

# Recent confiscation case law

By David Winch, June 2010

**This article deals with some recent important developments in the law of confiscation under the Proceeds of Crime Act 2002 and earlier legislation. The full text of the judgments of all the recent cases referred to in this article can be found online (and free of charge) at BAILII <http://www.bailii.org> or simply by following the links in the text.**

## Initial burden of proof

Solicitors and barristers are well aware of the draconian nature of confiscation proceedings and the impact of the statutory assumptions in 'criminal lifestyle' cases. In particular, where those assumptions apply, the burden is upon the defendant to rebut the assumptions.

But sometimes prosecutors presume too much! The prosecutor may overlook the initial burden, which rests upon the prosecution, to show that the amounts in question fall within the scope of the assumptions at all.

The Court of Appeal in [Whittington v R \[2009\] EWCA Crim 1641](#) put it this way:

"It is vital to bear in mind that it is for the prosecution to prove that the defendant has obtained the property in issue, which will either be known property he still possesses or which he has possessed. This issue as to proof of the existence of property must not be confused with proof of the source of that property. Subject to the particular, and confined exception, illustrated by **R v Briggs-Price** [see below], the prosecution must prove the existence of that property to the civil standard of proof (s6(7)).

Thus, once a criminal lifestyle has been established, it falls to the prosecution, if it can, to prove, on the balance of probabilities, that the defendant has obtained property. The prosecution, as the first three assumptions in s10 indicate, may do so by proving that property has been transferred to the defendant (s10(2)), that he has obtained property (s10(3)) or that he has incurred expenditure after the relevant day (s10(4))."

Bear in mind also that the statutory assumptions refer repeatedly to "the defendant". How often have I seen prosecutors merrily applying the statutory assumptions to, for example, property received by the defendant's wife or partner, other family members and limited companies - without making any attempt to link the property in question to the defendant himself.

## **Civil or criminal standard?**

Ordinarily in confiscation matters the standard of proof required is the civil standard - the balance of probabilities. That is spelled out in, for example, s6(7) Proceeds of Crime Act 2002.

But there is one circumstance in which proof to the criminal standard is required. That was illustrated by the House of Lords decision in [R v Briggs-Price \[2009\] UKHL 19](#).

In that case the appellant had been convicted of a conspiracy to import heroin. In the event that conspiracy was never implemented and so, in terms of confiscation, no benefit arose from that offence.

However the prosecution case at trial had been that this defendant had been invited to join this conspiracy because he had established a successful track record as an importer of other drugs. Although he was never charged with those earlier importations, evidence of them had been produced at trial in support of the prosecution case.

In the confiscation proceedings the Crown sought a figure of 'benefit' based, in large measure, upon those earlier importations. There was however no evidence that this defendant had obtained any monies (to which the statutory assumptions could then have been applied in the usual way). The Crown relied on their submission that this defendant had 'obtained' a benefit by virtue of his having been engaged as a conspirator in the earlier importations.

So the only evidence that this defendant had obtained that benefit was the (alleged) fact that he had committed the earlier offences (of which he had never been charged, much less convicted).

The House of Lords held that, in those circumstances, the Crown was obliged to prove to the criminal standard that this defendant had indeed committed those earlier offences.

This should be contrasted with the more normal situation in which it is clear that the defendant has obtained a benefit (because, for example, monies have been deposited in his bank account) but the source of that benefit is disputed. In that situation the prosecution can readily satisfy the initial burden of proof upon them (by producing the bank statements showing the credits to the account) and the statutory assumptions then apply, leaving the defendant to rebut the statutory assumptions (either by proving, to the civil standard, a legitimate source for the funds or an injustice such as double counting).

## **Assets purchased with mixed funds**

The Court of Appeal decision in [R v Waya \[2010\] EWCA Crim 412](#) is a very important one where it applies.

Stripped down to the bare essentials, the facts are these. Mr Waya bought a house costing £775,000. He used £310,000 of his own (legitimate) money and fraudulently obtained a mortgage advance for the remaining £465,000 (60% of the purchase price).

He was convicted of the mortgage fraud. By that time the value of the house had risen to £1,850,000. What was his 'benefit' of the fraud for confiscation purposes?

The Crown Court judge found his benefit to be £1,540,000 (i.e. the £1,850,000 value of the house less his legitimate funds of £310,000 used in the purchase).

The Court of Appeal took a different approach. They said that as 60% of the purchase monies were illegitimate that same proportion of the current market value was illegitimate. So the benefit was £1,110,000 (i.e. 60% of £1,850,000).

Put this way the Court of Appeal decision sounds like nothing more than simple common sense. But previous courts have adopted the approach originally adopted by the Crown Court in Mr Waya's case. They have done so following two long established cases **R v K (unreported) [1990]** and **R v Layode [1993]**.

However the Court of Appeal based its decision on a detailed examination of the wording of the relevant sections of PoCA 2002 and more recent decisions, including that of the House of Lords in [R v May \[2008\] UKHL 28](#).

