competent authority for the purposes of the re-importation of the goods. This meant that if, by chance, any of the vehicles were intercepted, there would be confirmation from White that the consignments were destined for a bonded warehouse. In fact, duty was paid by Medway in relation to 7 loads in respect of which there had been a query by Customs and Excise.

The prosecution relied on evidence from a variety of sources including Whittals, the hauliers, observation of Martin's premises at Dagenham, purchasers from Martin's company, Customs and Excise officers and from a bonded warehouse operator as to what ought to have been done. Employees at Medway Bond described what happened there. On 28th June 1994 Martin was arrested. He had in his possession a substantial amount of cash totalling over £100,000 in his desk, briefcase and safe. White had in his possession the stamp of ASH, a French company, which had been used for falsifying documents.

Martin gave evidence before the jury in which he agreed that he had cut corners, but he denied any fraud in relation to duty or VAT. He explained his activities as an entrepreneur and referred to Anthony Martin International which he said he had set up after Christmas 1993 and registered for VAT. He referred to an extensive trade with Russia, Portugal and other foreign countries. He claimed that his lack of original supporting documentation was attributable in part to a burglary at his Dagenham premises and in part to the theft of his van, (which had contained much documentation) a week before his arrest. In cross examination, it was suggested that the documentation which he had produced was false and that Anthony Martin International was not an effective trading company at any material time. He was shown invoices in the possession of the prosecution and also an affidavit, sworn by him in earlier restraint proceedings in the High Court, which made no reference to the existence of, or any income from, Anthony Martin International. The use of this affidavit gives rise to Martin's second ground of appeal and we shall return to this aspect later.

A number of defence witnesses of varying quality were called on Martin's behalf. By reason of the nature of his defence, no inkling of which had emerged during the course of the prosecution case, the Crown were permitted to call a good deal of evidence in rebuttal. This included evidence from Russian and British customs officers, carriers and British Telecom.

White gave evidence saying, in effect, that he was unaware of any sort of impropriety. £20,000 in his possession had come from investment in a wine bar. He had been used by Martin and had not participated in any fraud. A chartered accountant testified as to his good character.

The summing up lasted two-and-a-half days and the jury deliberated for approximately 23 hours.

We turn to the grounds of appeal.

The Indictment

As originally drawn the particulars to count 1 alleged against the appellants and the two acquitted co-accused that "between 1st day of November 1993 and 30th day of June 1994 (they) were in relation to a quantity of beer and wine knowingly concerned in the fraudulent evasion of the duty chargeable thereon".

Following the partly successful submission of Mr Cocks QC, the particulars to count 1A alleged that "between 1st day of November 1993 and 31st day of January 1994 (they) were in relation to a quantity of beer knowingly concerned in the fraudulent evasion of the duty chargeable thereon". Count 1B referred to the period 1st January 1994 to 30th June 1994 and to a quantity of beer and wine: the wording was otherwise identical.

On behalf of the appellant White, Mr Cocks submitted that both these fresh counts were bad for duplicity. As to this, his initial submissions were as to law. He referred to a number of authorities including R v. Thompson (1914) 2 KB 99 and R v. Tomlin (1954) 2 QB 274 in support of the undoubted general proposition that separate offences should not be charged in the same count. The reason is set out in the judgment of Mann J cited with approval by Lord Mackay of Clashfern in Gee v. General Medical Council (1987) 1 WLR 564 at 570H:

> "'A person should know of what it is he has been found guilty (if guilty he should be found). He cannot know if he has been found guilty on a duplicitous charge whether he has been found guilty of one offence or of many. He should have the opportunity of submitting that there is no case to answer in relation to a particular occasion. That he cannot do if he is confronted with a duplicitous charge. A person cannot make a sensible plea in mitigation unless he knows the number of his offences. The rule concerning duplicity seems to me to be a rule of elementary fairness...'"

Mr Cocks accepted that there are exceptions to this general rule first, where the offence is alleged to be joint; secondly, where it is only possible to charge a general deficiency as in Tomlin; and thirdly, where the conduct complained of can be properly described as a single or continuous activity, as in shooting more than one red deer on the same occasion without a game licence Jemmison v. Priddle (1972) 1 QB 489 approved by Lord Morris in R v. Merriman (1973) AC 584 at 593. He referred to the speech of Lord Diplock, with which Lord Reid and Lord Salmon agreed, in Merriman at 607:

> "The rule against duplicity, viz that only one offence should be charged in any count of an indictment, which is now incorporated in rule 4(1) of Schedule 1 to the Indictments Act 1915, has always been applied in a practical, rather than in a strictly analytical, way for the purpose of determining what constituted one offence. Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the eighteenth century, to charge them in a single count of an indictment."

In Jemmison v. Priddle Lord Widgery CJ at 494 referred to the language used by Lord Parker CJ in Ware v. Fox (1967) 1 WLR 379 at 381 and said:

> "I think that what it means is this, that it is legitimate to charge in a single information one activity even though the activity may involve more than one act."

