CONFISCATION, SENTENCING IN DRUG CASES, And OTHER 'NEWS'

CBA SPRING CONFERENCE

NEWCASTLE

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Contents

CONFISCATION ORDERS (FOLLOWING CONVICTION)

INTRODUCTION

Principal provisions of POCA

1. The provisions most likely to be encountered during confiscation proceedings are:-

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section 16	Statement of Information (formerly 'prosecutor's statement')
section 17	Defendant's Response to the Statement of Information;
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2. Part 2 of POCA 2002 came into force on March 24, 2003, but the transitional provisions need to be read with considerable care. The transitional arrangements are the subject of two Statutory Instruments. The first is the *Proceeds of Crime Act 2002 (Commencement No.5, Transitional Provisions, Savings, and Amendment) Order 2003*, SI 2003/333. The second, SI 2003/531, amends the former by substituting a modified version of art.7 in order to remedy a defect in the original wording of that article.

Transitional Provisions

3. The transitional provisions must be kept well in mind on each occasion that:

4. The court considers making a confiscation order under s.6 of the 2002 Act;[1]

5. The court is required to consider the "criminal lifestyle" provisions of s.75; (note art.7 of SI 2003/333 as substituted by SI 2003/531); [2]

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[1] In England and Wales, **art.3** provides:
"(1) s.6 of the Act (making of confiscation order) shall not have effect where the offence, or any of the offences, mentioned in s.6(2) was committed before March 24, 2003.
(2) s.27 of the Act (defendant convicted or committed absconds) shall not have effect where the offence, or any of the offences, mentioned in s.27(2) was committed before March 24, 2003.
(3) s.28 of the Act (defendant neither convicted nor acquitted absconds) shall not have effect where the offence, or any of the offences, in respect of which proceedings have been started but not concluded was committed before March 24, 2003."

[2] **7.** - (1) This article applies where the court is determining under section 6(4)(a) of the Act whether the defendant has a criminal lifestyle.
(2) Conduct shall **not** form part of a course of criminal activity under section 75(3)(a) of the Act where any of the three or more offences mentioned in section 75(3)(a) was committed before 24th March 2003.
(3) Where the court is applying the rule in section 75(5) of the Act on the calculation of relevant benefit for the purposes of determining whether or not the test in section 75(2)(b) of the Act is satisfied by virtue of conduct forming part of a course of criminal activity under section 75(3)(a) of the Act, the court must **not** take into account

6. The defendant absconds: see s.27 and s.28; and see arts 3(2) and 3(3), SI 2003/333.

7. Put shortly, the transitional arrangements are designed to ensure that confiscation proceedings are not triggered by an offence committed before March 24, 2003: see *R. v Evwierhowa* [2011] EWCA Crim. 572. Section 27 (defendant convicted or committed for sentence, but absconds) shall not apply to an offence(s) before March 24, and likewise, s.28 (defendant neither convicted nor acquitted, but absconds) shall not have effect in respect of proceedings started but not concluded before that date.

Nature and objectives of confiscation following conviction

8. A defendant's conviction for any offence may result in confiscation proceedings being pursued under POCA, but the description of that offence can be determinative of whether the defendant has a "criminal lifestyle" and, whether he has benefited from "general criminal conduct" or "particular criminal conduct". A "criminal lifestyle" will result in the court examining the defendant's financial history for a period that often exceeds six years prior to the date when criminal proceedings were initiated against him (.e. the period in respect of which (e.g.) 'statutory assumptions' operate).

9. Although the 2002 Act uses the expression 'confiscation order' [s.6][3], in reality such an order does not empower the court to forfeit, or to confiscate, any item of property, but it does impose on the defendant an obligation to pay a sum of money [the '*recoverable amount*'[4]] equal to the *value*[5] of the '*benefit*'[6] from his '*criminal conduct*'[7], or (if less) the '*available amount*', [8] or (as a last resort) a '*nominal amount*', if the available amount is nil.[9]

10. The aim of Pts 2, 3 and 4, is to recover from a defendant the full value of the benefit that he/she has obtained "as a result of" or "in connection with" his "criminal conduct" (see s.6(5), s.76(4), and s.75). When Pts 2, 3 and 4 of POCA refer to the defendant's "benefit", this is *not* a reference to "proceeds", but to "property obtained". The DTOA 1986 and the DTA 1994 speak of "proceeds" but, save for its short and long title, POCA does not.

11. Benefit is not to be equated with "profit", or "gain", or even "ill-gotten gain" (a term often inappropriately used by politicians): see *Smith*,[10] *R v Aujla*.[11]

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benefit from conduct constituting an offence mentioned in section 75(5)(c) of the Act which was committed before 24th March 2003.

(4) Conduct **shall** form part of a course of criminal activity under section 75(3)(b) of the Act, notwithstanding that any of the offences of which the defendant was convicted on at least two separate occasions in the period mentioned in section 75(3)(b) were committed before 24th March 2003.

(5) Where the court is applying the rule in section 75(5) of the Act on the calculation of relevant benefit for the purposes of determining whether or not the test in section 75(2)(b) of the Act is satisfied by virtue of conduct forming part of a course of criminal activity under section 75(3)(b) of the Act, the court may take into account benefit from conduct constituting an offence committed before 24th March 2003.

