

Confiscation Orders, Human Rights and Penal Measures

By

Janet Ulph

Reprinted from
Law Quarterly Review
March 2010

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

SWEET & MAXWELL

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INTRODUCTION

CONFISCATION orders are intended to deter convicted criminals from a life of crime by stripping them of the benefit which they have obtained from their criminal conduct.¹ It is thought that a sentence of imprisonment is unlikely to deter criminals who have a “nest egg” representing the fruits of their crime, stashed away ready to be enjoyed when they are finally released. The proceeds of crime can be used to finance a luxurious lifestyle, thereby encouraging others to follow suit, and there is a danger that the money will be used to finance further criminal activity. Few would therefore object if criminals were deprived of their net profits: this would merely restore the status quo, removing assets to which they were never entitled.² But Parliament did not elect to go down this route.³ The scheme which has been established instead is seen as controversial and thoroughly unjust in some quarters.⁴

Under the Proceeds of Crime Act (POCA) 2002, a confiscation order will vary according to the value of the tangible object or intangible asset which the criminal has obtained. The fact that this property has been restored to the victim, or has been destroyed or transferred elsewhere, is irrelevant. There is no necessity for the confiscation order to be satisfied by the property itself. A confiscation order is not an order in rem. Instead, the order creates a personal debt due to the State and the offender is obliged to pay this debt from whatever assets are available to him. A failure to pay a confiscation order will result in a further substantial term of imprisonment. The offender is therefore under pressure to pay even though he may well end up bankrupt as a result. A much larger confiscation order can normally be made under this scheme as compared to one limited to profits alone. Between April 2007 and February 2008, 4,054 confiscation orders were made for a total of £225.87 million, which went to swell the State’s coffers.⁵ However, if the law is arbitrary, it risks being incompatible with human rights legislation. This article therefore analyses not only whether the law is clear, and its application foreseeable, but also whether it is

¹*R. v May* [2008] UKHL 28; [2008] 1 A.C. 1028 at [9], [48(1)]; *Crown Prosecution Service v Jennings* [2008] UKHL 29; [2008] 1 A.C. 1046 at [13].

²*The Profits of Crime and their Recovery* (1984), at p.74.

³*R. v Briggs-Price* [2009] UKHL 19; [2009] 1 A.C. 1026, at [56], [57].

⁴I. Lawrence, “Draconian and Manifestly Unjust: How the Confiscation Regime has Developed” (2009) *Amicus Curiae* 22. See further *Hansard*, HL col.897 (December 7, 2009) (Lord Onslow).

⁵*R. v May* [2008] 1 A.C. 1028 at [48].

a proportionate response to the policy objectives of deterring criminal activity and stripping criminals of the proceeds of crime.

THE OPERATION OF CONFISCATION ORDERS

Background

Until the POCA 2002 came into force on March 23, 2003, there were two separate regimes dealing with confiscation orders. Drug trafficking was governed by the Drug Trafficking Act (DTA) 1994; for other serious crimes, the principal statute was the Criminal Justice Act (CJA) 1988.⁶ The POCA 2002 united the two regimes and made the operation of the law simpler and more effective. It introduced sweeping changes which included the principle that confiscation orders should be routinely made in any situation where a criminal is convicted of an economic crime. Nevertheless, certain basic principles have carried through from earlier legislation so that a common body of case law relating to confiscation orders has evolved.⁷

On May 14, 2008, the Judicial Committee of the House of Lords handed down three unanimous judgments in succession, which reviewed both current and previous law. The first decision was *R. v May*⁸; its principles were then incorporated into the judgments in *Crown Prosecution Service v Jennings*⁹ and *R. v Green*.¹⁰ Taken together, these three decisions provide a broad overview of the legislative scheme and provide guiding principles to assist the lower courts. In *May*, the House of Lords emphasised that there are three questions calling for separate answers:

- “(i) Has the Defendant (D) benefited from relevant criminal conduct?
- (ii) If so, what is the value of the benefit D has so obtained?
- (iii) What sum is recoverable from D?”¹¹

In *May*, the Committee emphasised that the courts are primarily engaged in a factual inquiry in addressing these questions.¹² The courts must initially focus on the statutory language¹³ but, subject to this, they are expected

⁶As amended by the CJA 1993, the POCA 1995 and the Criminal Justice (International Co-operation) Act 1990.

⁷*R. v May* [2008] 1 A.C. 1028 at [8]; *R. v Allpress* [2009] EWCA Crim 8; [2009] 2 Cr. App. R. (S.) 58 at [7].

⁸[2008] 1 A.C. 1028.

⁹[2008] 1 A.C. 1046.

¹⁰[2008] UKHL 30; [2008] 1 A.C. 1053.

¹¹*R. v May* [2008] 1 A.C. 1028 at [8], [48].

¹²*May* [2008] 1 A.C. 1028 at [48(3)].

¹³*May* [2008] 1 A.C. 1028 at [48(4)]; *Crown Prosecution Service v Jennings* [2008] 1 A.C. 1046 at [13].

to draw upon common law principles relating to ownership of property.¹⁴ Each question will be considered in order to determine whether the law is clear and to gauge the extent to which common law principles assist in creating a penal regime.

Has the defendant benefited from relevant criminal conduct?

Obtaining a benefit

According to s.6(4) of the POCA 2002, a court must decide whether, on the balance of probabilities, the criminal obtained a benefit “as a result of or in connection with the conduct”.¹⁵ The benefit can include intangible as well as tangible property.¹⁶ Thus, according to s.76(5), if a criminal obtains a “pecuniary advantage” (which could be obtaining a debt¹⁷ or avoiding the payment of tax on smuggled goods¹⁸) his confiscation order will reflect this value. But what does “obtains” mean in this context? The same word can be found in s.71(4) of the CJA 1998, as amended. Although there was a similar provision in the drug trafficking legislation, the terminology differed and the verb “received” had been used instead.¹⁹ In *Crown Prosecution Service v Jennings*,²⁰ the House of Lords was invited to consider the precise meaning of these terms. In this case, the appellant was charged with conspiracy to defraud. He had been an employee of a company which had engaged in an advance fee fraud, whereby members of the public with poor credit ratings had been invited to pay £70 in anticipation of receiving a loan. No attempt was made to arrange any loans but the company retained all of the money received, which amounted to £584,637.64. The appellant was neither a director nor a shareholder of the company. He argued that it was the company which had acquired this large sum. He maintained that the only money which he had personally accepted was his salary and other payments which would total £50,000 at most, and that his confiscation order should reflect this smaller amount. The House of Lords considered that the statutory provisions should be given their plain English meaning and, regardless of whether the word “obtains” or “received” was used, the court should consider whether the defendant had gained property:

¹⁴May [2008] 1 A.C. 1028 at [48(5)].

¹⁵POCA 2002 s.76(4).

¹⁶See POCA 2002 s.84(1). See further CJA 1988 s.102(1).

¹⁷In the context of bank accounts, see *R. v Shabir* [2008] EWCA Crim 1809; [2009] 1 Cr. App. R. (S.) 84 at [10]. But quere whether this includes a thing in action which is not legally enforceable: *R. v Najafpour (Ahmed)* [2009] EWCA Crim 2723.

¹⁸See *R. v Smith (David)* [2001] UKHL 68; [2002] 1 W.L.R. 54; *R. v Moran* [2001] EWCA Crim 1770; [2002] 1 W.L.R. 253.

¹⁹DTA 1994 s.2(3).

²⁰[2008] 1 A.C. 1046.

“This must ordinarily mean that he has obtained property so as to own 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.”²¹

This test was then applied to the facts. Piercing the corporate veil, it was held that, as the appellant was a primary mover in the fraud and therefore had control over the property, he had obtained the larger sum of £584,637.64.

Title and ownership of tangible property

In *Jennings*,²² the House of Lords indicated that their judgment must be read in conjunction with their decision in *May*, in which it had been stated that:

“In determining, under the 2002 Act, whether D has obtained property or a pecuniary advantage and, if so, the value of any property or advantage so obtained, the court should (subject to any relevant statutory definition) apply ordinary common law principles to the facts as found. *The exercise of this jurisdiction involves no departure from familiar rules governing entitlement and ownership.*”²³

But what are the familiar rules governing entitlement and ownership? The concept of ownership refers to the “different collections of rights held by persons over physical and other things”.²⁴ It is possible to enjoy different interests in property. For example, the owner may agree to transfer a chattel to another for a period of time upon the understanding that possession will eventually revert. As a consequence, possession of the chattel will be separated from a reversionary possessory right. This is one form of bailment. The bailee will enjoy possession of the chattel for his own benefit during the time agreed and will have a “possessory” title. The bailor, who has handed over the object, will have a “proprietary” title.²⁵ However, in relation to tangible objects, the law pays particular regard to physical control.²⁶ This is so because, as the common law evolved, it was strongly influenced by procedure and the rules of evidence. If a person had physical control, it was presumed that he had the intention to hold for his own benefit and therefore had a possessory title as well; this presumption aided the resolution of evidential uncertainties.²⁷ Thus, a finder of a lost chattel will obtain a possessory title which will be as

²¹*Jennings* [2008] 1 A.C. 1046 at [13] (emphasis added).