This approach was adopted in R v. Wilson (1979) 69 Cr. App.R. 83 where Browne LJ stressed at page 88 that "the question of whether there is one or more offence disclosed is really a question of fact and degree". In R v. Jones 59 Cr.App.R 120 this approach led to this Court upholding a count of unlawful assembly, in relation to activity involving a number of acts at various places giving rise to one activity, but quashing a count of affray which related to fighting at different sites, putting different people in fear.

Turning to the present case, Mr Cocks conceded that in relation to each transaction the alleged fraudulent evasion of duty reflected not one single act but a course of conduct, but he submitted that any such course of conduct terminated with the transaction in question. As to count 1A, the 27 transactions relied upon by the Crown were respectively discrete and definable so as to be featured as such in a schedule (Ford 2) that covered a period of weeks. Prima facie, a count based upon more than one such transaction would be bad for duplicity and the Crown could not invoke an exception recognised by law. The twenty-seven transactions were not linked in time and space so as to amount to one activity involving twenty-seven acts. Mr Cocks submitted that when indicting for an admittedly continuous offence, such as cheating the public revenue, good practice demanded the drafting of counts to reflect so far as possible, 'acts' (typically, the individual tax returns) rather than 'activity', thereby to reduce or avoid duplicity and resultant potential unfairness, to the court as well as to the accused. Thus, that which count 1A sought to indict should have been reflected in counts respectively invoking individual transactions, with the number a matter of choice for the Crown. Mr Cocks candidly conceded that, in the event, the problem identified by Mann J in the passage already cited had not arisen: as it happened, the role alleged against his client and the resultant defence were common to all the transactions so that no identifiable injustice referable to duplicity could be advanced. However that, as he submitted, was not the point: a bad count did not cease to be bad because of the nature of the defence as it emerged.

As to count 1B, Mr Cocks pressed the same argument with more vigour. The role of his client in relation to the 227 transactions was more nebulous. The Crown's case in relation to all was, seemingly that White had agreed to act as a 'longstop': Medway Bond was to be cited as the competent authority and he was to be ready and willing to acknowledge this and pay duty as and when a load fell foul of the Customs and Excise. In the event, however, his active participation could only readily be demonstrated on the seven occasions

when Medway's role had been called into question and duty paid. The duplicity of the count could be demonstrated: did the jury's verdict on that count mean he was guilty as charged (that is, with respect to all or the bulk of the transactions) or as demonstrated (that is, with respect to the seven in which he participated)?

On behalf of Martin, Mr Lawson QC, who did not appear below, supported these submissions and contended that he was not prevented from so doing by the alternative stance taken at trial by different leading counsel. He pointed out that the original count 1 effectively charged a conspiracy and that the present counts 1A and 1B arguably charged two conspiracies. By way of this rolled up, duplicitous, drafting the Crown was shying away from substantive counts notwithstanding strong authority to the contrary.

In response, Mr Sells QC drew attention to section 170(2):

> "Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion-
>
> (a) of any duty chargeable on the goods;
>
> ...
>
> he shall be guilty of an offence under this section and may be arrested."

He submitted that the offence thus created was notable for its width and its inherent continuity. Whereas, for example, illegal importation was committed at a defined time and place so as to constitute a readily indictable act, being 'knowingly concerned in any fraudulent evasion' connotes activity that can be at various places and times all within a period, the length of which depends on the particular circumstances. It was, he said, difficult to find a more widely drawn section. In the result, he told us, the form adopted for the original count 1 reflected standard and hitherto unchallenged practice when indicting the activity that constitutes this offence. When the count had been drafted initially the nature of the respective defences was unknown. By the stage at which Mr Cocks made his submission to the trial judge, the issues which had emerged in the evidence justified the spilt that was ordered as a pragmatic step but not as a legal necessity. Neither the original count, nor, more importantly, 1A and 1B were bad for duplicity. As to 1A, even now the unfairness that is the hallmark of duplicity, is not alleged. As to 1B and the alleged role of White, counts each reflecting one transaction would have been wholly inappropriate. If it was sought to indict for one of the 7 transactions, there was the immediate objection that the duty had not been evaded; if it was sought to indict for any one of the remaining transactions, there would be no specific evidence of participation by White. White's indictable conduct - that of being an available longstop as activated on 7 occasions - could only be reflected by one count, whether drawn as conspiracy or as count 1B. A further point made by Mr Sells was based on R v. Clark (1997) 2 Cr.App.R (S) 351 and R v. Kidd and Canavan (1998) 1 All ER 42. Given that sentencing reflects what is proved or admitted, then by counts 1A and 1B the loss in terms of duty was fully indicted without a multiplicity of counts.