(6) Where the court is applying the rule in section 75(6) of the Act on the calculation of relevant benefit for the purposes of determining whether or not the test in section 75(2)(c) of the Act is satisfied, the court must not take into account benefit from conduct constituting an offence mentioned in section 75(6)(b) of the Act which was committed before 24th March 2003.". [SI 2003/531 amending SI 2003/333]

3 And see s.86(6)(a) of the Act.

4 See section 7.

5 see section 79, and especially section 80.

6 section 76(4).

7 Section 76.

8 Section 7.

9 Section 7.

10 (1989) 89 Cr.App.R.235

11 [2008] EWCA Crim 637

12. If the full value of the defendant's benefit cannot be recovered under a confiscation order (because the defendant is worth less than the benefit figure), the court may recover what is available (*i.e.* the "available amount"), or a "nominal amount" if the defendant's assets are nil (see s.7(1)-(3)).

13. The court should *not* make a nil order.

14. In a case where the court believes that a victim of criminal conduct has started, or intends to start, civil proceedings against the defendant, and the defendant has insufficient wealth to pay the full value of his benefit under a confiscation order, as well as an amount in damages, the court is given a discretion under section 6(6) to make a confiscation order, and to do so for an amount "as the court believes is just" [s.7(3)]. Note also s.13(5) and (6) in respect of the making of a confiscation order, and a compensation order,[12] in circumstances where the court believes the defendant will have insufficient means to pay both orders: see *R v Matthews*.[13]

<u>Confiscation following conviction is an exercise in accountability – not culpability</u>

15. A confiscation order is a "penalty" for the purposes of Art.7, ECHR (*Welch v the United Kingdom*),[14] but the proceedings do not entail a "criminal charge" for the purposes of Art.6, ECHR, although they are to be regarded as part of the sentencing procedure following conviction: accordingly, Art. 6(2), ECHR is inapplicable:[15] *Phillips v UK*;[16] *R v Briggs-Price*,[17] and see *R v Clipston*.[18] [See below for elaboration.]

16. A confiscation order is a "sentence" for the purposes of the Criminal Appeal Act 1968 (see the amendment to s.50 of the 1968 Act made by s.456 of the Proceeds of Crime Act 2002, Sch.11, para.4(3).

17. The Court of Appeal has held that when fixing the term of imprisonment in default of payment of a confiscation order, it is wrong in principle to take into account the sentence imposed for the offences in respect of which the defendant was convicted (including offences taken into consideration): see *R v Price*.[19] The reasoning is that the purpose of a sentence of imprisonment is to punish the defendant for the offence; the purpose of the default term of imprisonment is to ensure compliance with the order of confiscation: and see *R v Smith*,[20] and see *R v Pigott*.[21] However, earlier decisions have pointed the other way, treating 'totality' as a relevant factor: see *R v Siddique*;[22] and *Qema*,[23] where the Court did not doubt "that totality is a relevant factor"; *Valentine* (where the Court assumed that totality had been taken into account),[24] *Cukovic*;[25] *Walpole*;[26] *Atlan*,[27] *Middlekoop*.[28]

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12 That is to say, under s.130, Powers of the Criminal Courts (Sentencing) Act 2000.
13 [2012] EWCA Crim 321
14 (1995) 20 E.H.R.R. 247
15 "Everyone charged with a criminal offence shall presumed innocent until proved guilty according to law."
16 (2001) 11 BHRC 280
17 [2009] UKHL 19; [2009] 1 AC 1026, esp. at [26] – [30]
18 [2011] EWCA Crim 446
19 [2009] EWCA Crim 2918
20 [2009] EWCA Crim 344
21 [2009] EWCA Crim 2292
22 [2005] EWCA Crim 1812
23 [2006] EWCA Crim 2806
24 [2006] EWCA Crim 2717
25 (1996) 1 CAR (S) 131
26 June 19, 1997, CA, unreported.

18. The court has power to require the prosecution, and the defendant, to provide the information it needs to make proper determinations under the Act (see, ss.16-18).

19. A failure to pay the sum due under a confiscation order may result in the defendant serving a term of imprisonment in default of payment (a last resort), which will not extinguish the debt (s.38(5)), and interest accrues on amounts unpaid under a confiscation order: s.12.

The incidence and standard of proof

20. As stated above, it is now well established that a confiscation order is a "penalty" for the purposes of Art.7, ECHR (*Welch v the United Kingdom*),[29] but the proceedings do not entail a "criminal charge" for the purposes of Art.6, ECHR, although they are to be regarded as part of the sentencing procedure following conviction.

21. In *Briggs-Price*, Lord Phillips remarked that the decisions of the ECrtHR demonstrate that "where, in confiscation proceedings after a defendant's conviction, the prosecution proves that the defendant possesses or has possessed property and invites the court to assume that this property represents or represented the benefit of criminal activity, this exercise does not involve charging the defendant with a criminal offence so as to engage article 6(2) of the Convention." [para.22][30]; and see *Phillips v UK* [31].

22. However, "even though article 6(2) does not apply to confiscation proceedings, the presumption of innocence does. This is because it is implied into article 6(1), which does....apply to those proceedings" (per Lord Rodger, para.65, *Briggs-Price*, citing *Phillips v UK*,[32] and the ECrtHR's admissibility decision in *Grayson and Barnham v UK*).[33]

23. Accordingly, Lord Rodger held that "If a presumption of innocence is implied into article 6(1), then it, too, must require that the person be proved guilty according to law. In the context of a criminal trial, the standard of proof, according to our law, is beyond reasonable doubt." [para.77].

