

32.19 *The complexities are a nightmare*

R v Ahmad and Others 2014 UKSC 36 Supreme Court The President para 35 The 2002 Act has often been described as poorly drafted. That is fair criticism, as can be illustrated by the problems which have had to be faced by the courts in a number of cases. However in fairness it can be explained in the inherent difficulties in recovering the proceeds of crime.

32.22 *Defendant absconds*

R v Okedare 2014 EWCA Crim 1173, 2 Cr App R (S) 68 (p 530) D was convicted in his absence of conspiracy to commit benefit fraud. He failed to appear for trial and a warrant was issued. At the confiscation hearing, again in his absence, the Judge ruled that of [Proceeds of Crime Act 2002 s 6](#) applied but neither [Proceeds of Crime Act 2002 s 27 and 28](#) applied. D, still absent, appealed the making of the confiscation order. It was conceded that the Judge was neither entitled to rely upon section 6 alone, nor upon section 27. D contended that he had not been afforded any of the protections under section 28(5), namely a) an obligation on the prosecution to make reasonable efforts to contact him, b) those potentially affected by the confiscation order have a right to be heard at the hearing, and c) the statutory assumptions under section 10 do not apply. Held. Following the explanatory notes and clear legislative intent, a court is entitled to make a confiscation order under section 6 [in conjunction with] section 28. We accept this is at variance with the heading of section 28. However that heading might apply to the time the defendant absconds. Since the original confiscation order in this case was made by the Judge under section 6 alone, and without the protections afforded by section 28(5), we quash it, and remit the matter to the Crown Court.

32.23 *European Convention on Human Rights Article 1*

Paulet v UK 2014 No 6219/08 ECtHR Fourth Section D pleaded to three counts of dishonestly obtaining a pecuniary advantage by deception, having a false ID document and other charges. He was an illegal immigrant who obtained jobs by using a false passport. In about four years he earned nearly £73,300. His benefit was assessed at £50,000. He had savings of almost £21,950. The Judge made a confiscation order in that amount. The defence claimed that was disproportionate and oppressive. The Court of Appeal considered the public interest but did not determine whether the requisite balance was maintained in a manner consonant with D's right to 'the peaceful enjoyment of his possessions', within the meaning of Article 1. Held. 6-1 The Court of Appeal's review was too narrow to satisfy the requirement of seeking the fair balance inherent in para 2 of Article 1. Therefore Article 1 had been violated and it was not necessary to consider the proportionality of the order. The money was not ordered to be returned because of the absence of a proximate causal link between the procedural violation and the financial loss sustained. An award of €2,000 to reflect the anguish suffered, with €10,000 costs and expenses.

Note: So all in all a disappointing decision partly because the Judges ducked the real issue. Ed.

32.23a *European Convention on Human Rights Article 6*

R v Ahmad and Others 2014 UKSC 36 Supreme Court para 7 Article 6.1 applies to all aspects of the confiscation hearing. Article 6.2 does not [apply], as the hearing is treated as part of the sentencing process rather than part of the criminal trial, see *Phillips v UK* 2008 ECtHR 41087/98. For more detail see [32.78](#).

32.35 *Defendant's qualified right to attend*

See also: *R v Ali* 2014 EWCA Crim 1658 (Defendant admitted to a mental hospital a few days before the hearing. The defence said he was very unwell, lacked capacity and was under the jurisdiction of the Court of Protection. They were unable to give a date when he could attend. Their doctor said he was incapable of following the proceedings. The prosecution doctor said there were elements of malingering and he could not follow the proceedings. The proceedings had already lasted 18 months. The defence accepted that illness could not be used to stave off proceedings forever. The Judge said on the medical evidence he might never be able to attend and the hearing would be fair. Held. The Judge was able to say he was capable of being present if he wished. The refusal to adjourn and the rejection of the abuse argument was proper.)