In the judgment of this Court, Mr Sells is right as to the fundamental nature of the offence created by section 170(2). It is an 'activity' offence to be defined by the nature of the evasion and of the 'knowing concern'. In some cases, the evasion and the knowing concern will arise in relation to only one transaction; in other cases there will be many giving rise to continuing activity: but in both types of case, the language of the section is such as properly to permit charging the offence in one count. We are supported in this view by R v. Masood Asif (1986) 82 Cr.App.R 123. There the court had to consider a similar suggestion of duplicity with respect to a count based on section 38 of the Finance Act 1972. That repealed provision commenced "If any person is knowingly concerned in, or the taking of steps with a view to, the fraudulent evasion of tax by him or any other person he shall be liable to ....." This wording is now substantially utilised in section 72(1) of the Value Added Tax Act 1994, the provision upon which counts 2, 3 and 4 in the instant indictment are founded. This Court held that an offence charged under this section related to a person's conduct during a specified period and created one offence embracing the commission of component offences which could have been individually indicted. It is true that the court was able to invoke section 39(3) "Where a person's conduct during any specified period must have involved the commission by him of one or more offences under the preceding provisions of this section, then, whether or not the particulars of that offence or those offences are known, he shall, by virtue of this sub-section, be guilty of an offence" - see now section 72(8) of the 1994 Act. It is further true, as is emphasised on behalf of the appellants, that

section 170 of the Customs and Excise Management Act 1979 features no provision comparable to section 38(3). That said, we cannot readily make a distinction between the offences created by section 170(2) of the Customs and Excise Management Act 1979 and, as of now, section 72(1) of the Value Added Tax 1994: in terms, each involves knowing concern in fraudulent evasion, a concept which is in our view apt to cover, equally, single and multiple transactions.

Accordingly, we hold that neither count 1A nor 1B is bad for duplicity. The nature of the offence created by section 170(2), taken in conjunction with the facts alleged by the Crown, properly justified one count to reflect Method A and one count to reflect Method B. As to Method A, we agree that it would have been feasible to draft sample counts, each reflecting one transaction, but one count did not offend by way of duplicity. It put one entire activity fairly before the jury and there was, in the light of the defences, no unfairness. Further, by way of one count, the totality of the alleged criminality was made the subject of a jury verdict. As to Method B, we are satisfied that it was not readily practicable to draft sample counts, each reflecting a transaction, given the difficulty, save by referring to the whole project, in defining the criminality alleged against White. The jury had to be sure that he was throughout the 'longstop', whether he was called upon or not. We can see no scope for the potential imputation to him of a lesser role, by way of differing verdicts on a set of sample counts each reflecting an individual transaction.

Notwithstanding the initial passivity of the defence at trial, this Court is critical of count 1 as originally drawn. It was duplicitous because section 170(2) does not permit one count to cover two different activities. For example, if White had been convicted on count 1 as originally drawn, it would have been impossible to know whether this was because his active or passive roles, or both, had been proved. Accepting Mr Sells' contention as to the common use of the form utilised for count 1, we are concerned that complacency may blunt professional acumen. The wide scope given by section 170(2) does not obviate the need to draft indictments so as to avoid duplicity and to achieve, so far as the facts allow, counts that are substantive and specific. More than one count may be necessary to identify differing aspects of the prosecution case and to avoid overlap.

The Affidavit

The history of the matter is a follows:

28th June 1994 - Martin was arrested.

22nd July 1994 - Macpherson of Cluny J made at the behest of the Customs and Excise an ex parte restraint order pursuant to section 77 of the Criminal Justice Act 1988, one term of which required Martin within 7 days to swear and serve an affidavit, essentially of his means and of the sources thereof. This part of the order

added: "Provided that no disclosure made in compliance with this order shall be used as evidence in the prosecution of an offence alleged to have been committed by the person required to make that disclosure or by any spouse of that person."

In response to this order, Martin swore an affidavit which purported to be a full disclosure of his income and its sources; it did not include any reference to a company, he owned, Anthony Martin International (AMI).

8th February 1996- Martin was under cross-examination by Mr Sells. He had claimed for AMI a leading role in the mirror transactions that were the key to his defence. Mr Sells, cross-examined on the affidavit, pointing to the absence of any reference to AMI. Leading counsel then appearing for Martin objected, not by reference to the proviso to the order, but on the ground that such cross-examination was potentially unfair. The judge ruled in favour of the prosecution and cross- examination on the affidavit continued.

18th March 1996- Mr Sells in the course of his final address sought to make submissions to the jury on the affidavit which was assumed, wrongly, to be in their documents. In the course of a subsequent discussion as

to whether it had been exhibited, leading counsel for Martin drew attention to the proviso. In the event, the judge persuaded Mr Sells that there was no need to put the affidavit before the jury and the matter was left there.

Before us, Mr Lawson submitted that reference to the affidavit and its content constituted a breach of the terms of the order pursuant to which it had been made and thus amounted to a serious material irregularity. To develop this point he traced the forensic history as follows:

1. The starting point is the common law summarised by Lord Donaldson MR in Re O and Another (Restraint Order: Disclosure of Assets) (1991) 2 QB 520 at 529:

"It is part of the common law of England that no man shall be subject to an order compliance with which might tend to incriminate him. Thus where in civil proceedings the defendant was ordered to answer interrogatories, it was a valid reason for refusing to comply with the order if, and to the extent, that he could reasonably claim that to do so would involve a risk of self- incrimination: see Lamb v. Munster (1882) 10 QBD 110. The common law can, of course, be varied or overruled by statute, but it requires clear words, or even clearer implication, to achieve this result particularly where so old and fundamental a freedom is involved."

