

# Confiscation and POCA Update

*by Adrian Harris*

This year there have been a number of cases in the often complex area of confiscation law. Confiscation is an intricate area of law, but is further complicated by the fact that there are still six different Acts governing when and how applications are made and decided. A common thread is the three questions that a court must ask itself when considering an application:

- (1) Has the defendant benefitted from relevant criminal conduct?
- (2) If so, what is the value of the benefit the defendant has so obtained?
- (3) What sum is recoverable from the defendant?

Where issues of criminal lifestyle arise the questions must be modified to take account of them.

This article is a brief guide to some of this year's case law. While each case refers directly to a specific piece of legislation, they often have application to the others and the principles are usually to be applied whichever Act is used. The subjects we will consider are:

- *Where a number of defendants obtain benefit as part of a common enterprise, how should that benefit be apportioned between them?*
- *When a defendant agrees to steal money by cheque that will be made payable to another in return for a specific, lesser, amount, what is his benefit?*
- *The relationship between confiscation and compensation: if a defendant has already paid confiscation, can the court still make a confiscation order in the full sum (and thereby make the defendant pay twice)?*

## **R v May [2008] UKHL 28**

The House of Lords recently considered the issue of multiple recovery from co-defendants. Their decisions came in a series of cases and it is May that contains the main judgement. The report is worth reading as an introduction to the law as it

helpfully reviews all the legislation and the differences between the Acts, then considers the ‘three questions’ (see above) and a number of authorities deal with them. Their Lordships do then emphasise that “guidance [in how to answer the three questions] should ordinarily be sought in the statutory language rather than in the proliferating case law” (para 48(6)).

In the case of May itself, there were 16 conspirators to a ‘carousel fraud’, where around £11M of VAT had been fraudulently reclaimed from HM Customs and Excise and May had joined the fraud about halfway through. In the Crown Court, confiscation proceedings had been held and all the conspirators were found to have jointly shared in the proceeds of the fraud. With that conclusion reached, all were found to have benefitted in the full sum of the phases of the fraud they took part in – May himself received a benefit of just over £3M.

The argument from the appellant was that with each conspirator found to have benefitted from the full amount, then the full amount could be recovered from each of them if they had the assets to pay. That would leave HM Customs and Excise recovering up to sixteen times the amount they had actually lost. He argued that the correct approach was to apportion the amount between the conspirators.

The Crown’s argument was that the statute gave no discretion to do that and the statute said nothing about apportioning the liability to pay, where defendants have jointly benefitted.

The judgement of the Court of Appeal had been that someone with joint control of the property had ‘obtained’ it for the purposes of confiscation – in this case, the money had been paid to a company they were running as a vehicle for the fraud, which was the same as paying it to a joint bank account. The Court of Appeal had said that “there might be circumstances in which orders for the full amount against several defendants might be disproportionate and contrary to article 1 of the First Protocol [of the ECHR], and in such cases an apportionment approach might be adopted, but that was not the situation here”.

The House of Lords upheld the Court of Appeal's judgement. Their Lordships concluded by making several points of general importance, including:

- “The legislation is intended to deprive defendant of the benefit they have gained...whether or not they have retained the benefit, within the limits of their available means... The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators.”
- The court should proceed by asking the three questions [referred to above].
- “In addressing these questions the court must first establish the facts as best it can on the material available, relying as appropriate on the statutory assumptions. In very many cases the factual findings made will be decisive.”
- “A defendant ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else....Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property. It may be otherwise with money launderers.”

This last paragraph could be useful ammunition in cases where the defendant's role is exactly that and the Crown still seek confiscation of the full value of the items he couriered.

The basic principle was then applied in **R v Green [2008] UKHL 30**, where the Committee upheld the following:

“Where money or property is received by one defendant on behalf of several defendants jointly, each defendant is to be regarded as having received the whole of it [for the purposes of this legislation]. It does not matter that proceeds of sale may

have been received by one conspirator who retains his share before passing on the remainder; what matters is the capacity in which he received them.”

### **R v Newman [2008] EWCA Crim 816**

In this case, the defendant was employed by a bank and on two occasions arranged to steal £15,000 from his employer by obtaining a cheque in favour of another. On each occasion the defendant produced or altered a cheque and handed it to the other person, who paid the cheque into his own account. The defendant received a lesser amount as his share; £7,000 on one occasion and a £10,000 car on the other. At the confiscation hearing the prosecution contended that the defendant's benefit was £30,000, while the defendant argued for £17,000. The judge decided in favour of the prosecution.