24. Given the above, three of their Lordships (Lord Rodger, Lord Brown, Lord Neuberger) held that unless the possession of property or expenditure can otherwise be established, the Crown must prove the offending, "even if not formally charged, to the criminal standard" [Lord Brown, para.96].

25. The above seemed reinforced by the judgment of Lord Justice Moses in *R v Whittington* [emphasis added]:[34]

> 13. It is vital to bear in mind that it is for the prosecution to prove that the defendant has obtained the property in issue, which will either be known property he still possesses or which he has possessed. This issue as to proof of the existence of property must not be confused with proof of the source of that property. Subject to the particular, and confined exception, illustrated by *R v Briggs-Price* [2009] 2 WLR 1101, the

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[27] February 20, 1997.
[28] October 25, 1996.
[29] (1995) 20 E.H.R.R. 247
[30] [2009] UKHL 19
[31] Article 6(2) did not apply to the sentencing process unless this involved accusations "of such a nature and degree as to amount to the bringing of a new 'charge' within the autonomous Convention meaning" [para.35]; and see *Engel v The Netherlands* (1976) 1 EHRR 647.
[32] (2001) 11 BHRC 280, para 40.
[33] Applications nos 19955/05 and 15085/06), 23 September 2008.
[34] [2009] EWCA Crim 1641.

prosecution must prove the existence of that property to the civil standard of proof (s.6(7)).

14. Thus, once a criminal lifestyle has been established, it falls to the prosecution, if it can, to prove, on the balance of probabilities, that the defendant has obtained property. The prosecution, as the first three assumptions in s.10 indicate, may do so by proving that property has been transferred to the defendant (s.10(2)), that he has obtained property (s.10(3) or that he has incurred expenditure after the relevant day (s.10(4)).

15. Only when the prosecution has established that the defendant has held property in one of those three ways does any question of the source of that property arise. The prosecution may establish the possession of property or expenditure by any manner of means according to the civil standard of proof. ***But in one particular circumstance it has to do so to the criminal standard. If the prosecution can only establish that the defendant had obtained property in the past by proof of criminal offences other than those charged on the indictment, it must prove those criminal offences to a criminal standard.*** This was the decision of the majority in *R v Briggs-Price* (Lord Rodger [76-79], Lord Brown, [96], and Lord Neuberger [152]).

26. However, it is tentatively submitted that following the decision of the Supreme Court in *Gale v SOCA* [2011] UKSC 49, the standard of proof to be applied in confiscation proceedings – in respect of any issue – is the civil standard of proof.

27. As stated in *Briggs-Price*, Article 6(2) does not specify the *standard* of proof that has to be applied in discharging the burden of proving that a defendant is guilty of a criminal offence. However, in English law, a distinction is made between the criminal standard of proof,[35] and the civil standard of proof.

28. In *Gale v SOCA*, after a detailed review of Strasbourg jurisprudence, Lord Phillips (with whom Lord Mance, Lord Judge and Lord Reed agreed) concluded that the views on the standard of proof expressed in *Briggs-Price* by their Lordships were *obiter* [para.54]. Lord Clarke said:

> 57. As to the standard of proof, I agree with Lord Phillips that the Strasbourg jurisprudence does not support the proposition (i.e. the second proposition in para 43 above) [36] that in no case can confiscation be ordered unless it is proved to the criminal standard that the defendant committed the offences from which the property is said to have been derived. I agree with his conclusion and reasons summarised in para 54 to the effect that the commission of criminal conduct from which the property the appellants held was derived had to be established according to the civil and not the criminal standard of proof.

29. It would thus seem that the decision of *R v Whittington* is not to be followed insofar as it suggests that the Crown shoulders the criminal standard of proof where the defendant had obtained property by the commission of criminal offences other than those charged on the indictment.

30. It is also submitted that *Gale v SOCA* is unlikely to be the last word on the issue.

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[35] The expression "proof beyond reasonable doubt" adequately describes that standard (it is submitted).

[36] The second proposition was stated to be that, "ii) In no case can confiscation be ordered unless it is proved to the criminal standard that the defendant committed the offences from which the property is alleged to have been derived."

Twin track recovery

31. ***Simple benefit calculation***: The defendant is ordered to pay an amount that represents the value of property obtained from the commission of offences in respect of which he falls to be sentenced (i.e. conduct described by counts on the indictment, or which constitutes offences that the court will be taking into consideration), The Act describes benefit that is calculated in this way, as the defendant's "particular criminal conduct".

32. ***Extended benefit analysis***: The court is required to examine the defendant's financial history, and to recover (if it can) the value of property obtained by the defendant of his "general criminal conduct" (s.76(2)). The court will only be able to do so if the defendant has a "criminal lifestyle" (defined by s.75), and it is irrelevant that the criminal conduct occurred before or after the passing of POCA. It is also irrelevant that the property was obtained before or after POCA came into force. It is not necessary that the defendant's criminal conduct (which generated benefit), did not lead to a finding of guilt, a conviction, or a caution.

33. Where a defendant is deemed to have a "criminal lifestyle", the court is required to make the statutory assumptions under s.10 of POCA. The court is not limited to an examination of the defendant's financial history over a six year period (usually a period of six years before the defendant was charged): property obtained by a defendant at any time, which represents his general criminal conduct, is recoverable: consider the circumstances, for example, in *R v Briggs-Price*.[37]

Sentencing and confiscation – which is imposed first?