2. A modification was introduced in significant terms by section 31(1) of the Theft Act 1968:

> "A person shall not be excused, by reason that to do so may incriminate that person...
>
> (a) from answering any question put to that person in proceedings for the recovery or administration of any property, for the execution of any trust or for an account of any property or dealings with property; or
>
> (b) from complying with any order made in any such proceedings;
>
> but no statement or admission made by a person in answering a question put or complying with an order made as aforesaid shall, in proceedings for an offence under this Act, be admissible in evidence against that person..."

3. The procedure relied upon for the order of July 1994 was section 77(1) of the Criminal Justice Act 1988: in circumstances identified in section 76, section 77 permits the High Court to "prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order": In Re O, the Court of Appeal held that ancillary to the power to make such an order was the power to make an order for disclosure of means. Being concerned with the potential conflict between such power and the privilege against self-incrimination, Lord Donaldson MR said at 530:

> "I cannot construe section 77 or any other relevant provision of the Criminal Justice Act 1988 as abrogating the common law rule against self-incrimination. It follows that the applicants would be entitled to refuse to comply with the disclosure order made in this case, if and in so far as to do so might tend to incriminate them. This would or might frustrate the purpose of the order and, if there were no way round the problem, might suggest that Parliament had impliedly varied the common law rule. There is, however, a way round, namely, to impose conditions upon the use which may be made of the affidavits sworn in compliance with the order. An appropriate condition, which should be inserted in all orders for disclosure in aid of a restraint order, would read:
>
> 'No disclosure made in compliance with this order shall be used as evidence in the prosecution of an offence alleged to have been committed by the person required to make that disclosure or by any spouse of that person.'"

4. In A.T & T Istel Ltd v. Tully (1993) AC 45 the decision in Re O was approved by the House of Lords.

With this forensic foothold, Mr Lawson submitted that the affidavit should never have been referred to in the course of the criminal proceedings against his client until the court came to consider confiscation, that is, until the stage at which section 82(2) provides for its use. He invited this Court to endorse the institution by

the Crown Prosecution Service of a species of Chinese Wall that would serve to remove such an affidavit from those charged with investigation and prosecution until that stage in the proceedings is reached: no use should have been made of the affidavit for the purpose of cross-examination, still less should there have been any question of it becoming an exhibit for perusal by the jury. Essentially two public policies, the privilege against self-incrimination and the need for full disclosure of the proceeds of crime are in inevitable conflict and in so far as the former can inhibit the latter it should do. He submitted that he was not precluded from taking the point in this Court notwithstanding that it was not taken at the trial.

Mr Sells accepted that he should have applied for the judge's leave before cross-examining as he did and that there should have been no question of the affidavit becoming an exhibit. But he submitted that it would be offensive to common sense and justice if Martin could say one thing on oath to the High Court and another thing on oath to the Crown Court, all without challenge.

Our judgment is as follows:

1. We start with the privilege against self- incrimination. Any questioning of Martin after arrest was governed by the Police and Criminal Evidence Act 1984 and the Codes of Practice. Such questioning was subject to the caution, then including words "you do not have to say anything .....". We observe that, as and when he was questioned, he lawfully heeded that caution so that his defence, including the role of AMI, never emerged until he came to give evidence. The order for disclosure, though not directly referable to what was being alleged, was closely associated. The Customs and Excise were alleging activity leading to ill-gotten gain; the order was for disclosure as to his income and assets, present and past. The imperative for disclosure which underpins the relevant provisions of the Criminal Justice Act 1988, demanded that Martin should have confidence in the words and spirit of the proviso. It was not in the public interest that he should be given any justification for being less than candid.

2. Mr Lawson rightly pointed out that the courts have expressed concern about disclosure of the content of an affidavit pursuant to a section 77 restraint order to those charged with investigation, see A.T. & Istel Ltd v. Tully, op. Cit, and Re C (The Times, 21st April 1995)). But we cannot accede to his submission that such an affidavit should remain detached from those engaged in prosecution. To attempt to debar the prosecution from sight of such an affidavit would be both impracticable and wrong, not least because the conduct of the prosecutor is or should be under the immediate supervision of the court. We are not prepared to contemplate the prosecution being kept in ignorance of any such affidavit until a confiscation order is sought.