32.78 *Step 7 Determining the benefit* *Conspiracies/Joint enterprises*

R v Ahmad and Others 2014 UKSC 36 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. They challenged the decision of the Court of Appeal, relying on *R v May* that each defendant was separately liable for the entire amount, as where a benefit is obtained jointly, each joint beneficiary has obtained the whole of the benefit. The question was, 'when a number of people (whether or not all are before the court) have been involved in the commission of a crime which resulted in property being acquired by them together, what is the proper approach for the court to adopt, and the proper orders for the court to make in confiscation hearings?' Held. As identified in *R v May*, there are three questions to be answered.

a) Has the defendant benefited? para 41 Section 76(4) of the 2002 Act provides that a person benefits from conduct 'if he obtains property as a result of or in connection with the conduct.' In *Jennings*, para 12, Lord Bingham agreed with Laws LJ in the Court of Appeal that the essence of benefit in that phrase is given by the word 'obtains'. para 45 In *Jennings*, para 12, Lord Bingham agreed...that the essence of benefit in that phrase is given by the word 'obtains'. Thus, one is concerned with what the particular defendant obtained, which is by no means necessarily the same as the totality of what was obtained by the criminal enterprise of which he was a party. para 46 Accordingly, where property is obtained as a result of a joint criminal enterprise, it will often be appropriate for a court to hold that each of the conspirators 'obtained' the whole of that property. However, that will by no means be the correct conclusion in every such case. para 50 There has sometimes been a tendency to equate joint involvement in the crime with joint ownership of the fruits of the crime. But the fact that the defendants were jointly responsible for the crime in question does not automatically justify a conclusion that they jointly obtained the resulting property.

para 51 Judges in confiscation proceedings should be ready to investigate and make findings as to whether there were separate obtainings. Sometimes of course this is too difficult or impossible. In many cases the court will not have before it all the conspirators for a variety of reasons. A court should never make a finding that there has been joint obtaining from convenience, or worse from laziness. para 56 In many cases it is often completely unclear how many people were involved in the crime, what their roles were, and where the money went. As a result, if the court could not proceed on the basis that the conspirators should be treated as having acquired the proceeds of the crime together, so that each of them

¹ This means compare.

‘obtained’ the ‘property’, it would often be impossible to decide what part of the proceeds had been ‘obtained’ by any or all of the defendants. It is one thing for the court to have to decide whether a defendant obtained any property, which the 2002 Act requires. It is another thing for the court to have to adjudicate on the respective shares of benefit jointly obtained, which the Act does not appear to require. para 58 [In relation to the Ahmad defendants] it would be logically incoherent to hold the two Ahmad defendants each liable for half of the ‘property’ simply on the basis that it would be oppressive for each to be liable for the whole. If an argument based on oppression were right, then no order could be made unless the number of participants and the role of every participant in the fraud could be ascertained.

b) What is the value of the benefit? para 61 A defendant who steals property or obtains it by deception does not, as explained above, acquire ownership of that property...As explained in *Rose*, approved in *Waya*, the court takes the market value of the property because that is the value of what the thief has misappropriated, namely what it would cost anyone to acquire it on the open market (not the value of the legal interest, which would be nil. Ed.).

para 62 In the light of [Lord Bingham’s] observation [in *R v May* 2008], it seems clear that the ‘interests’ of a defendant’s co-conspirators are not to be taken into account when valuing the property for the purpose of assessing the value of the property which the defendant ‘obtained’.

para 66 [The] argument [to treat the Ahmad defendants as having acquired an interest equal in value to half the £12.6m] has the attraction of being consistent with the ordinary cases of beneficial joint ownership, but it would have to be very persuasive before we were justified in departing from [the] clear and consistent [line of authority].

para 67 The position of joint obtainers under the 2002 Act inter se is very different from that of two lawful joint owners or joint debtors, and it is unsurprising if their rights and obligations under the 2002 Act do not follow those of such owners and debtors.

para 70 It therefore [followed] that the Court of Appeal was right to conclude that each of the Ahmad defendants ‘obtained’ £16.1m (after adjusting for inflation) as ‘property’, and that that was the value of their benefit. In the second appeal...there was no appeal against the judge’s finding that the Fields defendants jointly obtained a benefit worth £1.6m. [Consequently it] was right to hold that the benefit...in respect of each defendant was the whole amount of the property obtained.