²²*Jennings* [2008] 1 A.C. 1046 at [8].

²³*Jennings* [2008] 1 A.C. 1028 at [48(5)] (emphasis added).

²⁴*Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37; [2009] 2 All E.R. 986 at [28].

²⁵*Islamic Republic of Iran v Barakat Galleries Ltd* [2007] EWCA Civ 1374; [2009] Q.B. 22 at [16].

²⁶See F.H. Lawson and B. Rudden, *The Law of Property*, 3rd edn (2002), at pp.64–65.

²⁷See D. Fox, “Relativity of Title at Law and in Equity” [2006] C.L.J. 330 at 338.

good as an absolute title in the absence of a claim from someone with a better title.²⁸ Even if possession is wrongful, the position is the same. A thief who misappropriates an object will have an interest which the law will protect from anyone claiming title by later possession, although the thief's possessory title will ordinarily yield to those having title conferred by earlier possession.

The common law principle that physical control of an object carries with it an implication of possession and title is reflected in the law relating to confiscation orders. In *R. v Wilkes (Gary John)*,²⁹ for example, the police interrupted a burglary; the criminal had grabbed various objects but was forced to abandon them in his flight from the scene of the crime. His confiscation order reflected the value of the objects taken. In determining whether the defendant has obtained a benefit, the fact that the assets are later recovered by the police, as in the case of *Wilkes*, or are damaged or destroyed,³⁰ is irrelevant. For a brief period, the criminal will have gained physical control of these objects and has the intention to possess: this is sufficient to enable a court to conclude that he obtained a benefit reflecting their value. The common law developed a set of rules relating to title to provide certainty and to avoid disputes³¹; these principles are now called into play to support the confiscation regime.

Transfer of control of tangible property

In *May*, it was suggested that the defendant may be treated as having obtained a benefit where he has a power of disposition or control, such as where he is in a position to direct the transfer of the property to another.³² The Judicial Committee's emphasis upon determining who has control accords with common law principles. A person will have legal possession and title if he has sufficient control to exclude others and an intention to possess.³³ This would include a person who hires goods, or a burglar, as in the case of *Wilkes*. In contrast, it may be the case that although a person has an object in his custody, he has no intention of exercising dominion over the object to the exclusion of others. He will therefore not have legal possession. For example, if there is a bailment of goods, it will be a matter of looking at the terms of the bailment to determine whether the bailee had a right to possession.³⁴ If a bailee has

²⁸*Armory v Delamirie* (1722) 1 Strange 505; 93 E.R. 664 KB. See further *Parker v British Airways Board* [1982] Q.B. 1004 CA at 1018; *Costello v Chief Constable of Derbyshire* [2001] EWCA Civ 381; [2001] 1 W.L.R. 1437.

²⁹[2003] EWCA Crim 848; [2003] Crim L.R. 487. Contrast *R. v Wilkinson (Lee Geoffrey)* [2009] EWCA Crim 2733.

³⁰*R. v Davis (Derrick)* [2003] EWCA Crim 3110; [2004] 2 All E.R. 706 at [32] (Waller L.J.).

³¹*Parker v British Airways Board* [1982] Q.B. 1004 at 1009.

³²*R. v May* [2008] 1 A.C. 1028 at [48(6)].

³³*J.A. Pye (Oxford) Ltd v Graham* [2002] UKHL 30; [2003] 1 A.C. 419 at [39]–[43] (Lord Browne-Wilkinson).

³⁴*R. v Allpress* [2009] 2 Cr. App. R. (S.) 58 at [73].

hired goods for a period of time for his own benefit, he will have legal possession; in contrast, if he merely holds them on behalf of the owner, the owner will have control and constructive possession of them.³⁵

These common law principles can be applied to determine benefit for the purposes of a confiscation order in the following hypothetical problem:

A security guard opens the gate to a warehouse and allows the thieves to leave with the high value goods and he is paid £1,000 for his trouble. The thieves steal property for which the guard was responsible, to the value of £1,000,000. The guard is the only defendant. Is his benefit £1,000,000 or £1,000?³⁶

Whilst the security guard protects the goods in accordance with his instructions, he is merely a custodian and, assuming that his employer owns the goods, it is the employer who has the right to possession. The position changes when the security guard opens the gate to allow the thieves to steal the goods. At this point, he has flagrantly disobeyed his employer's instructions. If it can be shown that the guard has chosen to exercise control over the goods for his own benefit and to the exclusion of others, however briefly, he will have had legal possession; as a result, the benefit which he has obtained for the purposes of a confiscation order should be the value of the goods themselves (£1,000,000). Control of the goods is subsequently transferred to the thieves. If they can be found, they will be viewed as having obtained a benefit reflecting the value of the goods for the purposes of any confiscation order made against them. But it should be noted that, if it is evident that the security guard never attempted to exercise dominion over the goods, the value of his benefit will be merely £1,000. This would be so because control of the goods would have moved directly from his employer to the thieves.

The judgment in *R. v Islam*³⁷ provides a helpful illustration of the approach which may be taken in relation to determining control. In this case, a drug trafficker argued that he had never obtained possession of certain drugs because they were seized by Customs and Excise officers when they arrived at Felixstowe port. The drugs had been hidden in two consignments. The Court of Appeal stated that, in the light of the decisions in *May* and *Jennings*, this was a "hopeless" argument because the goods were under the appellant's complete control as consignee. Interestingly, the Court of Appeal did not elaborate on this statement or specify the terms of the international sales contract which had been used. In the context of international trade, the precise time when property in goods will pass

³⁵*Allpress* [2009] 2 Cr. App. R. (S.) 58 at [70]–[72]; F. Pollock and R.S. Wright, *Possession in the Common Law* (1888), at p.25.

³⁶This hypothetical example was kindly provided by Andrew Mitchell Q.C. and Stephen Hellman, barrister; it is reproduced with their permission. The suggested solution is my own.

³⁷[2008] EWCA Crim 1740; [2009] 1 Cr. App. R. (S.) 83.

will depend upon the parties' intentions and upon the property being sufficiently identified. Even so, it is common for property in the goods to pass either when the goods are loaded on board the ship or when the shipping documents are transferred whilst the goods are in transit.³⁸ The decision in *Islam* therefore appears to be entirely in tune with the "control" test. The commercial law aspects appear correct but were never explained in any detail. It can be argued that this is as it should be. Most Crown Court judges do not have to consider personal property law as part of their daily work.³⁹ In *R. v Mylupillai Sivaraman*,⁴⁰ Toulson L.J. expressed concern about the complexities of the law relating to confiscation orders and observed that, "to Circuit Judges and Recorders who do not come from a civil law background, it may seem rather daunting". Clearly, the appellate courts are keen to establish clear bright lines to assist those whose expertise lies primarily in the criminal law.

No control

In private law, litigation usually arises in a situation where an individual has an object in his custody and wishes to argue either that he has exercised dominion over the object to the exclusion of others and therefore *does* have a possessory title, or that he has *not* exercised any dominion in order to avoid liability in conversion. If an individual never has any control whatsoever, there is no hope of either making a claim or being held liable. It should be obvious that, if an individual is convicted of a criminal offence but never received control of an object, he will not have benefited from his conduct. This principle was confirmed by *R. v Olubitan*.⁴¹ In this case, a gang obtained two consignments of mobile telephones, paying for them with worthless bank documents. Subsequently, the appellant joined the gang. In the meantime, the police received a tip-off. As a result, the next consignment, which was the only one with which the appellant was involved, was a dummy consignment which was intercepted by the police before the defendant could obtain it. The Court of Appeal rightly held that he had not obtained any benefit from this consignment and his confiscation order was quashed.

Joint ownership

In *May*, it was stated that where each defendant has control over the whole property at some point, there is joint possession and each defendant will

³⁸This is true in relation to the most popular international sales contracts, f.o.b. and c.i.f. contracts. See, e.g. *Scottish and Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11; [2008] 2 All E.R. 768; *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd* [1986] A.C. 785 HL.

³⁹*Serious Fraud Office v Lexi Holdings Plc* [2008] EWCA Crim 1443; [2009] Q.B. 376 at [92].

⁴⁰[2008] EWCA Crim 1736; [2009] 1 Cr. App. R. (S.) 80 at [13].

⁴¹[2003] EWCA Crim 2940; [2004] 2 Cr. App. R. (S) 14; approved in *R. v May* [2008] 1 A.C. 1028 at [19].

own the whole of the property for the purposes of a confiscation order.⁴² A simple hypothetical example would be where three members of a gang steal objects worth £2 million and store it in a rented garage. If each member has a key to the garage, each may be seen as having control over the whole. Consequently, each will be treated as having obtained £2 million in value. This analysis was applied in *May*, where the defendant was convicted of conspiracy to cheat Customs and Excise of value added tax. The defendant argued that, as he had joined the conspiracy half way through, the total amount should be apportioned between those involved. But it was held that, as he had control over the whole property at the later stage, he had obtained the total value of unpaid tax. A similar approach was taken in *R. v Green*.⁴³ Here, as the trial judge had found that any money obtained by the co-conspirators was held by them jointly with the defendant, the House of Lords held that his benefit was the value of all of the property.⁴⁴ Their Lordships held that it was vital to analyse the capacity in which an accomplice received assets: if a co-conspirator received them on behalf of them all, then they all held jointly. The fact that a co-conspirator might then pocket part of the proceeds before passing the rest on to the others did not affect matters.