3. However, we cannot envisage circumstances in which any such affidavit could become admissible in evidence during a criminal trial at the behest of the Crown, either in the course of the prosecution case or, as was thought to have happened here, by being purportedly proved by way of cross-examination of the accused. We would hope and expect that, in future cases, the Crown and the court will be alert to the limitations subject to which an order for disclosure by affidavit is made. We accord no less weight to the orders proviso, stemming, as it does from the conscious attempt in In Re O to emulate the statutory protection, than to the provisions of section 31(1)

4. But the proviso does not, in our judgment, prevent the Crown from cross-examining the deponent, as accused, to credit, in reliance upon the content of an affidavit sworn pursuant to a restraint order. When Martin gave evidence about substantial trading by AMI there could be no objection to cross-examination challenging the veracity of that evidence by reference to Martin's failure to mention AMI in his affidavit. We say this for several reasons.

First, it would be an affront to common sense if Martin could make two seemingly contradictory statements under oath, without any risk that his veracity could be challenged.

Secondly, we find no objection in principle arising out of the proviso. An earlier statement utilised to demonstrate inconsistency, and thus to impugn credit, does not per se become admissible in evidence: R v. Birch 18 Cr.App.R 26, R v. Golder 45 Cr. App.R 5. Provided the use of the affidavit is limited to challenging credit, it is not being used "as evidence in the prosecution".

Thirdly, however, such use of the affidavit should be subject to safeguards aimed at reconciling the proviso with the immediate needs of the Crown. In our judgment, prosecuting counsel should seek prior directions from the judge as to the precise use which can be made of the affidavit. This will alert the judge and defence counsel to the situation and enable the judge to maintain an oversight that reconciles use of the affidavit with the proviso.

Fourthly, we do not believe that any material irregularity arose in the present case in relation to the affidavit. If leave to cross examine on the affidavit had been sought, it would, inevitably in our view, have been granted.

Conclusion as to conviction

Both grounds of appeal against conviction fail. The case against both appellants was strong. There is no reason to regard the convictions of either of them as unsafe. The appeals against conviction are dismissed.

Sentence

We turn to confiscation and sentence having granted leave to appeal to both appellants.

Martin appeals from the confiscation order in the sum of £3.32 million. Section 71(1) and (2) of the 1988 Act, as in force for the purpose of these proceedings, permit the court to make a confiscation order against an offender convicted of an offence of such sum as the court thinks fit, if it is satisfied that he has benefited from that offence or from some other offence of which he is convicted in the same proceedings or which the court takes into consideration in determining sentence, provided that the benefit is at least the minimum amount, which at the material time was £10,000. By section 71(6) the amount of the order must not exceed (a) the benefit in respect of which it is made or (b) the amount appearing to the court to be the amount that might be realised at the time the order is made, whichever is the less. Within those parameters, the court has a discretion as to the amount ordered.

Benefit is to be assessed in accordance with sub- sections (4) and (5), the effect of which, for the purpose of this case is, it is not disputed, that Martin benefited from these offences to the extent of the amount of excise duty evaded and the amounts of VAT received but not accounted for. Although Martin denied any fraudulent activity, he admitted that the total amount of excise duty which would have been payable on the transactions in count 1A would have been £497,000 and that the amount which would have been payable on the transactions in count 1B would have been £3,225,000. Further, the amount of VAT which would have been remittable following the sales of the goods covered by counts 3, 4 and 5 would have been £1,109,000. The judge assessed the total benefit to Martin at £4.831 million. Mr Lawson accepted that, if this court took the view that the effect of the jury's decision was that they found him guilty in respect of all the transactions covered by the indictment, he could not challenge that finding. We have already said that we are of that view.

However, the Crown did not invite the judge to confiscate the full amount of the duty and tax evaded. Both sides agreed that in confiscation proceedings under the 1988 Act, the burden lay on the Crown to prove to the criminal standard that the defendant had benefited to more than the minimum amount and that it was then for the defendant to satisfy the court, to the civil standard, that the amount which might be realised was less than the amount which it had assessed as the value of the benefit. Nonetheless, the Crown invited the court to make an order for a lesser sum than the full amount of duty and tax evaded. They recognised that the true benefit to Martin was the profit he had made by dealing in the goods on which he had evaded duty and tax. To assess that sum, the Crown relied on a report prepared by Mr Ford, the Customs Officer in charge of the case. He had undertaken a two stage exercise. First he had sought to estimate the sums Martin had received by selling the goods covered by the indictment, which had been sold to UK customers 'inclusive of VAT'. He calculated this sum at £7.448 million. He then estimated the total cost to Martin of the purchase of those goods, which came to £4.216 million. The difference between these two sums, £3.23 million, said the Crown, was the profit. The Crown had been able to identify assets of only about £1.1 million. However, it was submitted that, in the absence of evidence as to how the profit had been dissipated, the court should infer that the rest of the proceeds had been salted away and should make a confiscation order in the full sum of £3.23 million.

Martin did not give evidence in connection with the confiscation proceedings. There was before the court his affidavit of July 1994 in which he asserted that his total assets were of the order of £1 million. There were submitted on his behalf two accountants' reports from BDO Stoy Hayward. These challenged the validity of Mr Ford's approach and the accuracy of some of his calculations. They estimated the amount which might be realised at £1.369 million. Counsel for Martin submitted that the material on which the Ford calculations were based was so vague and unsatisfactory that the court should decline to make any confiscation order but should leave the Customs and Excise to their civil remedies. Alternatively the Stoy Hayward criticisms should be heeded and their assessment should be accepted. Further, Martin's bill of legal costs should be taken into account as a prior obligation. It was expected to amount to about £750,000.