The Court of Appeal held that each cheque did have value - the fact that had the true position been known neither would have been honoured made no difference in a case where they were honoured. The position should be the same as where a defendant stole cash and passed it on. The fact that, for example, the defendant received £7,000 in one case does not mean that the cheque was only worth that sum. The cheque was to be valued at its economic cost to the loser.

Secondly, it was held that if A arranged for property to be transferred to B who acted as his nominee or conduit and the property remained under A's control, then A obtained an interest in it (and therefore a benefit in that amount). It did not matter that his interest could not be enforced at law, as long as he had control. That was the case here and the appeal was dismissed.

### **R v Morgan; R v Bygrave [2008] EWCA Crim 1323**

Under several of the legislative schemes, including POCA 2002, a confiscation order is mandatory where an application is made and the test is made out. The court has no discretion whether or not to ultimately make the order – unless the victim had made, or intended to make, a civil claim to recover his loss, when the order does become discretionary. But what happens when no such civil claim is made or even

likely, because the defendant had already repaid or stood ready to pay? The statutes provide for no discretion in a defendant's favour.

While one of the appeals concerned the Criminal Justice Act 1988 (amended by POCA 1995) and the other POCA 2002, the legislative schemes were much the same.

The case of Morgan concerned a police officer who befriended but cheated an elderly lady out of nearly £280,000. Between his arrest and his confiscation hearing he repaid about five-sixths of her losses, and said he was ready to repay the outstanding £52,000. The judge in the Crown Court decided that he no choice but to make an order for the full benefit figure and find that the defendant had realisable assets of £106,000. This left the defendant about £55,000 worse off than if he had refused to pay at all.

The case of Bygrave concerned a theft of nearly £13,000. The defendant pleaded guilty, had borrowed a mortgage upon her home to repay the debt and had offered to pay the money back.

The judge in the Crown Court was, for some reason, not told of his power to pass both a confiscation order and a compensation order, and then order that the compensation be paid out of the money recovered under the confiscation order. Having in mind the need for fairness, he passed only a confiscation order – leaving the loser without the £13,000, with no means of recovering it from the state (who now had it) and with the defendant having no money to pay a civil claim.

The Court of Appeal decided that:

- (1) It was important to encourage defendants to repay their victims as quickly as possible, if possible without the need for formal confiscation proceedings.
- (2) Once the Crown invokes the confiscation process, the making of the order was mandatory, but it was not in every case that confiscation should be sought.

- (3) The court retains a discretion to stay a confiscation application, where it amounts to an abuse of the court's process.
- (4) To establish such abuse, it will not be sufficient to show oppression, or that a defendant will have to pay back more than he gained.
- (5) It may, though, be an abuse for the Crown to seek a confiscation order that would result in an oppressive order to pay up to double the full restitution, which the defendant has paid or is willing to pay – and would therefore deter him from making it.
- (6) There were three examples given of cases where it would not be oppressive to seek confiscation: (a) where a defendant significantly profited through the use of stolen money and so benefitted beyond the immediate loss, (b) where the statutory 'lifestyle' assumptions ought to be applied to show a benefit beyond the immediate loss, and (c) where although repayment is offered, it is uncertain whether the defendant will be able to make it. In the last example, the confiscation process offers significantly greater powers of recovery over a simple compensation order – and both orders should be sought.
- (7) It may be difficult to establish abuse unless the defendant has either repaid in full or is ready to repay in some guaranteed form.
- (8) Routine applications to stay in confiscation proceedings are not encouraged.
- (9) It is perfectly proper for a defendant to ask whether if he repays a particular sum by a specified time the Crown will continue to seek confiscation proceedings.

From this case, it would appear that in cases where the sole benefit to a defendant is the sum he stole or cheated, the approach by a defence team ought to be this:

- (1) Has he repaid, or is he ready to repay immediately (e.g. a banker's draught or funds lodged with a solicitor)? If so, it may be undesirable for a formal order at all.
- (2) The court could stay confiscation proceedings in such a case and revive them if no such payment is made.

- (3) In cases where a defendant may be able to repay some or all of the loss, the defendant ought to indicate to what extent he was able to repay and how.
- (4) He may wish to ask the Crown if confiscation will be sought at all if he repays a particular sum by a set time.
- (5) The proper course at a confiscation hearing is for the court to make both a confiscation order and a compensation order, but order that compensation is to be paid out of the sum recovered under the compensation order where the defendant cannot pay both (as permitted by, e.g. POCA 2002 s13(6)).