34. It is preferable for confiscation proceedings to take place before the defendant is sentenced for the underlying offence *unless* proceedings are "postponed" under s.14 of POCA. The maximum permitted period of postponement is two years starting with the date of conviction (or three months starting with the day when an appeal against conviction is determined or otherwise disposed of): s.14, POCA.

35. The court is required to take account of the confiscation order before it imposes a fine on the defendant (s.13(2)(a)), or before it makes orders for forfeiture, deprivation, or other order (other than compensation) specified in s.13(3): see s.13(2)(b)); and see s.100 (Scotland), and s.163 (N.I.). This is reinforced by s.15(2) which states that in the event that proceedings are postponed, but the court proceeds to sentence the defendant, the court must not then fine the defendant (etc.): consider *R. v Paivarinta-Taylor*,[38] and *R. v Constantine (Mark Anthony)* (where the court went so far as to hold that a court must take account of a confiscation order before making any order "involving payment by the defendant",[39] and see *Donohoe*.[40]

The procedure

36. In England and Wales, either the prosecutor or the court initiates confiscation proceedings: s.6 POCA. In Scotland, only the prosecutor can initiate confiscation proceedings.

[37] [2009] UKHL 19
[38] [2010] EWCA Crim 28
[39] [2010] EWCA Crim 2406
[40] [2007] 1 Cr.App.R.(S.) 88

37. A confiscation order cannot be made where the precondition under s.6(3) of POCA 2002 has not been complied with: consider *Meader*.[41]

38. The prosecution must serve a "*Statement of Information*" (s.16, POCA) which should contain a bare outline of the prosecution case, and it should carefully itemise monies and property that are alleged to be recoverable under a confiscation order. If the prosecutor believes that the defendant does have such a lifestyle, s.16 of POCA (s.101 (Scot.), s.166 (N.I.)), requires the statement to include matters relevant to the court's duty to decide that issue, as well matters relevant to the question whether the defendant has benefited from general criminal conduct, and the extent of any such benefit (see s.16(3)). A statement must, as appropriate, include information relevant to the court's decision whether to make - or not to make - any of the statutory assumptions.

39. Upon service of the *Statement of Information*, the defence may serve a *Response* (s.17). Although the Court may order the defence to provide a response but there is no statutory obligation to do so.

40. The defendant may be ordered to provide information about his financial affairs, for example, the extent of his wealth, where assets are situated, and the existence of third party interests: s.18, POCA.

41. A defendant, who without reasonable excuse, fails to comply with an order, takes the risk that the court may draw an adverse inference from that failure (consider *R v Bhanji*).[42]

42. Self-incrimination is not a reasonable excuse, given the protection afforded by s.18(9).

43. A failure to comply with an order may be punishable as a contempt of court (see s.18(5)).

44. Even without the power now given to the courts by s.18 POCA, the courts took the view that pre-existing legislation enabled the Crown Court to make orders akin to disclosure orders: *In Re T. (Restraint Order)*,[43] (and see *Re O. (Restraint Order)*[44]).

45. The standard of proof is on a balance of probabilities: s.6(7), POCA.

<u>Rules of evidence</u>

46. Strict rules of evidence in criminal proceedings do <u>not</u> apply to confiscation proceedings: see *Silcock*,[45] and *Clipston*.[46]

47. In *Clipston*,[47] the Court of Appeal (Criminal Division) reviewed a number of earlier decisions (including *Silcock*) and, in a carefully crafted judgment, articulated four general conclusions [para.61]:

    i) The CEA 1995 hearsay regime has no application to confiscation proceedings.

    ii) The CJA 2003 hearsay regime, while potentially more suitable, can like-wise not apply - at least strictly and directly.

    iii) The Court's conclusion does not entail that hearsay evidence is inadmissible in confiscation proceedings. Any such outcome "would be absurd, having regard to

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41 [2011] EWCA Crim 2108
42 [2011] EWCA Crim 1198
43 The Times, May 19, 1992
44 [1991] 2 Q.B. 520
45 [2004] EWCA Crim 408
46 [2011] EWCA Crim 446
47 [2011] EWCA Crim. 446, [2011] Crim LR 485

the realities both of confiscation proceedings in particular and the sentencing process more generally".

iv) Instead, the Court's conclusion does entail that hearsay evidence is admissible in confiscation proceedings - but in accordance with the approach outlined in the judgment, rather than via the CEA 1995 or, at least directly, by way of the CJA 2003.

48. The Court stressed that the procedure for the introduction of hearsay evidence must be both flexible and fair and, that it could not be "sensibly be unduly prescriptive". It suggested the following "broad considerations":

i) In many instances, there will or should be no realistic issue as to the admissibility of the evidence, not least given the focus of POCA on "information".

ii) There will, however, be occasions where a hearsay statement is of importance, and seriously in dispute, so that admissibility is, quite properly, a live issue. If so, the CJA 2003 regime, applied by analogy, will furnish the most appropriate framework for adjudicating on such issues. The vital need is for the Judge in such a situation to understand the potential for unfairness and to "borrow", as appropriate, from the available guidance in s.114(2) (together with the matters contained in s.116) of the CJA. However, when applying this regime - and especially the "interests of justice" test in s.114(1)(d) -it will be of the first importance to keep the post-conviction context in mind. There may well be room for more flexibility than in the trial context.

