

Recent developments in confiscation

By David Winch, February 2009 (revised October 2009)

Confiscation proceedings are now commonplace where a defendant has been convicted of one or more offences from which he has obtained – or is deemed to have obtained – a benefit. But one theme which has recurred in confiscation cases over the past 12 months is, as the House of Lords put it, “in very many cases the factual findings made will be decisive”.

The flood of confiscation appeals have thrown up a variety of points of interest relating to the way in which ‘the facts’ can impact upon the computation of ‘benefit’ and the amount in which a confiscation order should be made. Several decisions in the Court of Appeal and the House of Lords over the past year have modified our understanding of the law of confiscation.

May, Jennings and Green

Of key importance were the House of Lords’ decisions, handed down together, in the cases of *R v May [2008] UKHL 28*, *CPS v Jennings [2008] UKHL 29* and *R v Green [2008] UKHL 30*. Prior to these definitive decisions there had been much controversy about the ‘benefit’ derived by joint defendants or conspirators in criminal conduct. How should Courts approach the apportionment between the various defendants of the total benefit derived from the crime?

The short answer is that where benefit is obtained jointly it should not be apportioned at all. Every co-defendant obtains the whole of the benefit which is jointly obtained.

However this naturally leads to the next question – how does one determine the benefit which has been obtained jointly? Here the House of Lords, particularly in its judgment in *Jennings* took a rather different view from the Court of Appeal. The Lords held that, in relation to each defendant individually, “obtained” meant “obtained by him” and that “a person’s acts may contribute significantly to property (as defined in the Act) being obtained without his obtaining it”.

Benefit in a conspiracy

Following on from those decisions, the Court of Appeal has recently made it plain that the benefit obtained by an individual member of a conspiracy is an issue of fact and that whilst conspirators may, in certain circumstances, obtain benefit jointly there may also be circumstances in which some conspirators benefit more than others.

In the case of *R v Sivaraman [2008] EWCA Crim 1736* the defendant was an employee of a company which operated a service station on the A508 near Northampton. The company illegally sold agricultural ‘red’ diesel as road fuel and thereby evaded the excise duty chargeable on diesel engine road vehicle fuel (DERV).

The defendant had supervised the delivery to the service station of the red diesel upon which duty had been evaded, for which task he had been paid £15,000, and was convicted of conspiracy in the evasion. However, the Court of Appeal noted that the excise duty evaded had not been a liability of the defendant himself (but that of the company of which he was merely an employee) and held that this defendant's benefit from the conspiracy was limited to the £15,000 he had himself received.

On the other hand, the owner of the company which had evaded the duty had properly been held to have obtained the benefit of the entire amount of duty evaded (without any deduction for the £15,000 paid to Mr Sivaraman).

Benefit obtained by a money launderer

Very recently the Court of Appeal has considered the benefit obtained by a money launderer. It had been believed that a person convicted of a money laundering offence would inevitably be deemed to have obtained a 'benefit' in the sum laundered by him. In *Allpress & Others v R [2009] EWCA Crim 8* the Court of Appeal reconsidered the position and concluded that a mere courier or custodian of proceeds of crime does not 'obtain' those proceeds for the purposes of confiscation and so does not 'benefit' by the amount of those proceeds, even though he commits a money laundering offence by virtue of physically possessing the proceeds or physically removing them from one jurisdiction to another.

In contrast, a money launderer who converts or transfers proceeds of crime using the banking system will be regarded as having 'obtained' those proceeds (of which he has temporarily had legal ownership and practical control) and will accordingly have a 'benefit' of those proceeds in confiscation proceedings.

Seized drugs

In July 2008 the Court of Appeal set out in very clear terms that seized drugs have, of themselves, no value "whether for the purpose of assessing a defendant's benefit from obtaining drugs or for the purpose of assessing the amount available to him at the time of the confiscation order" in *R v Islam [2008] EWCA Crim 1740*. However in June 2009 the position was reconsidered and that view was overturned in part by the House of Lords in *R v Islam [2009] UKHL 30*. The House of Lords concluded (on a majority view) that the 'black market' value of seized drugs can be taken into account in determining a defendant's benefit from criminal conduct, but cannot be taken into account in ascertaining the defendant's available amount.

It is open to the court to include the expenditure incurred by the defendant in obtaining those drugs as an element in computing his 'benefit' under the criminal lifestyle assumptions (that point not having been in dispute in *Islam*).

Oppressive confiscation proceedings

In the remarkable case of *Shabir v R [2008] EWCA Crim 1809* the defendant was a dispensing pharmacist who had falsely inflated claims which he submitted to the NHS for payment. Mr Shabir had inflated six particular monthly claims by including false items totalling £464 overall. However each of those claims had also included a multitude of legitimate items, far in excess of the false ones.

The total value of the six claims was £179,731. Mr Shabir was accordingly convicted of obtaining by deception six money transfers totalling £179,731.

Since he had been convicted of six offences and the 'benefit' of £179,731 exceeded the £5,000 threshold of section 75(4) Proceeds of Crime Act 2002, the Crown proceeded to confiscation on the basis that Mr Shabir had a 'criminal lifestyle'.

The Court of Appeal held that confiscation in this case was oppressive given that in any ordinary language the true extent of the offending was only £464. The confiscation order was quashed and instead a compensation order was made in the sum of £464.

Using a forensic accountant

The undoubtedly draconian impact which confiscation can have on a convicted defendant and the way in which, in 'criminal lifestyle' cases, the scope of the prosecution investigation extends well beyond the offending which gave rise to the conviction, presents a challenge to the defendant's legal team. Typically the defendant himself will regard the situation which he faces as manifestly unfair and will object to being described as having obtained a large 'benefit' or labelled as having a 'criminal lifestyle'.

However the case law underlines the importance of establishing the relevant facts and points to areas in which the prosecution may be successfully confronted resulting in a reduction in the 'benefit' figure.

A forensic accountant with appropriate skills and experience, whose fees may be covered by a prior authority from the LSC, can be invaluable to the defence in establishing the facts in these cases.

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