One may say, with some caution, that this analysis reflects the common law position. Where there are conflicting claims to chattels, the common law will resolve title disputes in favour of one party rather than giving all claimants proportionate shares. Nevertheless, the common law has always accepted that parties can agree to co-own chattels either as joint tenants or tenants in common and they will have concurrent interests in the object. In the latter situation, a party will own an undivided share in the asset. Each tenant will have "a separate but not separated share of the asset held in common".⁴⁵ Joint tenants hold property jointly and the survivor is entitled to the whole. Nevertheless, any joint tenant can turn his joint entitlement into an undivided share in the asset by giving notice to the others. However, their Lordships in both *May* and *Green* did not analyse whether criminals, such as co-conspirators, held the property as joint tenants or tenants in common. One may surmise that the omission was deliberate: their Lordships were concerned to establish clear bright lines in relation to all types of property and were therefore intent upon keeping the focus of the inquiry upon the need to identify those in control. Consequently, if the Crown can establish that property had been received jointly by criminals acting as principals, they will each be viewed as obtaining the whole of the value. The result may be harsh for the criminals

⁴²*May* [2008] 1 A.C. 1028 at [27], [44].

⁴³[2008] 1 A.C. 1053.

⁴⁴*Green* [2008] 1 A.C. 1053 at [15].

⁴⁵Lawson and Rudden, *The Law of Property* (2002), at p.92.

concerned. However, the courts are expected to look carefully at the facts and, if it appears that a defendant only took control of a small portion of the property, his confiscation order will be confined to the value of that part.

The distinction between principals and mere custodians and minders

Although some crimes are committed alone, it is common for other people to be involved at various stages. If, for example, stolen goods are handed from a thief to a handler who then resells them, it will be easy enough to say that each person in turn has benefited. The position is more complicated where it is not clear whether a junior member of the gang had any real control over the goods, even if he had physical possession for a short period. In *May*, their Lordships distinguished a situation where the defendant had control from one where the defendant acts as a “minder or custodian”.⁴⁶ The benefit which a custodian of goods would be viewed as having obtained would not be the assets derived from crime but the relatively small payment which was received.⁴⁷ From a policy perspective, this is not necessarily satisfactory. One must remember that these accessories have been convicted of crimes themselves: they are not innocent people who have been caught up in a dishonest scheme. A large number of crimes could not be carried out if there were not “smaller fish” ready to aid the ringleaders. However, the House of Lords’ approach is defensible when one considers common law principles, where a distinction is made between those who deal with objects as if they are their own and those who are custodians. A defendant will only be liable in conversion if it can be shown that he treated the property in issue in a manner which was inconsistent with the property rights of the owner.⁴⁸ If a defendant stores goods in accordance with the instructions of the apparent owner, he will not be liable.⁴⁹ Yet the civil courts have struggled at times to determine whether a defendant was merely a custodian or whether he had exercised control over the property.⁵⁰ These cases are often far removed from the type of case which a Crown Court judge is likely to face. In the context of a confiscation order, the simple but clear guidance provided by their Lordships in *May*, whereby those who act as agents in accordance with their instructions cannot be said to have obtained a benefit from the property, seems appropriate.⁵¹

⁴⁶*R. v May* [2008] 1 A.C. 1028 at [15].

⁴⁷*R. v Allpress* [2009] 2 Cr. App. R. (S.) 58; *R. v Johannes* [2001] EWCA Crim 2825; [2002] 2 Cr. App. R. (S.) 30; *R. v Sewell* [2009] EWCA Crim 488.

⁴⁸*Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19; [2002] 2 A.C. 883 at [39].

⁴⁹*Hollins v Fowler* (1874) L.R. 7 H.L. 757 at 767.

⁵⁰See *Marcq v Christie Manson & Woods Ltd* [2003] EWCA Civ 731; [2004] Q.B. 286.

⁵¹See *R. v Sewell* [2009] EWCA Crim 488.

The courts are expected to take a common-sense approach in applying the statutory provisions. For example, in *R. v Mylupillai Sivaraman*,⁵² there was a conspiracy to buy red diesel fuel, which was subject to a low rate of tax because it was intended solely for agricultural use. The conspirators removed the red dye colouring so that it could be sold as ordinary diesel fuel. The appellant was the manager of his employer's garage. He accepted nine deliveries, knowing of the conspiracy, and received £15,000 for his trouble. However, the tax avoided on those nine deliveries was almost £130,000. He appealed against his confiscation order, which reflected the tax avoided; he argued that it should be limited to the sum of £15,000 which he had been paid. He maintained that he had merely accepted the fuel on behalf of his employer: the deliveries had been arranged by his employer and were pumped into his storage tanks. The Court of Appeal noted that the trial judge had accepted that the appellant was merely an employee: he was not a joint purchaser of the fuel who, by his conduct, would jointly obtain a pecuniary advantage. Toulson J. observed that, although the appellant was convicted of conspiracy with others, it did not automatically follow, for the purposes of a confiscation order, that he received a joint benefit.⁵³ As the manager was acting upon the instructions of his employer, it was held that the confiscation order should be limited to the payment which was additional to his salary.

It would therefore appear from the decision in *Mylupillai Sivaraman* that a large number of accessories will avoid large confiscation orders by pleading that they are mere employees. It could be said that the decision is particularly striking because the appellant was a manager and, as a senior member of an organisation, he would have significant control over his employer's property. However, the Court of Appeal's reasoning rewards careful attention. The thrust of its decision was that, applying the guidance contained in *May*, what matters is the capacity in which a particular defendant receives property.⁵⁴ In carrying out this inquiry, the facts are all important. The appellant, despite being described as a manager, appeared to possess a fairly low status and his actions were governed by his employer. The reality is that there are all sorts of "managers" in the commercial world. Rather than being distracted by the nomenclature of a particular post, courts must focus upon whether a defendant held property for his own benefit or whether the property was under the control of another.

⁵²[2009] 1 Cr. App. R. (S.) 80.

⁵³*Sivaraman* [2009] 1 Cr. App. R. (S.) 80 at [20].

⁵⁴*Sivaraman* [2009] 1 Cr. App. R. (S.) 80 at [12(6)]; *R. v Allpress* [2009] 2 Cr. App. R. (S.) 58 at [30].

Banknotes and bank accounts

This article has concentrated primarily so far on common law principles relating to goods. What is the position in relation to banknotes in private law? Unless banknotes have been earmarked in some way, they will form part of the general currency. If the money is stolen, a thief has a possessory title, which he can pass to anyone. Indeed, unlike the position involving theft of goods, a good faith purchaser will obtain an absolute title to banknotes upon delivery.⁵⁵ In *R. v Allpress*,⁵⁶ the Crown argued that, as bank notes are fungible and possessory title passes upon delivery, any money launderer receiving cash derived from crime will have obtained a benefit to the extent of its value. In this case, the first three appellants had acted as couriers, transporting cash from one person to another. The Court of Appeal rejected the Crown's argument and ruled that the courts should not take any special approach to bank notes for the purposes of the confiscation regime.⁵⁷ The key distinction to be made for all types of property was between mere custody and control.⁵⁸ The court suggested by way of example that an employee, such as a till operator, may receive cash on behalf of his employer; in this situation, the employee will have no right to possession of the money and it is the employer who will exercise control.⁵⁹ As the couriers had possession but not control, it was held that the benefit which they obtained was limited to the value of the relatively small payment which they had received.⁶⁰

What if money is paid into a bank account? According to common law principles, it ceases to be identifiable and the bank obtains title to it. The debt which the bank owes to its customer will reflect the value of the money received.⁶¹ In other words, the payment will give rise to a thing in action in favour of the customer, who will have an enforceable right to its value. In order to determine whether a criminal has obtained a benefit in this context, the Court of Appeal in *Allpress* ruled that it is a matter of identifying the persons in control,⁶² in accordance with the guidance provided by the House of Lords in *May*.⁶³ If, for example, a defendant has fraudulently made out a cheque, drawn upon his employer's bank account, in favour of an accomplice, the defendant can be viewed as having

⁵⁵*Miller v Race* (1758) 1 Burr. 452 at 457–458; 97 E.R. 398 KB at 401.

⁵⁶[2009] 2 Cr. App. R. (S.) 58.

⁵⁷*Allpress* [2009] 2 Cr. App. R. (S.) 58 at [45]–[49]. See further *R. v Seager* [2009] EWCA Crim 1303 at [60].

⁵⁸*Allpress* [2009] 2 Cr. App. R. (S.) 58 at [70]–[72].

⁵⁹*Allpress* [2009] 2 Cr. App. R. (S.) 58 at [75].

⁶⁰*Allpress* [2009] 2 Cr. App. R. (S.) 58 at [80].

⁶¹*South Australian Insurance Co v Randell* (1869) L.R. 3 P.C. 101 at 111; *Foley v Hill* (1848) 2 H.L. Cas. 28 at 36–37; *Ross v Lord Advocate* [1986] 3 All E.R. 79 HL at 85.