iii) In many more cases, the real issue will be the weight rather than the admissibility of the evidence or information in question. If so, the "checklist" contained in s.114(2) (and the matters set out in s.116) of the CJA 2003, suitably adapted to address weight rather than admissibility, will here too provide a valuable (if not exhaustive) framework of reference. In any event and in every case, a Judge must of course proceed judicially, having regard to the limitations of the evidence or information under consideration (including, by way of examples, the reliability of the maker, the circumstances in which it came to be made, the reason why oral evidence cannot be given and the absence of cross-examination). Furthermore, care must invariably be taken to ensure that the defendant has a proper opportunity to be heard.

iv) Here, as elsewhere in the sentencing process, the Judge will need to exercise judgment. In the present context, such judgment must be exercised consistently with both the legislative intent underpinning POCA and (it goes without saying) the need for fairness to all concerned.

CONCEPTS IN CONFISCATION PROCEEDINGS

I. "Criminal Conduct"

49. Section 76(1) of POCA defines "criminal conduct" as conduct that constitutes an offence in England and Wales, or which would constitute such an offence if it occurred in England and Wales.

50. Note that there is no dual criminality requirement.

51. There is no requirement that the fact of "criminal conduct" must be proved by way of a recorded conviction or finding of guilt by a court of law.

52. It is immaterial where the conduct was carried out – provided that the conduct would be an offence contrary to English law had it been performed in England or Wales.

53. Criminal conduct may form part of the defendant's "particular criminal conduct" (in essence, the offence on the indictment in respect of which he was convicted, plus offences that he has asked to be taken into consideration by the sentencing court): s.76(3).

54. Criminal conduct may form part of the defendant's "general criminal conduct" if the defendant is found to have a "criminal lifestyle" (s.76(2)),

II. "Criminal Lifestyle"

55. Central to Part 2 is the concept of 'criminal lifestyle'. If the court embarks on confiscation proceedings, its first task is to decide whether the defendant has such a lifestyle: s.6(4)(a).

56. 'Criminal lifestyle' triggers the statutory assumptions under section 10, and it broadens the definition of 'tainted gifts' [see section 77].

The Definition of 'Criminal Lifestyle': s.75

57. Broadly stated, a defendant has a 'criminal lifestyle' in three situations:

    i) the defendant is convicted in current proceedings of an **offence specified in schedule 2** [s.75(2)(a)];

    ii) the 'offence concerned'[48] is conduct that forms part of a "**course of criminal activity**" [s.75(2)(b)].

    iii) The 'offence concerned' was **committed over a period of at least 6 months** AND the defendant has benefited from that conduct.

58. In each case, the offence concerned [see s.6(9)] must have been committed on or after the 24th March 2003.[49]

(i) Schedule 2 offences

59. A conviction of one schedule 2 offence (e.g. supplying a controlled drug) is sufficient to constitute a 'criminal lifestyle'.

60. It is not necessary to show that the defendant benefited from the offence.

61. The conviction must relate to an offence charged as a count on the indictment, and not an offence to be taken into consideration.

(ii) Course of Criminal Activity

62. This means EITHER:

    (a) the defendant has been convicted of an offence from which he has benefited AND he has benefited from THREE **other** offences in respect of which he was convicted in the same proceedings: s.75(2)(b), and s.75(3)(a). NOTE:

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[48] See section 88(1) and note s.6(9).

[49] SI 2003/333, article 3(1), and note article 1(1). Article 7, as substituted by SI 2003/531, is relevant in respect of conduct forming part of a 'course of criminal activity'.

- That all offences must have been committed on or after the 24th March 2003: SI 2003/333 as amended by SI 2003/531.
- That the defendant must be convicted of at least FOUR offences.
- That the four offences must not include an offence to be taken into consideration.
- That each offence must result in benefit to the defendant – even if only in the sum of £1.
- That there must be '*relevant benefit*'[50] of at least £5000 [s.75(4)].
- That for the purposes of *relevant benefit*, the court can include offences to be taken into consideration – s.75(5).

OR

(b) The defendant has been convicted of an offence from which he has benefited AND he was convicted on at least TWO other occasions in the period of 6 years before he was charged with the current offence: s.75(3)(b). NOTE:

- That the defendant must therefore benefit from at least THREE offences.
- That the current conviction must be for an offence committed after the 24th March 2003, BUT the two earlier convictions can pre-date the 24th March 2003 [SI 2003/333, article 7 as substituted by SI 2003/531].
- That there must be "relevant benefit" of at least £5000, and for this purpose, the court may include the value of benefit derived from offences taken into consideration: s.75(5).

(iii) Offences committed over six-month period

63. The offence must have been committed on or after the 24th March 2003 – note article 1(1), SI 2003/333; and consider the cases of *Ahmed (Kurshid)*,[51] *Martin* (also known as 'Brown'),[52] *Palmer*,[53] *Clayton*,[54] *Simpson*,[55] and *Foggon*,[56] in the context of conspiracy or substantive continuing offences – when is the offence committed?

64. The offence must be one from which the defendant has benefited: s.75(2)(c)

65. The court must find 'relevant benefit' of at least £5000: s.75(4).

66. "Relevant benefit" can include offences to be taken into consideration [s.75(6)] BUT the offences must not have been committed pre 24th March 2003: see article 7(6) SI 2003/333 as substituted by SI 2003/531.