c) What is the sum payable? (see para **32.88a**)

32.76 Step 7 Determining the benefit *Drugs, Unlawful*

R v Elsayed 2014 EWCA Crim 333 D pleaded to ‘counts of possession of cocaine’ with intent to supply. His work locker was searched and 169 grams of cocaine and a small wrap of cocaine was found. No cutting agents or wraps were found there or at his home. The large amount was at 80% purity and the smaller amount was at 5% purity. D’s basis of plea was to divide the 169 grams into wraps of 5% purity. The defendant did not seek a *Newton* hearing to challenge that. In confiscation proceedings D was found to have nearly £246,000 worth of available assets. The prosecution valued the drugs at a street of £40 a gram, assuming it had been cut to wraps of 5% purity. ($169 \times 80 \div 5 \times £40$) making just over £108,000. The Judge agreed because the drugs were going to be cut by D. On appeal, the defence said a) the benefit should be the actual value when seized, namely the wholesale value and relied on [Proceeds of Crime Act s 80\(2\)\(a\)](#), see **32.65**, and b) using the cut figure of drugs was to an extent speculative. The prosecution said in confiscation proceedings drugs may frequently be valued on a wholesale basis. However here the Judge was perfectly entitled to adopt the retail valuation. Held. para 25 The dicta in *R v Islam* 2009, see above, tells strongly against the defence argument. para 30 The valuation of benefit is essentially a fact-

driven exercise. para 20 What D was going to do with the cocaine was not “speculative”. D was going to sell them, cut and divided into wraps at 5% purity, as a dealer at street level. It is perfectly consistent with the entire notion of ‘market value’ that for particular property it may vary, depending for example on the time at which it is obtained or the capacity or role of the person obtaining it. Using the market value here flows from a ‘fair and purposive’ construction of [Proceeds of Crime Act 2002 s 79](#) and [80](#). It reflects the legislative purpose which was to deprive the defendant of the benefit of his criminal conduct. It was not a disproportionate outcome. Order upheld.

32.81 Step 7 Determining the benefit Benefit fraud

R v Jacques 2014 EWCA Crim 1922 D pleaded to benefit fraud offences. Her confiscation order was made by agreement on the day judgment was given in *R v Waya* 2012 UKSC 51, 2013 2 Cr App R (S) 20 (p 87). The confiscation order was based on the amount she had received and not on the amount she had been overpaid. On appeal the defence argued that she had been entitled to a very significant part of the money she had received. Further that following *R v Waya* 2012, the calculation was disproportionate. Held. para 22 We do not accept that the principle in *R v Waya* 2012 ensured that the benefit figure had to be confined to the incremental gain which had flowed from the unlawful behaviour.

32.84 Determining the benefit Assessing the value ‘Market value’, Meaning of

R v Hussain 2014 EWCA Crim 1181 D pleaded to being concerned in keeping goods with intent to defraud. A confiscation order was made by valuing the goods on their lawful market value. The goods were Russian-made tobacco which could not be sold in the UK because there was no assessment of the quality and safety of the product. The prosecution agreed with the defence that the value should have been the value of the goods if sold on the black market. Held. To determine whether the agreed view was correct, there were two critical questions. a) What, if anything, did D obtain as a result of or in connection with his admitted criminal conduct? b) What was the value of [the goods] which he obtained? In [Proceeds of Crime Act 2002 s 80\(2\)](#) (see [32.65](#)) the value of the property at the material time is the greater of the value of the property at the time the person obtained it, adjusted to take account of the later changes in the value of money and the value at the time that person obtained the property. In this case the value of the property obtained was the market value of the tobacco products at the time he obtained them. As none of the products could be lawfully purchased because a) they did not bear the relevant duty marks, and b) the relevant market is the unlawful black market [price]. That is the figure we substitute.

See also: *R v Tatham* 2014 EWCA Crim 266 (Order made under Criminal Justice Act 1988 s 71. Under the old regime and the 2002 regime, for a confiscation order to be made, the offender would have to be personally liable for the import duty. Review of current law. Order upheld when applying the correct test.)