⁶²*Allpress* [2009] 2 Cr. App. R. (S.) 58 at [85]. Contrast the position where control is severely limited: *R. v Frost (Colin Charles)* [2009] EWCA Crim 1737.

⁶³*R. v May* [2008] 1 A.C. 1028 at [48(6)].

obtained a benefit because he was in control of the employer's money via the medium of the cheque.⁶⁴ Once the money is paid into an account, all those who control the account will be viewed as obtaining a benefit, unless there is evidence to show otherwise.⁶⁵ Thus, if the defendant is the sole signatory of an account, the money will be viewed as being held for his benefit.⁶⁶ If the account is in the names of several criminals, there may be joint control, depending upon the facts; if each has unfettered control over the account, each will be viewed as having obtained a benefit of the entire value (akin to the example given above of where tangible assets are stored in a garage and each criminal has a key to the garage).

The Court of Appeal's decision in *Allpress* provides welcome clarification of the principles to be applied in relation to cash and money in bank accounts. The ruling that no distinction is to be made for the purposes of a confiscation order between cash and other types of property is surely the right approach. Common law rules relating to money evolved in earlier times and were commercially convenient, providing traders with transactional security. It would have been anomalous to create a situation where cash couriers were treated differently from other types of criminal in the context of confiscation orders. By strengthening the emphasis upon the question of control, the Court of Appeal's decision has served to illuminate the House of Lords' judgments in *May*, *Jennings* and *Green*. Although a complex point of the common law may have been discounted as a consequence, this is not at odds with the judgment in *May* itself. It was stated that common law principles would be used to support the confiscation regime. However, it was never envisaged that the common law would enjoy equal status with the statutory provisions; the common law was seen as a servant not a partner.

THE POSITION OF MONEY LAUNDERERS

In *May*, the House of Lords somewhat hesitantly suggested that money launderers might not be viewed as custodians:

"D ordinarily obtains property if in law he *owns* it, whether alone or jointly, which will ordinarily connote a power of disposition or control . . . *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

⁶⁴*R. v Newman* [2008] EWCA Crim 816; [2009] 1 Cr. App. R. (S.) 12 at [13]–[14].

⁶⁵Such as where a criminal is using his child's account to deposit the proceeds of crime: *R. v Allpress* [2009] 2 Cr. App. R. (S.) 58 at [86].

⁶⁶This is the case even where the account is a company bank account: *R. v Sharma* [2006] EWCA Crim 16; [2006] 2 Cr. App. R. (S.) 63, approved in *R. v May* [2008] 1 A.C. 1028 at [34].

found to have obtained that property. *It may be otherwise with money launderers.*"⁶⁷

This comment appears puzzling at first glance. It would be a matter of serious concern if the courts were to treat money launderers differently in this context in the belief that their crimes deserved more severe measures. There is no statutory basis for making such a distinction. Equally, there is no policy reason for doing so. Handling stolen goods, for example, is also seen as a very serious offence.⁶⁸ It would seem odd to single out money laundering offences, particularly as they are widely drawn and there is an overlap with other offences. This overlap has already provoked debate.⁶⁹ However, there is no evidence that money launderers are treated differently in relation to confiscation orders. Indeed an argument to that effect was expressly rejected by the Court of Appeal in *Allpress*.⁷⁰ It is therefore submitted that, in *May*, their Lordships were simply acknowledging that they were aware that the principal money laundering offences present particular factual problems. This is because, where an individual is charged with one of these offences, receipt of property is not an ingredient of all three money laundering offences. Even where it is an ingredient, custody may suffice. To illustrate these two points, the offences must be examined in turn.

The three principal money laundering offences are now contained in ss.327, 328 and 329 of the POCA 2002.⁷¹ They are broad in scope and overlap.⁷² For each offence, the prosecution must show that the defendant knew or suspected⁷³ that the property was derived from criminal conduct. The offences cover not only money but various types of property, including goods.⁷⁴ The question of whether a defendant has benefited in connection with his criminal conduct for the purposes of a confiscation order is quite distinct from the question of whether he is guilty of an offence. Consequently, if an individual is convicted under one of these sections, the factual basis upon which the jury reached its verdict (together with any additional findings of fact which do not conflict with the verdict),

⁶⁷*R. v May* [2008] 1 A.C. 1028 at [48(6)] (emphasis added).

⁶⁸D. Ormerod, *Smith and Hogan: Criminal Law*, 11th edn (2005), at p.834.

⁶⁹*R. v Allpress* [2009] 2 Cr. App. R. (S.) 58 at [44]. See further *R. v Rose* [2008] EWCA Crim 239; [2008] 3 All E.R. 315.

⁷⁰*Allpress* [2009] 2 Cr. App. R. (S.) 58 at [43]. See further *R. v Seager* [2009] EWCA Crim 1303 at [60].

⁷¹They came into force on February 24, 2003: SI 2003/120. POCA 2002 Pt 7 has been amended by the Serious Organised Crime and Police Act 2005, which came into effect on July 1, 2005.

⁷²e.g. cash couriers can be prosecuted under POCA 2002 s.327(1)(d), or its statutory predecessors, as in *R. v Loizou* [2005] EWCA Crim 1579; [2005] 2 Cr. App. Rep. 37, as well as under POCA 2002 s.328.

⁷³POCA 2002 s.340(3). See *R. v Da Silva* [2006] EWCA Crim 1654; [2007] 1 W.L.R. 303.

⁷⁴POCA 2002 s.340(9).

should be considered afresh to determine the benefit received for the purposes of a confiscation order.⁷⁵

Section 327(1) makes it an offence to (a) conceal, (b) disguise, (c) convert or (d) transfer criminal property or (e) remove it from the jurisdiction.⁷⁶ For example, if the defendant altered the appearance of a stolen vehicle, such as by adding false registration plates, or by stripping it and adding parts to other cars, he may be guilty of disguising it contrary to s.327(1)(b).⁷⁷ If a defendant is involved in transferring a sum of money representing the proceeds of crime into and out of a bank account, he may be guilty of converting it contrary to s.327(1)(c).⁷⁸ However, for the purpose of a confiscation order, the court must decide who had control of the property, whether tangible or intangible, in order to ascertain whether he obtained a benefit. If the criminal had merely been involved in storing or transporting criminal property in accordance with instructions, it is unlikely that he has gained its value as a benefit.

If a defendant acts as an agent in relation to a money laundering scheme, the prosecution may bring a charge under s.328 of the 2002 Act, which provides:

“A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.”⁷⁹

The section affects a wide variety of professionals: for example, a solicitor who is involved in the conveyance of a house from one person to another can be prosecuted under s.328 if criminal property is involved.⁸⁰ However, the benefit which the solicitor has received will only reflect the value of the fee which he received,⁸¹ unless it can be shown that he had exercised control. This is evident from the decision in *Allpress*.⁸² In this case, the appellant Morris was a solicitor who had sole operational control of the bank account in question. He had actively directed the movement of money hither and thither in order to conceal its provenance. It was held that he had obtained its value and his confiscation order should reflect this fact.

⁷⁵*R. v Sangha* [2008] EWCA Crim 2562; [2009] 2 Cr. App. R. (S.) 17 at [30]. Moreover, a defendant who pleads guilty to an offence but without factual admissions can challenge the evidence for the purposes of the confiscation process: *R. v Knaggs* [2009] EWCA Crim 1363.

⁷⁶As regards the prior law, see DTA 1994 s.49(2) and CJA 1988 s.93C(2).

⁷⁷*R. v Eshimu* [2007] EWCA Crim 1380; *R. v Ashmore* [2006] EWCA Crim 2996.

⁷⁸*R. v Fazal* [2009] EWCA Crim 1697; [2010] 1 Cr. App. R. 6 at [22]. See further *R. v Saik* [2006] UKHL 18; [2007] 1 A.C. 18.

⁷⁹As regards the prior law, see DTA 1994 s.50, and CJA 1988 s.93A, as amended by CJA 1993 s.29.

⁸⁰*R. v Griffiths* [2006] EWCA Crim 2155; [2007] 1 Cr. App. R. (S.) 95.

⁸¹In relation to the previous law, see *R. v Glatt* [2006] EWCA Crim 605.

⁸²[2009] 2 Cr. App. R. (S.) 58.

An individual will be prosecuted under s.329 where he has acquired, used or had possession of criminal property.⁸³ A typical example would be where a criminal gives his girlfriend money from the sale of drugs by way of a gift.⁸⁴ This section appears to be particularly concerned with those who receive property for their own benefit and their conviction may well suggest that they have legal possession of the property itself. Even so, courts must revisit the facts to determine whether this is the case. In *Allpress*, for example, Martin was prosecuted under this section because he was in possession of drug money which he was storing for his brother. As he did not control the money, he did not benefit from it for the purposes of a confiscation order.

Caution therefore needs to be taken in determining the value which the criminal has obtained in relation to a money laundering offence. This is particularly so because s.340(11) widens the net to include all those who aid, abet, counsel or procure these offences. The emphasis placed upon control clarifies the law and sends a message to Crown Court judges that they will need to examine any communications, as well as the actions, of those involved in money laundering to distinguish between those who are in charge and those who merely carry out their instructions.