67. In *R v Bajwa*[57] the CA(CD) held that s.75(2)(c) must be construed in the context in which that provision appears when dealing with a person who is alleged to have a 'criminal lifestyle'. In relation to s.75(2)(c), the offence committed over a period of 6 months *must*

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50 See the definition of 'relevant benefit' in s.75(5) and (6) of the 2002 Act.
51 February 8, 2000, CA. Not to be confused with *Ahmed and Qureshi* [2004] EWCA Crim 2599, which is cited in *R v May* [2008] UKHL 28.
52 [2001] EWCA 2761
53 [2002] EWCA Crim 2202
54 [2003] EWCA Crim 1209
55 [2003] EWCA Crim 1499
56 [2003] EWCA 270
57 [2011] EWCA Crim 1093

relate to the particular defendant's part in the offence [para.55]. The Court identified four reasons for reaching this conclusion (it is submitted that the fourth reason is particularly telling in favour of the Court's analysis of s.75(2)(c)):

i) The approach is consistent with the object of section 75, which is to identify particular defendants who have a "criminal lifestyle".

ii) Section 75(2)(c) is the third set of "tests" for establishing whether a defendant has a criminal lifestyle. It only need be considered if a defendant does not fulfil the other two. It should be construed consistently with paragraphs (a) and (b) in which the first question is whether the particular defendant has committed the offences identified in those paragraphs.

iii) If it were enough for s.75(2)(c) that "the offence" at large was committed over a period of at least six months, it would mean that in a case where there is only one defendant involved in the offence, it would have to be demonstrated that he had committed the offence concerned for at least six months. But if there is more than one defendant involved in the same offence, then (on that construction) the defendant (A) committing the offence only on the last day of a period of at least six months would be caught by the paragraph, but only if it could be demonstrated, for at least one other co-defendant (B), that the offence had been committed over at least six months.

iv) No matter how short a period a particular defendant (A) was involved in a conspiracy, so long as one other co-defendant was involved for at least six months, then defendant (A) could never enter a basis of plea that would avoid him being treated as having a "criminal lifestyle.

III. The notion of "benefit"

Statutory Definition of "Benefit"

68. Section 76(4) defines benefit as:[58]

> "A person benefits from conduct if he obtains property as a result of **or** in connection with the conduct".

69. In cases where the defendant obtains a *pecuniary advantage* as a result of or in connection with conduct[59], section 76(5) provides:

> "….he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage".

70. By section 76(6)[60]:

> "References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and some other".

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[58] See section 71(4), Criminal Justice Act 1988, for comparative purposes.
[59] See section 71(5), Criminal Justice Act 1988, for comparative purposes.
[60] see section 102(5), Criminal Justice Act 1988, and section 63(2), Drug Trafficking Act 1994, for comparative purposes.

Overview

71. "Benefit" does not mean "profit": see *Smith*;[61] *Banks*;[62] *Comiskey*,[63] *McDonald*;[64] *R v Aujla*.[65]

72. However, a recent line of cases is making it clear that the focus of the court's inquiry is on what the defendant himself has obtained: see the trilogy of decisions of the House of Lords in *R v May*,[66] *R v Jennings*,[67] and *R v Green*.[68] Those cases have provided an invaluable bedrock upon which a coherent set of principles is developing, notably, the cases of *Allpress,*[69] *Mitchell*,[70] *Seager*,[71] *Briggs-Price*,[72] *Sivaraman,*[73] *White and others,*[74] and *R v More*.[75]

73. In *R v May*, the House of Lords stated six conclusions of which the sixth is perhaps the most significant (para.48(1)-(6)) [*please note that the footnotes, and emphasis in italics, have been added by the author of this paper*]:

    (1) The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren[76] and others, but *nor does it operate by way of fine*.[77] The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators.

    (2) The court should proceed by asking the three questions posed above: (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? Where issues of criminal life style arise the questions must be modified. These are separate questions calling for separate answers, and the questions and answers must not be elided.

    (3) In addressing these questions the court must first establish the facts as best it can on the material available, relying as appropriate on the statutory assumptions. In very many cases the factual findings made will be decisive.

    (4) In addressing the questions the court should focus very closely on the language of the statutory provision in question in the context of the statute and in the light of any statutory definition. The language used is not arcane or obscure and any judicial gloss or exegesis

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61 (1989) 89 Cr.App.R.235
62 [1997] 2 Cr.App.R.(S.) 110
63 (1990) 12 Cr.App.R.(S.) 562
64 (1990) 12 Cr.App.R.(S.) 457
65 [2008] EWCA Crim 637
66 [2008] UKHL 28
67 [2008] UKHL 29
68 [2008] UKHL 30
69 [2009] EWCA Crim 8
70 [2009] EWCA Crim 214
71 [2009] EWCA Crim 1303
72 [2009] 2 WLR 1101 (HL)
73 [2008] EWCA Crim 1736
74 [2010] EWCA Crim 978
75 [2010] EWCA Crim 1224
76 Leaving aside the reference to "schoolchildren and others", the shorter *Oxford English Dictionary* definition of "confiscate" includes "appropriated to the use of the state, adjudged forfeit", "to appropriate property to the public treasury by way of penalty"; and "confiscation" is defined as "the action of confiscating" and, even, "robbery under legal authority".
77 A confiscation order is a money order which, in some respects, can be enforced in the same manner as a fine. However, a confiscation order certainly does not operate as a fine (albeit that such an order is a "sentence" for the purposes of the Criminal Appeal Act 1968 and constitutes a "penalty" in ECHR terms): see para.13 in *CPS v Jennings* (HL).

should be viewed with caution. *Guidance should ordinarily be sought in the statutory language rather than in the proliferating case law*.[78]

(5) 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. While the answering of the third question calls for inquiry into the financial resources of D at the date of the determination, the answering of the first two questions plainly calls for a historical inquiry into past transactions.