In her ruling the learned judge said:

> "I must say I do not accept the figures set out in those (the Stoy Hayward) reports. I have to say that I do not accept that this defendant, having benefited to the extent of just under £5 million in a period of eight months and having, according to his accountants, just over £1.3 million, has only these realisable assets. A great deal of money quite obviously was received by this defendant in a short space of time. I have to say that in these circumstances I am not satisfied that this defendant has discharged the burden according to the civil standard which rests upon him as to his assets and I do not accept that he has no assets under control somewhere. I draw the inference that he has these assets somewhere under his control."

She then appeared to accept Mr Ford's figures and ordered confiscation of £3.32 million. We think she made an error in confiscating £3.32 million as it appears that the Crown contended for £3.23 million.

Before this Court, Mr Lawson submitted, first, that the judge had failed to give any reasons for her refusal to accept the criticisms in the Stoy Hayward report. Thus it was impossible to tell whether she had exercised her discretion on a proper basis. Second, she appeared to have reached her conclusion on the basis that Martin had actually received into his hands the full benefit of £4.831 million. She referred to him having had the benefit of just under £5 million. The Crown had never contended that he had actually made a profit of nearly £5 million; that was the amount of duty and tax evaded. The actual profit contended for was only £3.23 million. We do not think there is anything in this second complaint. Although it does appear at one stage as though the judge was implying that Martin had salted away the difference between`nearly £5 million and £1.3 million, we do not think she made that error. We think she well understood the Crown's contention that he had made an actual profit of £3.23 million. We can well understand why, in the absence of any evidence from Martin, she was not satisfied that he had only those assets he was prepared to admit.

It seems to us that there is greater force in Mr Lawson's first submission that the judge did not take into account the Stoy Hayward criticisms of Mr Ford's calculations or explain her reasons for rejecting them. He submits that it is not possible to tell what, if any, consideration she gave them. If the Stoy Hayward reports were given proper consideration, it would be seen either that Mr Ford's calculations were so undermined by uncertainty that they should not be accepted at all, or, at the very least, the profit figure should be reduced to reflect his errors and unjustified assumptions. In addition, in reviewing the amount to be ordered, Mr Lawson invited us to deduct two specific figures which he submitted the judge failed to take into account. The sum then arrived at would be a fairer estimate of the money which 'might be realised', always assuming that the court rejected the contention that Martin had only those assets which he had declared in his affidavit.

We accept that the judge did not explain her reasons for rejecting the criticisms of Mr Ford's calculations and that it is not possible to tell what consideration she gave them. We accept that it was incumbent upon her to consider this material and to explain, albeit briefly, why she rejected it if she did. This process was an essential stage in the exercise of her discretion. Accordingly we conclude that we must consider the material ourselves and exercise our own discretion in deciding the order to be made.

To this end it is necessary to examine Mr Ford's contentions. Mr Ford set out to construct a schedule of all the sales by Martin of the goods covered by the indictment. Only about half of the relevant sales invoices were available. Where an invoice was available, he calculated the amount actually received by Martin. Where no invoice was available, Mr Ford used a selling price from a closely comparable transaction for which there was an invoice. In respect of this process, Stoy Hayward made four criticisms:

(i) Mr Ford included some items which were not the subject of the indictment. It appears that he did so in the sales schedule but the figures relating to those items were deducted by counsel in submissions and the judge left them out.

(ii) Mr Ford made an arithmetical error when calculating the sales price of stock item 93/0595 and that this has resulted in an excess of £8,000 in the total. We cannot locate this item at all and must ignore the point.

(iii) Where Mr Ford did not have an actual invoice, he estimated the sales prices at too high a level and has thereby inflated the gross receipts. On examination, it appears to us that where there was a range of prices for a certain product, he has taken the median price. We do not think he could be criticised for that. It is said that on some occasions he has taken a price relating to a small quantity of goods and has applied it to a large consignment. A lower price should have been used as a discount would have been given for quantity. There may be something in this point, but Martin did not say what the prices should have been. It is said that where there was no invoice for a certain item within the month in which it was sold, he has taken the sale price from an invoice in a different month. So he did, but there was little else he could do and in any event, the inaccuracy may have been in either direction. We do not think Mr Ford's approach to the schedule of sales could be criticised. It was Martin who had caused the remaining invoices to be destroyed and only he who could have said what the true prices would have been. We think the sales schedule was as accurate as it could be, given the material available.

(iv) Mr Ford included in the sales schedule goods which Martin had claimed were not sent to him. However, there does not appear to have been any evidence before the judge to substantiate Martin's instructions to Stoy Hayward and without some evidence we do not accept this submission.