The value of the benefit

Once it is clear that property was obtained as a result of or in connection with criminal conduct,⁸⁵ its market value will be ascertained.⁸⁶ The law operates in a harsh manner. It is irrelevant that the criminal has merely a possessory title rather than ownership of the property in question; he cannot argue that the value is nil because the true owner may recover the property at any time.⁸⁷ Furthermore, by s.80(1), the market value is determined at the “material time.” By s.80(2), this might be the value at the time when the defendant obtained the property, adjusted to take account of inflation; but, if the criminal has retained the property (or an exchange product) which has increased in value by the time when the court makes its decision, it will be that higher value.⁸⁸ Thus, suppose that the prosecution can establish that the defendant received £100,000 in cash from criminal activity. A confiscation order can be made for that amount, adjusted to take account of inflation. As this is a personal debt due to

⁸³As regards the prior law, see DTA 1994 s.51, CJA 1988 s.93B.

⁸⁴*R. v Taylor* [2005] EWCA Crim 966.

⁸⁵POCA 2002 s.76(4). As regards prior legislation, see DTA 1994 s.4(1)(a) and CJA 1988 s.7(4).

⁸⁶POCA 2002 ss.76(7), 79(2). As regards prior legislation, see DTA 1994 s.4(1)(b) and CJA 1988 s.7(4). Although illegally imported drugs do not have a value in a legitimate market, their estimated value on the illegitimate market for which they were destined can be used: *R. v Islam* [2009] UKHL 30; [2009] 1 A.C. 1076. See further *R. v Mejia* [2009] EWCA Crim 1940.

⁸⁷*R. v Allpress* [2009] 2 Cr. App. R. (S.) 58 at [63].

⁸⁸See further POCA 2002 s.80(2), (3).

the State, there is no need to seek the property itself. Consequently, if the money was paid into a bank account and transferred from one bank account to another overseas, there is no need for the prosecution to trace the money through these accounts. It is enough to point to the initial receipt of £100,000. But, if the money has been used by the criminal to purchase an asset which has increased in value, the prosecution can opt to use this value.⁸⁹ In short, s.80 provides the prosecution with a series of options which are likely to increase the value of the confiscation order and which operate in a penal fashion against the wrongdoer.

The recoverable benefit

The convicted criminal may not be able to pay the value of what he has obtained from his criminal activities. For example, the property which he obtained may have been recovered by the police and returned to its true owner, or it may have been handed over to accomplices. This evidence was not relevant at the two previous stages of the inquiry. However, it is vital at this third stage. If the defendant has insufficient funds to pay the recoverable benefit, he can bring forward evidence to explain why. The court will then determine what sum is available to satisfy the confiscation order. There are detailed rules which guide the court in this inquiry.⁹⁰ These rules moderate the severity of the confiscation order regime. As their Lordships observed in *May*, it would be unjust to subject a defendant to a further term of imprisonment if he does not have the means to pay a confiscation order.⁹¹ It would mean that a rich defendant could escape an additional period in jail, whilst a poor defendant could not.

Nevertheless, these provisions do not necessarily prevent harsh results. A diligent saver who has led a blameless life until being tempted astray may find that, for example, as the property which he obtained has been returned to the true owner, he is obliged to pay the confiscation order by using his hard-earned reserves. The only justification one can put forward is that the law does not operate by way of a fine but depends upon the value of the benefit which the defendant has received: it is intended to be rational but draconian in character. It may well mean that, where a group of criminals co-operate in carrying out a crime, there will be an asymmetric removal of property, with some suffering more than others because they have substantial assets. This can be defended on the basis of policy. Career criminals, engaged in sequential offences, will make serious efforts to avoid detection and one obvious way of doing so is to use friends and acquaintances who have no convictions and who are

⁸⁹See, e.g. *R. v Panesar* [2008] EWCA Crim 1643.

⁹⁰POCA 2002 ss.6(5), 7, 9(1); DTA 1994 ss.5, 6; CJA 1988 ss.71(6), 74, 83. See *R. v Mehta* [2009] EWCA Crim 1601.

⁹¹*R. v May* [2008] 1 A.C. 1028 at [35].

unknown to the police. It can be argued that, if a newcomer runs the risk of paying far more than his accomplices because he has savings, this may lead to a breakdown in co-operative behaviour between criminals.⁹² If this factor became well known amongst the public, it would act as a serious deterrent. The problem at the moment is that confiscation orders are not well understood by anyone other than specialists in the field.

HUMAN RIGHTS

Article 1 of Protocol No.1

A criminal who is stripped of his property may object that the confiscation regime violates art.1 of Protocol No.1 of the European Convention on Human Rights. Protocol No.1 is set out in Sch.1 to the Human Rights Act 1998 and consists of three rules:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions.⁹³ No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

These rules are distinct and must be balanced against each other; together they provide a framework against which a particular legal principle may be judged.⁹⁴

In *Phillips v United Kingdom*,⁹⁵ it was held that a confiscation order was a penalty, falling within the third rule of “control of use” of Protocol No.1.⁹⁶ Once Protocol No.1 is engaged, the burden falls upon the UK Government to justify legislation for which it is responsible. The Government is obliged to show that the relevant law is clear and precise in

⁹²R. Cooter and N. Garoupa, “The Virtuous Circle of Distrust: a Mechanism to Deter Bribes and Other Cooperative Crimes” (November 7, 2000), Berkeley Ohlin Program in Law & Economics, Working Paper 32, <http://escholarship.org/uc/item/83c0k3wc>.

⁹³Intangible property is protected: *Stran Greek Refineries v Greece* (1994) 19 E.H.R.R. 293 ECtHR at [59]–[62]; *Blake v United Kingdom* (2006) 44 E.H.R.R. 633 ECtHR at [168]. Possessory interests are also protected: *Beyeler v Italy (No.1)* (2001) 33 E.H.R.R. 52 ECtHR.

⁹⁴*Kozacioglu v Turkey* (App. No.2334/03), decision of February 19, 2009 ECtHR [GC] at [48]; *J.A. Pye (Oxford) Ltd v United Kingdom* (2007) 46 E.H.R.R. 45 ECtHR [GC] at [52]; *Sun v Russia* (App. No.31004/02), decision of February 5, 2009 ECtHR at [23]; *Islamic Republic of Iran Shipping Lines v Turkey* (2007) 47 E.H.R.R. 573 ECtHR at [86].

⁹⁵(2001) 11 B.H.R.C. 280 ECtHR. See further *R. v Glatt* [2006] EWCA Crim 605.

⁹⁶(2001) 11 B.H.R.C. 280 at [51]. See further *Sun v Russia* (App. No.31004/02), decision of February 5, 2009 at [25]; *Allgemeine Gold-und Silberscheideanstalt v United Kingdom* (1986) 9 E.H.R.R. 1 ECtHR at [51].

accordance with the rule of law.⁹⁷ The recent decisions in *May*, *Jennings*, and *Green* ensure that the law is coherent. As the Judicial Committee of the House of Lords observed in *Crown Prosecution Service v Jennings*:

“It is, however, relevant to remember that the object of the legislation is to deprive the Defendant of the product of his crime or its equivalent, not to operate by way of fine. The rationale of the confiscation regime is that the Defendant is deprived of what he has gained or its equivalent.”⁹⁸

The relationship between the private law of personal property and the confiscation regime is complex and is not readily comprehensible to the untutored eye. But a law is Convention-compatible if its effect is foreseeable if legal advice is obtained⁹⁹; the rules of the confiscation regime satisfy this test.

The Government would also be obliged to demonstrate that any interference with an individual’s enjoyment of his possessions is in the public interest for social, economic or other reasons. In the case of confiscation orders, the policy objectives are compelling. As Lord Steyn observed in *R. v Rezvi*, in relation to an earlier confiscation regime:

“It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential. The provisions of the 1988 Act are aimed at depriving such offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises.”¹⁰⁰

There must be a “reasonable relationship of proportionality” between the policy behind the law and its effect upon the individual.¹⁰¹ The court considers a wide variety of circumstances in determining this issue and the wrongful conduct of the defendant is one factor to be taken into account.¹⁰² A legislative provision must not be arbitrary so that

⁹⁷*Adzhigovich v Russia* (App. No.23202/05), decision of October 8, 2009 ECtHR at [32]–[34]; *Sun v Russia* (App. No.31004/02), decision of February 5, 2009 at [26]–[27].

⁹⁸[2008] 1 A.C. 1046 at [13].

⁹⁹*Sun v Russia* (App. No.31004/02), decision of February 5, 2009 at [27].

¹⁰⁰*R. v Rezvi* [2002] UKHL 2; [2003] 1 A.C. 1099 at [14].

¹⁰¹*J.A. Pye (Oxford) Ltd v United Kingdom* (2007) 46 E.H.R.R. 45 at [55]; *Gabric v Croatia* (App. No.9702/04), decision of February 5, 2009 ECtHR at [35]; *Allgemeine Gold-und Silberscheideanstalt v United Kingdom* (1986) 9 E.H.R.R. 1 at [52]; *James v United Kingdom* (1986) 8 E.H.R.R. 123 ECtHR at [50]; *R. v DPP Ex p. Kebilene* [2000] 2 A.C. 326 HL at 380.