(6) D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property. *It may be otherwise with money launderers*.

74. The above has considerable practical significance, for example:

1) ***Cash couriers and custodians of drug moneys***: *R v Allpress and others*,[79] It is submitted that old cases, such as *Simpson*,[80] are now best put to one side on this point.

2) Money laundered through a bank account. Consider *Allpress*.

3) ***Couriers and bailees***: see *R v Anderson* (a case of 'people-trafficking');[81] *Clark and Severn*;[82] *R v Smith and others*,[83] stolen illicit controlled drugs, a case decided in the context of the Theft Act 1968.

75. Note that the fact that D initially obtained criminal property which he then divided up between others, does not prevent D being assessed as having obtained the whole amount: see *Patel* (above) and see *R v Carter and others*;[84] and see *Glatt*;[85] and see *Gibbons*.[86]

76. The expression "he obtains property" does not mean that the property must pass through the defendant's hands, but it is not always sufficient to show merely that the defendant's acts contributed to a non-trivial extent to the getting of the property": see *CPS v Jennings* (HL), and consider *R v Newman*,[87] *Byatt* (where B withdrew from the conspiracy before the robbery took place and therefore did not obtain a 'benefit')[88], and see *Stanley*.[89] See also *ARA v Olupitan,*[90] and *Nadarajah*.[91]

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[78] That is not to say that existing case law is to be disregarded (it is impossible to see how it could be as many of the cases necessarily explain the operation of the relevant enactment).

[79] [2009] EWCA Crim 8

[80] [1998] 2 Cr.App.R.(S.) 111

[81] [2010] EWCA Crim 615

[82] [2011] EWCA Crim 15

[83] [2011] EWCA Crim 66

[84] [2006] EWCA Crim. 416

[85] [2006] EWCA Crim 605 [para.82]

[86] [2002] EWCA Crim 3161, [2003] Cr.App.R.(S.)34

[87] [2008] EWCA Crim 816

[88] [2006] EWCA Crim 904, [2006] 2 Cr App R (S) 116: "The prosecution did not require the issue of the time of the appellant's withdrawal from the conspiracy to be tried. That was the basis of plea that was accepted by the learned judge. When he (the appellant) withdrew, no robbery had taken place. The appellant and Young had gone at the time of the robbery; and he cannot be said to have been instrumental in obtaining the cash in any realistic way. In those

"Or in connection with the conduct"

77. *R v Ahmad and Ahmed*,[92] is an important case that considered two issues[93] of which the first concerns the calculation of a defendant's "benefit" from an offence, for the purposes of Part VI of the CJA 1988. Central to the appeal is the meaning of the "*in connection with [the commission of the offence]*" in s.71(4) of the 1988 Act.[94] The Court held that "[to] make a confiscation order which includes within the benefit the costs of committing a crime seems to be contrary to the object of the legislation and that part of the confiscation order would, it seems to us, to operate by way of a fine" [per Hooper LJ., para.35].

> A1 and A2 were convicted of conspiracy to cheat the public revenue. A confiscation order was made against each appellant in the sum of £92.3 million. A1 and A2 were directors of, and major shareholders in, MST Ltd. The company had engaged in no lawful trade and it had been used by the appellants in furtherance of a massive 'carousel fraud'. The trial judge pierced the 'corporate veil'. Accordingly, the benefit of the company had been obtained jointly by the appellants (applying *R v May* [2008] 1 AC 1028 (para.43, subject to the possible exception stated by Lord Bingham at para.45). The amount of VAT which was fraudulently reclaimed by the 'exporter' was approximately £12.6 million. *However, the trial judge held that the benefit was the total amount of money which had passed through the MST bank accounts in furtherance of the fraud, concluding that that was property obtained in connection with the commission of the offence*. "To commit an MTIC fraud it is, as the judge found, a necessary part of the deception on HMRC that an amount representing the value of the goods and the VAT thereon should pass through the accounts of the buffer companies" [per Hooper LJ., para.27].

78. The Court of Appeal held that the benefit for each appellant should have been set at £12.6 million (subject to any increase in the value of money from the date that the trial judge made the confiscation orders [para.60], noting that "In this case the offence was cheating the revenue of the VAT" and added that "the selling or purported selling of the goods was a mechanism by which the fraud was committed and the necessary costs involved in the selling or purported selling were the costs of committing the offence" [para.59].

79. The Court stressed that the instant case was not a case where the statutory assumptions applied [59]. It declined to follow *R v Waller*,[95] on the grounds that it was "clearly wrong" [per Hooper LJ., para.54]. In *Waller*, the cost of purchasing tobacco had been included as part of W's "benefit" together with the value of the duty evaded on its importation. Section 71(4), CJA 1988 states that "a person benefits from an offence if he obtains property *as a result of or in connection with* its commission and his benefit is the value of the property so obtained" [emphasis added].