Mr Ford's next task was to prepare a schedule of purchase prices and to calculate the cost to Martin of buying all the goods covered by the indictment. Several criticisms are made by Stoy Hayward of this process:

(i) He has merely identified a sample of cost prices in respect of some of the goods and has estimated the rest. There is some force in this argument as it is not clear from Mr Ford's report where his purchase price figures have come from. However, purchase prices for commonly supplied goods must be ascertainable from suppliers and if Mr Ford's figures were significantly inaccurate one would have expected Stoy Hayward to produce or there to be some other evidence of relevant price lists from suppliers. There is no such evidence. We see no valid criticism of Mr Ford's calculation in this respect.

(ii) It is unrealistic to assess profit merely by subtracting the cost of purchases from the cost of sales. The difference is gross profit, whereas net profit should be used. No account has been taken of the costs of the business, such as overheads, transport costs, salaries and stock losses. Nor has account been taken of the stock seized by Customs and Excise at the time of Martin's arrest. Each of these arguments was countered by the Crown in counsel's skeleton argument.

Dealing with transport costs, the Crown argued that as all Martin's purchases included transport costs, no account should be taken of this item. But as Stoy Hayward pointed out, the cross channel costs must have fallen upon Martin's business. They suggested £64,000 as a fair estimate of those costs. We think the cross channel costs probably did fall on Martin's business and we bear in mind the estimate of £64,000.

Stoy Hayward did not suggest any figures for other overheads such as salaries. In the absence of evidence to the contrary, it seems to us that we are entitled to assume that the general overheads of the business were covered by legitimate trading.

Stoy Hayward contended that some stock loss was inevitable and that anything between 1% and 5% might be appropriate. In their own calculations they adopt 3% as a reasonable estimate. That would amount to £114,000. The Crown argued that there was no evidence of stock loss and in any event the stock was in Martin's possession. In our view, it is likely that there would be some stock loss, whether from breakages, loss or theft, particularly bearing in mind that much of this stock went to France and back. We think the allowance should be about 1%.

Stoy Hayward submitted that no allowance has been made for the value of the stock confiscated at the time of Martin's arrest, said to be worth £83,000. However, the Crown contended that the stock which was seized had been delivered to Martin's premises from France between 23rd and 28th June and had not been included in the sales schedule. That appears to us to be right and we think the value of the stock seized should be ignored.

Finally, Stoy Hayward advanced their own calculation of the net profit made by Martin from these transactions. We reject their approach as flawed, based as it was on those comparatively few documents which were available and leaving out of account all those goods for which the documents had been destroyed.

In addition to the points raised by Stoy Hayward, Mr Lawson noted that Mr Ford accepted that when, in January 1994, Martin paid £125,000 as compensation for a previous tax fraud, he had probably used the proceeds of the present fraud which was then under way. Although this point was mentioned by Mr Ford himself, the amount does not appear to have been taken into account when the judge assessed the amount which might be realised. We think it would have been open to the Crown to argue that the £125,000 handed over in January 1994 came from the earlier fraud but, as Mr Ford seems to have accepted that it was not, we think the Crown are obliged to accept that that sum could no longer be realised.

Mr Lawson also invited us to take account of Martin's obligation to pay his legal fees for the trial which, so the judge was told, would be of the order of £750,000. No documents were produced. We have been shown a bill for approximately £500,000, although we understand that bill is still under dispute. The Crown argued that the legal costs should not be taken into account. The debt had not become payable at the time of the judge's order; indeed there is still no evidence of the sum which is or will be properly payable. The Crown submitted that it is open to the appellant to apply to the Court for a variation of the confiscation order under section 83 of the Act, if, in the light of later events, it can be seen that the order was made in too great a sum. That is plainly so. In any event, section 74(3) provides that:

> "For the purposes of this Part of this Act the amount which might be realised at the time a confiscation order is made is-
>
> (a) the total of the values at that time of all the realisable property held by the defendant, less
>
> (b) where there are obligations having priority at that time, the total amounts payable in pursuance of such obligations,
>
> together with the total of the values at that time of all gifts caught by this part of this Act."

Thus it appears to us that an obligation may only be taken into account in reduction of the amount which might be realised if it has priority at the time of the making of the order. An obligation which has priority at the time is defined by section 74(9) as one which would be included among the preferential debts (within the meaning given by section 386 of the Insolvency Act 1986) in the defendant's bankruptcy commencing on the date of the confiscation order. Thus, in our view, there can be no question of any reduction being made for legal costs at the time of this order. It may be that Martin will be advised to make an application to vary the order at some future date, but we say nothing of that.

In summary, we think that Mr Ford's schedules formed a sufficiently reliable basis for the assessment of the amount which might be realised for it to be fair and just for the court to make an order based upon them. The information underlying them was not vague or uncertain. However, we do think that Stoy Hayward made some modest inroads into his calculations and these should have been recognised by the Judge in fixing the amount. Exercising our discretion afresh, and bearing in mind that the fixing of such a sum cannot be arithmetically precise, we make a confiscation order in the sum of £3 million.