In **May** the House of Lords had made some criticism of the earlier approach and indeed the decision in **Waya** is consistent with the decision of the Court of Appeal in [R v Roach \[2008\] EWCA Crim 2649](#) - although that decision was arrived at by a very different route.

It does seem that the decisions in **R v K** and **R v Layode**, insofar as they relate to use of mixed legitimate and illegitimate funds in the purchase of an asset, should now have been consigned to legal history. However I continue to see prosecutors quoting them in confiscation statements.

### **Duty or tax evasion cases**

The case of [R v White & Others \[2010\] EWCA Crim 978](#) confirms the simple point that in cases of tax and duty evasion the benefit is a sum of money equal to the pecuniary advantage obtained based on the tax or duty for which the defendant is personally liable.

The Court also noted that more than one individual may be personally liable for the tax or duty evaded. It may be necessary to study the detailed regulations or primary legislation to determine whether a particular defendant had a personal liability for the evaded duty or tax.

The judgment then went on to consider the statutory provisions in some detail.

The judgment did not however consider whether the benefit of any of the defendants in these cases should include interest arising on the unpaid tax or duty.

### **Impact of an apparent mis-step in postponement**

Another recent Court of Appeal case, [Crown Prosecution Service v Neish \[2010\] EWCA Crim 1011](#), concerned something of a muddle in the Crown Court relating to the postponement of a confiscation hearing.

Following Mr Neish's conviction in the Summer of 2009 his confiscation hearing was postponed to 11 December 2009. On 4 December the judge realised he could not be available on that day and he asked the Court listing officer to reschedule the hearing. The listing officer rescheduled the hearing for 4 January 2010.

When the matter came to be heard on 4 January counsel for Mr Neish submitted that the Court had no jurisdiction to conduct the hearing as the postponement had been made only until 11 December. The Crown Court judge accepted that he had made an error and now lacked jurisdiction to continue with the confiscation proceedings. But the prosecutor did not agree with the judge's conclusion and appealed his decision not to proceed.

Perhaps not surprisingly the Court of Appeal found that what the judge had done constituted a valid postponement by the court, of its own motion, to 4 January. On that basis the matter could properly still be heard.

This case may be contrasted with [RCPO v Iqbal \[2010\] EWCA Crim 376](#), in which the Crown Court judge had made a postponement (without specifying a date) and asked that the confiscation application be listed for a mention in 3 months if a new date had not by then been fixed. For whatever reason the case was not listed for mention and did not come to the Court's attention again until more than 2 years after the date of Mr Iqbal's conviction.

The Court of Appeal held that, in the absence of any application to extend the postponement before the normal 2 year time limit of s14 PoCA 2002 had expired, the Court had no longer had jurisdiction to hear the confiscation application in Mr Iqbal's case.

### **Breach of planning permission**

The case of [R v Basso & Another \[2010\] EWCA Crim 1119](#) is notable chiefly because of the nature of the criminality and the severity of the confiscation order.

The defendants operated a 'park and fly' facility not far from Stansted Airport. Customers could park their cars, be driven to the airport, and collected and re-united with their car on their return.

But the site had no planning permission for that use, to which the local authority objected strongly. Despite various warnings and legal measures, even extending to the issue of an enforcement notice, the 'park and fly' business continued to trade on the site.

In due course Mr Basso and a Mr Goodwin were convicted of breach of the enforcement notice and were subject to confiscation. The offence had continued for at least 6 months and the benefit was at least £5,000, so each defendant had a 'criminal lifestyle'.

The judge found the benefit of each defendant to be the turnover of the business during the period they had carried on business in partnership after the issue of the enforcement notice. That was £1.8 million, obtained jointly.

Neither had an 'available amount' of that, so confiscation orders were made against each defendant in the sum of his 'available amount'. These confiscation orders dwarfed the penalties imposed for the offences.

The defendants appealed against the confiscation orders, but their appeals were dismissed. The Court noted that the defendants did not appear to have realised the risk they faced from confiscation proceedings - but that was no reason to reduce the orders.

## Claiming costs against the police for cash seizure

The police seized £150,000 in cash belonging to Ms Perinpanathan and made application for its forfeiture under s298 PoCA 2002. The police were unsuccessful and the cash was returned. Ms Perinpanathan then sought costs from the police.

In the Court of Appeal [R \(on the application of Perinpanathan\) v City of Westminster Magistrates Court & Another \[2010\] EWCA Civ 40](#), the decision of the Divisional Court that Ms Perinpanathan was not entitled to costs was upheld.

Although the police had lost the case they had not behaved unreasonably and the Court adopted the principles of [City of Bradford Metropolitan District Council v Booth \[2000\] EWHC Admin 444](#). Costs would not automatically be awarded against the losing party which was an authority that had acted honestly, reasonably and properly in exercise of its public duty.

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