32.84a Step 7 Determining the benefit Enforcement notice offences

R v Ali 2014 EWCA Crim 1658 D was convicted of failing to comply with an enforcement notice and was committed for sentence. He bought four properties and converted them into 38 flats. He was served with enforcement proceedings and took no notice of them. The Judge included in the amount the rent and housing benefit obtained before the enforcement notices were issued. The defence challenged that. Held. This issue is of practical importance because breaches of the planning laws may not be discovered for some time. [Proceeds of Crime Act 2002 s 76\(1\)\(a\)](#) and (b) defines criminal conduct as ‘conduct which...constitutes an offence in England and Wales’. In [Proceeds of Crime Act 2002 s 75\(2\)](#) requires the relevant conduct to comprise of an offence or offences. D’s conduct did not constitute an offence until an enforcement notice was actually effective which meant the relevant notice period had expired. We reduce the order to reflect that.

32.88a Step 8 Conspiracies/Joint enterprises

R v Ahmad and Others 2014 UKSC 36 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. They challenged the decision of the Court of Appeal, relying on *R v May* 2008, that each defendant was separately liable for the entire amount, as where a benefit is obtained jointly, each joint beneficiary has obtained the whole of the benefit. The question was, ‘when a number of people (whether or not all are before the court) have been involved in the commission of a crime which resulted in property being acquired by them together, what is the proper approach for the court to adopt, and the proper orders for the court to make in confiscation hearings?’ Held. As identified in *R v May* 2008, there are three questions to be answered.

- a) **Has the defendant benefited?**
- b) **What is the value of the benefit?** (see para 32.78)
- c) **What is the sum payable?**

para 72 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 A1P1 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. para 74 Accordingly, 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. para 78 Appeals allowed.

32.89b Step 8 Insurance payouts

R v John 2014 EWCA Crim 1240 D was convicted of conspiracy to steal vehicles. In confiscation proceedings in 2007, his benefit was assessed at £200,000. A £7,200 confiscation order was made reflecting his then assets. In 2009, he had a road accident and received compensation of £21,000 for his injuries and £5,400 for the loss of his vehicle. The payment for the injuries was £13,000 for general damages (for pain and suffering etc.) and £10,000 for special damages (payment for a scan, physiotherapy, therapy and hearing aids). In 2014, the prosecution applied for a reconsideration of the confiscation order. The Judge considered it “more than just” that D should forego the insurance payments which were awaiting payment. D appealed. The prosecution said D had an ongoing right to NHS care. Held. It is important for judges to assess carefully what course is truly just. In cases such as this not involving a windfall gain, the consideration should be particularly anxious. It would not be fair for the special damages to be included. However, the general damages should be included.

Note: The test for the recoverable amount at a confiscation hearing is, (amongst other matters), the amount that, ‘the court believes is just’ [Proceeds of Crime Act 2002 s 7\(3\)](#). The test on a reconsideration

is, (amongst other matters), the amount the court, ‘believes is just’, [Proceeds of Crime Act 2002 s 22\(4\)](#). The Court is not saying here one type of damage is to be included and the other is not. It said on these facts this was the appropriate decision. Ed.

32.91 Step 8 Property, Assessing the value of General principles

R v Sheidu 2014 EWCA Crim 1671 D pleaded to five counts of acquiring criminal property. In confiscation proceedings, the prosecution relied on photographs of him on a partially-built house with crude wooden scaffolding. In it, D was making a gesture of triumph with his arm. D denied it was him. The Judge accepted the prosecution value of £250,000 and included it in the calculations. Held. The Judge was able with the facial mapping to say the house was his. It seems likely the house was in Nigeria. However without knowing where it was, a vital element in the valuing of it was missing. £250,000 was a totally arbitrary figure. The better course was to leave the house out of the confiscation calculations.

32.114 Compensation orders Combined with

R v Firmager 2013 EWCA Crim 2756 D was sentenced to 15 months’ imprisonment and a compensation order. He appealed before the confiscation hearing. Held. The compensation order was unlawful because it was premature. Order quashed.