In the event that his appeal against conviction was to be wholly unsuccessful, which it has been, the appellant White did not seek to challenge the confiscation order made in his case.

We turn to the sentences passed. Martin was aged 39 and had only one previous conviction in January 1994 for an offence of cheating the revenue for which he was ordered to perform community service and to pay compensation of £125,000. It is submitted on his behalf that the sentence of 6 years 10 months on count 1B was too long. The maximum for the offence of being knowingly concerned in the evasion of excise duty is 7 years. Mr Lawson submitted that this is by no means the worst example of an offence of this kind. Nor has Martin a long record for this kind of offence. Those two matters apart, there is little that can be said in mitigation. As the judge observed, Martin had flouted the law for personal gain to a massive extent. The judge was of the view that the sentences on counts 1A and 1B could properly have been made consecutive but that this would have produced too long a total sentence. We hesitate to differ from the view of an experienced judge who had the benefit of conducting this lengthy trial. Nonetheless, we do think that the term of 6 years and 10 months was too close to the maximum and outside the bracket for even the whole of

this course of conduct. We take the view that the appropriate term would be one of five-and-a-half years. We therefore allow the appeal to that extent on count 1B. The remaining terms of imprisonment stand and all will be served concurrently making a total sentence of five-and-a-half years' imprisonment.

The judge directed that Martin should serve a further term of 4 years' imprisonment in default of the payment of the confiscation order. We have made only a modest adjustment to that order and 4 years is still an appropriate term to be served in default.

As to the order for payment of £146,000 prosecution costs, it is submitted that as the confiscation order had, by definition, sought to deprive Martin of all his assets, it must be wrong in principle to require him to pay something over and above that sum. Attractive though that argument appears, we think it is not necessarily right. In this case, the object of the confiscation order, as contended for by the Crown, was to deprive the appellant of all the money he had made from these fraudulent evasions of duty and tax. It does not follow that because he is to be deprived of all the proceeds of this fraud, he has no other funds from which to discharge an order for costs. It is plainly right that an order for costs should not be made unless there is some evidence that the defendant will be able to satisfy it. The judge declared herself satisfied that he had the money to pay the additional order for costs. We do not know what evidence she had in mind, other than that from which she refused to draw the inference that he had dissipated all the proceeds of this fraud. We think in the circumstances she ought not to have made the order for costs and we accordingly quash that order.

Turning to Mr White, he is aged 50 and had no previous convictions. There were before the court several letters of reference attesting to his positive good character. There was also a pre-sentence report which spoke of the extent to which White's family had suffered as the result of his involvement in this fraud. His professional life was in ruins and it would be difficult for him ever to find work again. We accept that.

We acknowledge too that White's benefit from these frauds was very small when compared with Martin's. The confiscation order, agreed at £20,000, was the extent of his benefit. The seriousness of his position was that he had broken the trust placed in him as a bond holder. This is an important responsibility and it is right that persons who hold such a position should recognise the seriousness of any breach of trust. That said, we have come to the conclusion that particularly in the light of the reduction we have allowed in Martin's sentence, a term of 4 years for White would be too long. We are of the view that a term of 3 years would be appropriate for him and to that extent his appeal is allowed.

MR COX: My Lord, we took the liberty of putting before you a proposed draft question.

THE VICE PRESIDENT: We have those. Have the prosecution been invited to comment on them or not?

MR COX: I understand from my learned friend, Mr. Sells, he is broadly in agreement with that. There is an error, I regret to say, in paragraph 1, it should be 170(2)(a) not (b).

THE VICE PRESIDENT: Well, so far as the affidavit questions are concerned, the second question is superfluous, is it not, it is covered by the first?

MR COX: That was drafted by my learned friend, Mr. Lawson.

THE VICE PRESIDENT: He is not here to defend himself. You invite us to certify the question in relation to both appellants and the question in relation to Martin only, the first of the two on the sheet.

MR SELLS: I only hesitate about Mr. Lawson's number 2(i) and 2(ii).

THE VICE PRESIDENT: 2(ii) has gone, it is, as they say duplicitous.

MR SELLS: I should hardly be the one to make that suggestion. It is a matter for the Court entirely it seems to me. Whereas there is perhaps a question of significance in 1, with great respect to my learned friend, Mr. Lawson, it is more difficult to see it in 2.

THE VICE PRESIDENT: Yes, save that, of course, we are not wholly ignorant of the developments in relation to the European Convention.

MR SELLS: I am conscious of that. There was in fact - I meant to bring it today - it may be the Court has seen it there was a Parliamentary decision by Her Majesty's Attorney on this matter, a few days ago.

THE VICE PRESIDENT: I have not seen it.

MR SELLS: I will certainly distribute it. My Lord, I do not wish to say any more.

THE VICE PRESIDENT: Subject to the deletion of (b) and the substitution of (a) in 1, we certify question 1 and question 2(i).

MR COX: We also apply for leave to appeal from this Court.

THE VICE PRESIDENT: That is refused.