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Confiscation 2020

In September 2020, The Law Commission published its 720 page consultation paper¹ setting out what some might suggest are conservative proposals to make the Confiscation regime more effective, fairer and less complex. The Commission's conclusions are expected to be published in Spring 2021. In the meantime, appeals from confiscation cases continue to take up a disproportionate amount of the Court of Appeal's list, but there is a sense that the sometimes aggressive approach taken by prosecutors in pursuing confiscation is being tempered by proportionality and common sense.

It is now 8 years since *R v Wya*² established that confiscation orders must be proportionate, which was codified in 2015 through the introduction of POCA section 6(5). This article highlights a few of last year's appeal decisions.

In *R v Andrewes*³ the Court of Appeal provided further guidance on the meaning of "disproportionate". Mr Andrewes, a 63 year-old man of otherwise good character, had managed to land several senior health posts, including the boards of two NHS Trusts, on the basis of a CV which contained "a series of staggering lies". He was duly convicted of one count of obtaining a pecuniary advantage by deception and two counts of fraud.

In the confiscation proceedings, the benefit was found to be £643,602 – representing his entire salary from the various roles – and he was ordered to pay £96,737 (representing his recoverable amount). This was held on appeal to be wholly disproportionate on the basis that he had, throughout his periods of employment, properly performed his duties in return for the remuneration he received. Thus, in effect, he had made restoration and a confiscation order would operate as a double recovery.

Reference was made to *R v Sale*⁴, in which the owner of an air conditioning company was convicted of corruption following payment of bribes to obtain contracts with Network Rail. A confiscation order representing the entire turnover of these contracts was held to be disproportionate since the services had been provided. A proportionate order would have been for the amount of profit.

In a parting shot, the Court reminded prosecutors that they have a discretion as to whether to seek confiscation and suggested that they should think long and hard before seeking

¹ <https://www.lawcom.gov.uk/project/confiscation-under-part-2-of-the-proceeds-of-crime-act-2002/#confiscation-consultation-paper>

² [2012] UKSC 51

³ [2020] EWCA Crim 1055

⁴ [2013] EWCA Crim 1306

However, a similar argument was amongst those made, and rejected in **R v Roth**⁵. Mr Roth, having been granted planning permission to convert a property into 3 flats, duly built 12. The benefit for confiscation was £527,877, being the total rent received for all the properties over a 53-month period. The Defendant argued that this was disproportionate as the tenants had received full value for the rent and, at most, benefit should be limited to the net profit. The court (Davis J, giving the judgement, as he did in **Andrewes**) disagreed. Two other grounds of appeal were also rejected:

- First, that since the charge referred only to breach on particular date, benefit should be limited to the rent on that day. However, it was held that this was a continuing offence; and,
- Second, that the rent received was not benefit from criminal conduct but was in fact legitimate income from lawful tenancies (see **Sumal and Sons (Properties) Ltd v London Borough of Newham**⁶). This latter ground was dismissed with the portentous comment “*we hope that this will be the last time an argument of this kind is advanced on this basis in confiscation proceedings in [this] context*”.

In another housing case, **R v Bajaj**⁷, the Defendants were convicted of breaches of various regulations under the Housing Act 2004 relating to two HMOs. The properties, licensed for 8 occupants, were each rented out to up to 20 tenants and described as grossly overcrowded and squalid. The Defendants, however, benefited both from flawed drafting of the charges and a flawed argument on confiscation:

The Crown sought confiscation of over £917,000 based on the estimated cost of providing compliant accommodation for the additional 12 tenants (which would essentially have involved either building a new house or providing hotel accommodation!). This, it was argued, was the pecuniary advantage obtained by the Defendants. However, the Court of Appeal rejected this approach as “too broad and speculative”. It was suggested that the benefit could have been calculated by reference to the cost of compliance with the regulations for 8 occupants (a figure of only £14,305).

Ultimately, the benefit was assessed as the rent received from the tenants and, fortuitously for the defendants, because the offences had been charged by reference to a single day, rather than over a period, this amount was only £200 - the Court helpfully suggested that the offence could have been charged under the Planning Acts to allow for confiscation of rent over the entire period, as in *Roth, above*.

In **R v Lowther**⁸ the Court considered the recovery of joint benefit and the application of sums recovered under a confiscation order where there was both joint and individual benefit.

⁵ [2020] EWCA Crim 967

⁶ [2012] EWCA Crim 1840

⁷ [2020] EWCA Crim 1111

⁸ [2020] EWCA Crim 1387

Three Defendants were convicted on various counts including blackmail and money laundering relating to a good old-fashioned protection racket. The benefit for each defendant included both joint benefit arising from their particular criminal conduct and individual benefit from general criminal conduct applying the statutory assumptions in POCA section 10. The Court indicated there was no presumption that any sums recovered would be applied first to the joint benefit.

The case also highlighted the difficulties faced by defendants seeking to discharge the statutory assumptions, even with the aid of a forensic accountant, when faced with large unexplained and undocumented cash transactions. The Defendants had sought to explain this by reference to their lifestyle as members of the Travelling community. The Court emphasised that the section 10 assumptions put the burden of proof onto defendants to demonstrate that funds came from legitimate sources.

R v Munir⁹, a drugs conspiracy, illustrated the relevance of a basis of plea in confiscation.

The defendant pleaded to possession with intent to supply on a basis, which was not challenged, that he was asked by one of the co-defendants to “hold on to” a binbag containing 1.5kg of cannabis and a confiscation order was imposed which included the street value of the cannabis. On appeal, it was held that it was wrong to include the drugs when calculating benefit because, as confiscation is part of the sentencing exercise, confiscation should have been applied consistently with his basis of plea. Following ***R v May***¹⁰ he was a mere custodian and did not “obtain” the drugs.

Finally, ***R v Cribben***¹¹ serves as a warning to all of us not to treat the benefit figure as academic in cases where there are no, or limited, available assets.

Mr Cribben was the driver in a drugs conspiracy. In 2008, on the advice of counsel, a benefit figure of over £1,619,232 (the street value of the drugs) and a confiscation order of £1,214 were agreed. It appears not to have been argued that (as in ***R v May***) he did not “benefit” from the value of the drugs.

Mr Cribben duly served his prison sentence and went on to lead a respectable life. He began to make some money and, in 2019, the Crown came after his new “wealth” and sought a redetermination and a further £19,589 under POCA section 22. Realising that the huge benefit figure would mean any money he ever made in the future would be subject to confiscation, he sought leave to appeal out of time.

Fortunately, good sense prevailed and, despite the fact the original benefit figure had been agreed, the Court allowed an out of time redetermination of the benefit figure to £19,589 on the basis that the original determination was analogous to a mistake in law. The court commented “Counsel in confiscation cases must bear in mind the possibility of a future

⁹ [2020] EWCA Crim 1549

¹⁰ [2008] UKHL 28

¹¹ [2020]

This last case perhaps illustrates how draconian and unfair the confiscation regime can be to offenders. Confiscation orders can hang over their lives like a financial sword of Damocles for many, many years. This particular issue is addressed by the Law Commission but there is, for the time being, no proposal to limit the Crown's ability to apply for a redetermination. Whether their proposals in other areas will address the complexity, effectiveness and fairness of the POCA regime remains to be seen and will no doubt be the subject of a further article later in the year.



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