¹⁰²*Allgemeine Gold-und Silberscheideanstalt v United Kingdom* (1986) 9 E.H.R.R. 1 at [54]. Lack of compensation might be a relevant factor in relation to the second rule: *Lithgow v United Kingdom* (1986) 8 E.H.R.R. 329 ECtHR; however, it is not relevant in relation to the third rule, concerning control of use of property: *J.A. Pye (Oxford) Ltd v United Kingdom* (2007) 46 E.H.R.R. 45 at [79].

an unusually heavy burden is placed on certain individuals.¹⁰³ It could be argued that the law is too harsh and the regime should be confined to recovering profits. However, the European Court will not declare a particular legislative provision incompatible with Protocol No.1 simply because a better solution might be available.¹⁰⁴ It would therefore not be enough to point to the fact that English confiscation legislation is more severe than comparable regimes elsewhere.¹⁰⁵ This is because there is considerable discretion available to states in this area (known as a “margin of appreciation”) in relation to the means of enforcement and in determining whether its consequences are justified. It is thought that states are in a better position to make a judgment regarding social and economic factors within their jurisdiction.¹⁰⁶ The legislature’s judgment is respected “unless that judgment is manifestly without reasonable foundation”.¹⁰⁷ The POCA 2002 builds upon prior law, which has never been limited to profits¹⁰⁸ and which has been consistently declared to be a proportionate response to policy concerns to deter crime and to protect the public.¹⁰⁹ Furthermore, it is not clear that a regime which targets profits is the best answer. If confiscation orders were limited to profits alone, it might well mean that the law no longer acted as a deterrent and failed to meet its policy objectives. A scheme based upon profits might encourage criminals to view crime as akin to any other form of business venture, in which the possibility of detection and imprisonment was simply to be factored into a project as an acceptable risk.

The problem of multiple defendants

Although any attack on the overall scheme of confiscation orders is highly unlikely to succeed, this does not preclude an appeal on the basis of a specific aspect of the POCA 2002. It could be argued that the legislation is disproportionate because confiscation orders against multiple defendants may in total far exceed the profits of the crime. As discussed, if a number of defendants have joint control of assets, each will be viewed as having received a benefit of the whole value and there will be no apportionment.¹¹⁰ Equally, the sums recovered by way of confiscation

¹⁰³ *Sporrong and Lönnroth v Sweden* (1982) 5 E.H.R.R. 35 ECtHR at [73]; *Kristov v Ukraine* (App. No.24465/04), decision of February 19, 2009 ECtHR at [46].

¹⁰⁴ *James v United Kingdom* (1986) 8 E.H.R.R. 123 at [51].

¹⁰⁵ *R. v Green* [2008] 1 A.C. 1053 at [16].

¹⁰⁶ *J.A. Pye (Oxford) Ltd v United Kingdom* (2007) 46 E.H.R.R. 45 at [55], [71], [75]; *Allgemeine Gold-und Silberscheideanstalt v United Kingdom* (1986) 9 E.H.R.R. 1 at [48].

¹⁰⁷ *Kozacioglu v Turkey* (App. No.2334/03), decision of February 19, 2009 at [53]; *J.A. Pye (Oxford) Ltd v United Kingdom* (2007) 46 E.H.R.R. 45 at [71].

¹⁰⁸ *R. v Shabir* [2009] 1 Cr. App. R. (S.) 84 at [12].

¹⁰⁹ *R. v Rezvi* [2003] 1 A.C. 1099 at [17]; *Phillips v United Kingdom* (2001) 11 B.H.R.C. 280 at [52]–[54].

¹¹⁰ *R. v May* [2008] 1 A.C. 1028 at [27], [44]. See further *Crown Prosecution Service v Jennings* [2008] 1 A.C. 1046; *R. v Green* [2008] 1 A.C. 1053 at 1154.

orders may be vastly inflated where there are a series of offences involving the same property, involving either handling stolen goods or money laundering. However, the risk that the State may receive huge sums of money due to the fact that a gang is involved in a particular economic crime may not frequently materialise in practice. The law's focus upon receipt of a benefit can act to restrict the scope of confiscation orders. First, the court may find that some of the gang members did not take possession and therefore cannot be made subject to a confiscation order at all. Secondly, if the evidence indicates that the defendant has only received a particular portion of the property, his benefit will be limited to this value alone. Thirdly, if there is evidential confusion, the court may order equal apportionment of the value.¹¹¹ Fourthly, custodians who had no control over the property, regardless of whether they have been convicted of a conspiracy,¹¹² will be viewed as having only obtained the fee which they received.¹¹³ Even where defendants are found to have legal possession of property, they may have dissipated the proceeds, so that the amount available to pay the confiscation order is a relatively small sum.

In *May*, the House of Lords considered that, in general, there would be no breach of Protocol No.1 because the law merely deprived the criminal of property which he had wrongfully received.¹¹⁴ However, somewhat surprisingly, it was added:

“There might be circumstances in which orders for the full amount against several Defendants might be disproportionate and contrary to art 1 of the First Protocol, and in such cases an apportionment approach might be adopted, but that was not the situation here and the total of the confiscation orders made by the judge fell well below the sum of which the Revenue had been cheated.”¹¹⁵

This comment is puzzling at first sight. If each member of a gang had control of the whole property for a short period of time, it is difficult to see how the courts can order apportionment without creating a decision which conflicts with case law establishing that, as soon as a defendant obtains legal possession of property, he has received a benefit which reflects its value. Yet it may be that this comment was made because their Lordships wished to avoid appearing intransigent, when they could not anticipate every type of circumstance which might arise.

¹¹¹*R. v May* [2008] 1 A.C. 1028 at [32]; *R. v Gibbons* [2002] EWCA Crim 3161; [2003] 2 Cr. App. R. (S.) 34. This mirrors the civil law: see *Glencore International AG v Metro Trading International Inc* (No.2) [2001] 1 Lloyd's Rep. 284 QBD; J. Ulph, “Retaining Proprietary Rights at Common Law through Mixtures and Changes” [2001] L.M.C.L.Q. 449.

¹¹²*R. v Allpress* [2009] 2 Cr. App. R. (S.) 58 at [31].

¹¹³*R. v May* [2008] 1 A.C. 1028 at [15].

¹¹⁴*May* [2008] 1 A.C. 1028 at [46]; *R. v Green* [2008] 1 A.C. 1053 at [16].

¹¹⁵*May* [2008] 1 A.C. 1028 at [45].

The statutory assumptions and the definition of “criminal lifestyle”

One feature of the law which is seen as manifestly unjust relates to the treatment of people of hitherto good character. One would think that first-time offenders would simply face a confiscation order relating to the particular offence for which they have been convicted. Although this may happen, and this possibility is recognised by s.6(4)(c), first-time offenders are often treated as having a “criminal lifestyle” instead. If any offender falls within the “criminal lifestyle” definition, it is assumed by ss.6(4) and 10 that any income gained, or property received, or expenditure incurred, *over a period of six years* prior to the commencement of proceedings has been derived from the defendant’s “general criminal conduct”.¹¹⁶ Although the defendant can rebut these assumptions by establishing that the property in question did not derive from criminal conduct,¹¹⁷ it may be very difficult to bring forward convincing proof—or even remember the facts—in relation to a transaction made some years before.¹¹⁸ These assumptions, which apply at the second stage of the assessment process in determining the value of the benefit, are therefore seen as draconian. They may well leave criminals penniless. Their friends and family are affected because they had no right to any gifts provided by a defendant during those years.¹¹⁹ Section 10 provides two limited safeguards. The assumptions will not be made if either it would be incorrect to do so in relation to specific property or if there would be a serious risk of injustice.¹²⁰ The injustice must relate to the operation of the assumptions rather than from the consequences, however severe, of making the confiscation order. This safeguard has a fairly narrow scope. It is not intended to give the judge a general discretion to decide whether the application of the assumptions is fair. It is intended to avoid unjust contradictions in relation to facts, such as where an assumption would conflict with evidence which the judge accepted during the trial.¹²¹

The application of these assumptions may seem reasonable where the law is dealing with a habitual criminal. The effect is merely to deprive him of property to which he was never entitled. There had been a fear that people might be attracted to crime by seeing others enjoying a “champagne lifestyle” with no visible means of support. But these assumptions have been criticised because the definition of “criminal lifestyle” is so widely

¹¹⁶This distinction between particular and general criminal conduct is set out in POCA 2002 s.76(1)–(3).

¹¹⁷POCA 2002 s.4(6).

¹¹⁸The burden of proof is not relaxed where a transaction has been made some time before: *R. v Agombar* [2009] EWCA Crim 903.

¹¹⁹J. Ulph, *Commercial Fraud: Civil Liability, Human Rights, and Money Laundering* (2006), at paras 4.23–4.27.

¹²⁰POCA 2002 s.10(6); previously DTA 1994 s.4(4).

¹²¹*R. v Jones* [2006] EWCA Crim 2061; [2007] 1 W.L.R. 7; *R. v Lunn* [2004] EWCA Crim 1125; [2005] 1 Cr. App. R. (S.) 24.

drawn by s.75(2) that many first-time offenders fall within its scope. This will be the case if they commit an offence which is listed in Sch.2, such as drug trafficking, money laundering, directing terrorism, people trafficking, arms trafficking, counterfeiting, copyright offences, running a brothel and blackmail. However, the offences listed are serious ones. As many of them involve consensual transfers of property and are victimless crimes, they are likely to go unreported. These types of criminal activity, easily repeated, lucrative and with a low rate of detection, are highly appealing to career criminals. The Government could legitimately maintain that severe measures are needed to ensure efficient deterrence of crime.

A defendant may also be subject to the assumptions if his conduct forms “part of a course of criminal activity”. By s.75(3), this is where the criminal has two convictions for the same offence within the last six years from each of which he has benefited, or where he has been convicted of four charges in the same proceedings from each of which he has benefited. Equally, the assumptions will be applied if the offence is one committed over a period of more than six months. Unless the total benefit is less than £5,000,¹²² these provisions will apply. First-time offenders may be caught if they become involved in some dishonest scheme which exposes them to a series of charges. Their savings may be stripped from them and their lives ruined by the fact that they have gone off the rails temporarily. Yet the wide definition of “criminal lifestyle” can be justified by the Government. The statutory provisions reflect the pattern of criminal activity to be found in the United Kingdom. Although organised criminal groups, such as the Mafia, are active in the United Kingdom, they have not yet created a position of permanence and power as they have done elsewhere. Instead, criminals tend to band together temporarily for a particular purpose, such as robbery.¹²³ The European Court accepts that the legislature is in a better position to make a judgment regarding social and economic factors within its borders; as states enjoy a margin of appreciation, the fact that first-time offenders are subject to these assumptions will be difficult to challenge.¹²⁴

¹²²POCA 2002 s.75(4)–(5).

¹²³C. Phillips, “UK Perspectives on Transnational Crime: Recent Trends and Future Prospects” in P.J. Cullen and W.C. Gilmore, *Crime Sans Frontières: International and European Approaches* (1998), at pp.178–179.

¹²⁴The Proceeds of Crime Act 2002 (References to Financial Investigators) Amendment Order 2009 (SI 2009/2707) was revoked by the House of Lords because of a concern that the powers contained in the 2002 Act might be applied to those guilty of quite trivial offences. This proposal would have been vulnerable to a human rights challenge. For details, see *Hansard*, HC cols 211WS–213WS (December 14, 2009); HL col.897 (December 7, 2009); “Councils get ‘Al Capone’ Power to Seize Assets Over Minor Offences”, *The Times*, October 28, 2009.

The statutory assumptions, the burden of proof and hidden assets

The statutory assumptions lead to a situation where a criminal is assessed for benefits received from past conduct for which he has not necessarily been convicted and where he will be subject to a term of imprisonment if he fails to pay. The prosecution must prove on the balance of probabilities that the defendant has benefited from his general criminal conduct; but it is sufficient if the prosecutor identifies property received or expenditure made as likely to have been derived from crime. The burden of proof then shifts to the defendant who may genuinely struggle to bring forward convincing evidence to rebut the assumptions and to show that the transactions identified related to property derived from a legitimate source. The position is made worse if, relying upon evidence of past receipts, the prosecution alleges that the defendant has far more property than he says that he has and a confiscation order is made to reflect the assumption that money has been secretly hidden away. Could it be argued that the assumptions are disproportionate and therefore incompatible with Protocol No.1 in these circumstances? Furthermore, as the prosecution is ordinarily expected to bear the burden of proving the allegations made against a defendant as one of the ingredients of a fair hearing, could it be argued that there is a violation of the defendant's right to a fair trial because he is being asked to prove that he has no hidden assets? As confiscation orders are imposed after conviction, the detailed guarantees listed in art.6(2) which relate to criminal proceedings have no application at this stage.¹²⁵ However, as they are still part of the sentencing process,¹²⁶ art.6(1) which guarantees a right to a fair trial will still apply.¹²⁷

These issues arose before the European Court in *Grayson v United Kingdom*.¹²⁸ Both of the appellants had been convicted of drug trafficking offences. It was presumed that they had large amounts of hidden assets and their confiscation orders reflected that assumption. The appellants pleaded that they had very little money with which to pay the large confiscation orders and they argued that there had been a violation of art.6(1) as well as Protocol No.1. But it was held that the rule that the prosecution must bear the burden of proof is not a rigid one: persuasive presumptions are acceptable as long as states act within reasonable limits, taking account of policy objectives but safeguarding the rights of defendants.¹²⁹ Here, the assumptions had not been applied in a random manner. For example,

¹²⁵ *R. v Briggs-Price* [2009] UKHL 19; [2009] A.C. 1026 at [22], [27], [65].

¹²⁶ *R. v Rezvi* [2003] 1 A.C. 1099 at [13].

¹²⁷ *Phillips v United Kingdom* (2001) 11 B.H.R.C. 280 at [35], [39], [40]; *Grayson v United Kingdom* (2008) 48 E.H.R.R. 42 ECtHR at [39]; *Bullen v United Kingdom* (App. No.3383/06), decision of January 8, 2009 ECtHR at [59].

¹²⁸ (2008) 48 E.H.R.R. 42.

¹²⁹ *Salabiaku v France* (1988) 13 E.H.R.R. 379 ECtHR at [28]; *Phillips v United Kingdom* (2001) 11 B.H.R.C. 280 at [40]. See A. Ashworth [2009] Crim. L.R. 200.

the trial judge in Grayson's case had examined his bank accounts to determine the property which he had received. The records suggested that Grayson had obtained far more property than the £236,000 which the police had identified. Furthermore, Grayson was found in possession of 28 kilograms of heroin with a wholesale value of over £1.2 million: it was highly unlikely that Grayson would have been in a position to purchase such a large consignment if he had not been involved in drug trafficking on previous occasions. The appellants were fully informed of exactly how the benefit figure had been calculated; it was decided that it was not unreasonable to expect an explanation of what had happened to all the money which the prosecution had identified as having once been in their possession.¹³⁰ The European Court also noted that the judge had a discretion whether to apply the assumptions and would not do so if it caused serious injustice. It was therefore held that the statutory assumptions did not violate art.6. The European Court also quickly dismissed the argument that there had been a violation of Protocol No.1. In the court's view, the case could not be distinguished from *Phillips v United Kingdom*,¹³¹ in which it had been decided that confiscation orders were not a disproportionate interference with an individual's right to enjoyment of his possessions.

The facts in *Grayson* cannot be viewed as presenting the European Court with a real dilemma. The evidence suggested that the defendants might well have hidden assets and were intent on concealing them. There would be a huge incentive to hide illegal gains if a criminal was confident that they would be safe from seizure if he did so. As the European Court had already decided in *Phillips v United Kingdom* that the statutory assumptions did not violate the right to a fair trial, the decision in *Grayson* should not cause surprise. The effect of the decision means, however, that any legal challenge to the assumptions would have little hope of success.

Exercise of discretion by the Crown and the courts

Although confiscation orders are part of the sentencing process, the regime created by the POCA 2002 is mandatory in character.¹³² It could be argued that the new law is disproportionate because it fails to give the courts some residual discretion. For example, the imposition of a confiscation order can have a severe impact upon a convicted criminal, often forcing him into bankruptcy, yet the court cannot take account of the effect of a confiscation order upon creditors.¹³³ Equally, unlike sentencing in general,

¹³⁰*Grayson v United Kingdom* (2008) 48 E.H.R.R. 42 at [43], [44], [49]; *Phillips v United Kingdom* (2001) 11 B.H.R.C. 280 at [44].

¹³¹(2001) 11 B.H.R.C. 280.

¹³²*R. v May* [2008] 1 A.C. 1028 at [43]. The statutory discretion was removed by the POCA 1995.

¹³³*Serious Fraud Office v Lexi Holdings Plc* [2008] EWCA Crim 1443; [2009] Q.B. 376.

information relating to the defendant's personal history, such as whether he is a first-time offender, is irrelevant. There is a danger that arbitrary decisions will be made if the system is too inflexible. However, as recent decisions reveal, both the Crown and the courts have some discretion as part of their inherent powers which may be exercised in relation to the confiscation process to prevent a decision being made which is truly oppressive.

In *R. v Shabir*,¹³⁴ the defendant, a pharmacist, was convicted of obtaining £179,731 by deception from a Health Service body. As the defendant had been convicted on six counts, he was deemed to have a criminal lifestyle and the statutory assumptions were therefore applied. The defendant appealed on the basis that he had been entitled to most of the money received and had only dishonestly obtained £494. According to s.75, if a criminal obtains less than £5,000, the statutory assumptions cannot be made. The Court of Appeal acknowledged that the link between benefit and ownership led to different results according to what was received by the defendant. If, for example, a defendant does not declare tax owed in full, the benefit which he will have received is the undeclared tax.¹³⁵ In contrast, as the facts of *Shabir* demonstrated, if a defendant receives a large sum, only part of which represents value obtained through criminal conduct, his benefit will be taken to be *all* of the property received (£179,731).¹³⁶ The Court of Appeal observed that the Crown has a discretion whether to invoke the confiscation process and, subject to the approval of the trial judge, it can discontinue the proceedings at any stage. The courts also retain the jurisdiction to stay the confiscation process at any point, where it amounts to an abuse of the court's process. This power can be exercised where it would be oppressive to seek a confiscation order.¹³⁷ In *Shabir*, the Court of Appeal held that that the confiscation regime was proportionate and compatible with Protocol No.1. However, it was decided that the original confiscation order in this case was truly oppressive not merely because of the disparity between what Shabir dishonestly obtained and the size of the confiscation order made but also because Shabir's criminal conduct could have been charged in a number of different ways and it was the form in which he had been charged which brought the statutory assumptions into play. As there had been an abuse of the court's process, the Court of Appeal quashed the confiscation order.

There are other limited circumstances where a stay of proceedings may be granted and which are discussed in guidance provided to prosecutors in

¹³⁴[2009] 1 Cr. App. R. (S.) 84.

¹³⁵*R. v Moran* [2001] EWCA Crim 1770; [2002] 1 W.L.R. 253. This decision was approved by the House of Lords in *R. v May* [2008] 1 A.C. 1028 at [18].

¹³⁶*R. v Shabir* [2009] 1 Cr. App. R. (S.) 84 at [19].

¹³⁷*Shabir* [2009] 1 Cr. App. R. (S.) 84 at [22]–[23].

relation to the exercise of the Crown's discretion to instigate or discontinue confiscation proceedings.¹³⁸ One example is where the criminal wished to restore the property to his victim and the effect of a confiscation order would be to deter him or prevent him from doing so. The 2002 Act does make some limited provision for victims. According to s.6(6), there is no obligation upon the court to make a confiscation order if a victim has instituted civil proceedings or is threatening to do so. The court can therefore allow an offender who has limited funds to focus upon reimbursing his victim. However, what is the position where a victim had not threatened civil proceedings beforehand because the victim knew that the offender wanted to repay the money? This situation falls outside s.6(6). This issue arose in *R. v Morgan and Bygrave*,¹³⁹ where the trial judge was not made aware that there was an alternative: the court has a power under s.13(6) to make a compensation order in favour of a victim which can be paid out of the confiscated monies. The Court of Appeal decided that Bygrave's confiscation order was oppressive because she had no funds left to pay her victim once she had satisfied the confiscation order. The court placed great emphasis upon the fact that her crime was confined to the loss caused to this particular victim and she had not made a profit through the use of the stolen money. The court took a common-sense view noting that, as a matter of public policy, offenders should be encouraged voluntarily to compensate their victims without waiting to be sued.¹⁴⁰

There is no risk that courts could use the power to stay the confiscation process to undercut the statutory scheme in a substantial way, because it can only be exercised sparingly. It cannot be used to provide victims with some form of general protection.¹⁴¹ It would be inappropriate for courts to stay proceedings where the legislation is being applied properly and any challenge is based solely upon the fact that the consequences are severe for the criminal concerned.¹⁴² The legislation is intended to be draconian in its application. The courts are expected to focus upon the benefit which the criminal received when the offence was committed and no objection can be made if the confiscation order is for a much greater sum than the defendant had received by way of net profit.¹⁴³ Nevertheless, the courts' inherent power to stay proceedings assists in minimising the risk of an

¹³⁸"Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceeds". This informal guidance is discussed in *Crown Prosecution Service v Nelson* [2009] EWCA Crim 1573; [2009] Lloyd's Rep. F.C. 663 at [38]–[41].

¹³⁹[2008] EWCA Crim 1323; [2008] 4 All E.R. 890. See further *R. v Silvester* [2009] EWCA Crim 2182.

¹⁴⁰This approach is reflected in the "Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceeds" and was endorsed in *Crown Prosecution Service v Nelson* [2009] Lloyd's Rep. F.C. 663 at [43]–[45].

¹⁴¹*R. v Hockey* [2007] EWCA Crim 1577; [2008] 1 Cr. App. R. (S) 50 at [27].

¹⁴²*Crown Prosecution Service v Nelson* [2009] Lloyd's Rep. F.C. 663 at [35]; *R. (on the application of BERR) v Lowe* [2009] EWCA Crim 194; [2009] 2 Cr. App. R. (S.) 81 at [16].

¹⁴³*Crown Prosecution Service v Nelson* [2009] Lloyd's Rep. F.C. 663 at [47].

arbitrary decision being made; the opportunity for legal challenge before the European Court of Human Rights is correspondingly diminished as a result.

CONCLUSIONS

The POCA 2002 is an unusual hybrid of criminal law offences and civil law mechanisms, representing a combined strategy in relation to redress for wrongs. From a commercial perspective, the basic policy of forfeiture of assets by the State would appear to be a sound one. As regards property offences, there is a significant distinction between “predatory” crimes, such as robbery and fraud, where property is misappropriated, and “enterprise” crimes, such as drug trafficking, which involve a voluntary exchange.¹⁴⁴ If not for the fact that the defendants are engaged in criminal conduct, enterprise crimes can be equated with any other commercial activity. They often involve the distribution of goods (such as drugs) or services (such as prostitution) and are run on similar lines to any other business operation, with the aim being to maximise financial returns. To the extent that the State objects to such conduct and has legitimate reasons for doing so, the rational response is not only to remove the financial incentives in engaging in these types of wrongful economic activity but also to deter future participation in that market.

A criminal defence lawyer may well be more critical. It might be argued, for example, that it is inappropriate to expect lawyers and Crown Court judges to be familiar with ancient common law principles relating to ownership. But, as the House of Lords has observed in *May*, the inquiry will usually be a factual one and the key concern of determining who had control of the property is clear enough. It could also be countered that the confiscation regime, once it is properly understood, is easy to administer, whereas any other scheme, such as one based upon recovering net profits, could be far more complicated to apply in practice. However, there is no doubt that the regime appears to have the characteristics of a sleek machine devoid of sentiment. The link established between benefit and common law notions of ownership adds considerable weight to its penal character. The criminal lifestyle provisions are seen as not only too harsh but also too wide in scope. If someone commits an offence for the first time in their middle age, the fact that they may lose everything they own, the product of many years of hard work and careful saving, seems tragic. Admittedly, these assumptions can be defended on the basis that they deter people from being drawn into a life of crime; even so, their application to first-time offenders seems odd when one recalls that the length of the prison

¹⁴⁴See R.T. Naylor, “Follow-the-money Methods in Crime Control Policy” in M.E. Beare (ed.), *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption* (2003).

sentence for the crime itself will reflect culpability, and, in particular, whether it was a first offence or not. The confiscation system can easily be perceived to be one which is bent on stripping offenders of property in an efficient manner. This impression is reinforced by the fact that the prosecution is provided with targets which should be met.¹⁴⁵ Stakeholders in the criminal justice system, such as the victim and the offender, appear to be subsidiary to this process.¹⁴⁶

This leads us to consider finally whether the confiscation regime satisfies its objective of acting as a deterrent. It is not clear that it is particularly effective in this regard. First, it cannot be said with confidence that criminals understand the current confiscation regime and, foreseeing the consequences of their actions, will take steps to avoid these severe measures.¹⁴⁷ Furthermore, some career criminals may be motivated by the excitement gained in carrying out an offence, or may reoffend because they cannot easily find legitimate work. The possibility that their property may eventually be appropriated by the State is unlikely to inhibit them. As regards professional people, such as solicitors and accountants, who may become involved in money laundering, the bigger disincentive might well be the general fear of imprisonment, together with disciplinary action by their professional bodies. But this is not to suggest that confiscation orders are pointless: there is no doubt that they will deter crime to an extent. These orders are designed to impoverish defendants¹⁴⁸ and there is no doubt that they do so. They remove assets which might otherwise be spent on supporting further criminal activity. Strong, pragmatic reasons therefore exist to justify confiscation orders. They can be seen as part of a populist and punitive drive by the State, linking penal policy with the sensed public view.¹⁴⁹ Arguably these measures reassure the public at large by fleshing out the notion that crime does not pay or that, at least, it certainly does not pay for the unlucky ones which get caught.

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¹⁴⁵*R. v Morgan and Bygrave* [2008] 4 All E.R. 890 at [32].


¹⁴⁶If a victim has begun or intends to bring a civil action, the court has a discretion whether to make a confiscation order: POCA 2002 s.6(6); *Morgan* [2008] 4 All E.R. 890. See generally A. Ashworth, "Responsibilities, Rights and Restorative Justice" [2002] Brit. J. Criminol. 578.

¹⁴⁷See R. Bowles, M. Faure and N. Garoupa, "Forfeiture of Illegal Gain: an Economic Perspective" (2005) 25 O.J.L.S. 275 at 288. See further Beccaria, *On Crimes and Punishment* [1764] (1995).

¹⁴⁸*R. v Glatt* [2006] EWCA Crim 605 at [60]; *R. v Panesar* [2008] EWCA Crim 1643 at [8].

¹⁴⁹As regards penal populism in general, see, e.g. J. Pratt, *Penal Populism* (2006); L. Campbell, "Criminal Justice and Penal Populism in Ireland" (2008) 28 L.S. 559.

* University of Durham. I wish to thank the Leverhulme Trust for their generous support by way of an individual Research Fellowship.

 Assets recovery; Civil evidence; Co-defendants; Confiscation orders; Human rights; Proceeds of crime; Statutory interpretation