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circumstances, as we conclude that there was no benefit, it is unnecessary to deal with the other points raised. We therefore quash the confiscation order." [Her Honour Judge Goddard QC]

89 [2007] EWCA Crim 2857

90 [2008] EWCA Civ 104

91 [2007] EWCA Crim 2688

92 [2012] EWCA Crim 391

93 The second issue relates to the "amount to be recovered" where a defendant is alleged to have hidden assets. As to the latter, suffice to say that the Court of Appeal (Criminal Division) endorsed the "comprehensive analysis" in the judgment of the Court given by Moses LJ in *R v McIntosh* [2011] EWCA Crim 1501.

94 NOTE that s.76(4) of POCA 2002 defines "benefit" in similar terms ("A person benefits from conduct if he obtains property as a result of or in connection with the conduct").

95 [2008] EWCA Crim 2037.

80. In *Ahmad*, the Court noted that, in *R v James*,[96] J "had bought items to assist the process of converting raw tobacco into hand rolling tobacco. The judge had held that the items purchased were part of the benefit and that the rent and wages which he had paid were a pecuniary advantage and also part of the benefit. The Court quashed that part of the confiscation order which encompassed these items. The appellant did not obtain the items in connection with any criminal conduct. His criminal conduct in participating in the conspiracy formed no part of the transactions by which he acquired the various items. Their acquisition was by way of lawful purchase for value. We accept that these transactions were entered into for the purpose of criminal conduct, but that is not necessarily a state of affairs caught by section 76(4)" [para.52].

81. It is respectfully submitted that the judgment of the Court is correct.[97] However, the following points are made.

a. What should not be lost sight of is the fact that every statutory confiscation regime, following D's conviction for a relevant offence, is concerned with the *proceeds of crime*. Although the notion of what constitutes the 'proceeds of crime' can be explained in various ways, it does not usually encompass lawfully acquired property - even if that property has been used as an instrument of crime.

b. The Court was right to stress that the cases of *Ahmad and Ahmed* did not involve the making of statutory assumptions. But, even in cases where the expenditure assumption is engaged, the focus remains on determining whether the money expended had itself been lawfully "obtained" (CJA/POCA) or lawfully "received" (DTOA/DTA).

c. It is questionable whether the expression "in connection with" adds much to the meaning of "benefit", but experience has shown that it can have relevance: see *Randle and Pottle* [98] (see also *R v Osei*)[99]. The problem is knowing where to draw the line between property that can fairly be said to flow *from* the commission of a crime and, cases such as *Osei*.

d. In *Ahmad and Ahmed*, the Court held - in relation to *R v James* - that the acquisition of items that ought not to have been included as a "benefit" was "by way of lawful purchase for value" [para.52]. Note the phrases "lawful purchase" and "for value". The former is presumably intended to exclude cases where (e.g.) controlled drugs had been purchased (albeit overseas; and thus the Court has been careful not to undermine the decision of the House of Lords in *R v Islam* [2009] UKHL 30). In *James*, the Court said:

> "We accept also that the expression 'in connection with' widens the meaning of the words 'as a result of': see *R v Waller* [2009] 1 Cr App R (S) No 76, at page 450. In our view, the expression was probably intended to cover the type of situation where a person obtains property in anticipation of the criminal venture. For example, suppose that A is provided with a car (which is registered in his name) by someone planning a criminal venture, ostensibly for A's own use but really with a view to him using it also in order to act as a courier to transport illegal

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[96] [2011] EWCA Crim 2991

[97] The correctness of the decision in *R v Waller* has been questioned in *Archbold* [5-1051], in *Criminal Law Week* [08/35/30; see para.50 of the judgment], and - with more reserve - by this commentator ([see http://www.rudifortson4law.co.uk/recentdevelopments.php.

[98] *Independent* March 26, 1991; and see R. Fortson, chp.13-081, '*Law on the Misuse of Drugs and Drug Trafficking Offences*</i>' (6th ed., 2012, Sweet & Maxwell).

[99] (1988)10 Cr.App.R.(S) 289.

tobacco products for that criminal venture. In this situation, it is clear that A has obtained the car in connection with his subsequent criminal conduct of transporting the illegal goods, although it may be open to argument whether he also obtained the car as a result of any criminal conduct" [per Edwards-Stuart J., para.49].

On the reasoning of the Court in *Ahmed*, there would be no such benefit had D purchased the car lawfully and for value. One assumes that the example, in *James*, proceeds on the basis that the car was gifted to D.

IV. Value of property that constitute benefits

82. Under the 2002 Act, ss.79 and 80 provide rules for the valuation of property.

83. Section 80 specifically relates to the value of *benefits* obtained by the defendant – i.e. as a result of his/her criminal conduct.[100] The leading case is *Nottinghamshire CPS v Rose*,[101] which examined the relationship between ss.79 and 80 POCA:[102]

84. A useful exercise in the application of s.80 occurred in *R v Waya*,[103] and see *Walls*,[104] *Nadarajah*,[105] and *Roach*.[106]

Benefit obtained in a joint venture – the misnomer of "apportionment"

85. In *R v Rooney*,[107] the Court of Appeal - having considered a number of decisions including *R v May* (HL)[108] and *Olubitan*[109] - expressed its understanding of the principles to be as follows [para.36]:

(a) If a benefit is shown to be obtained jointly by conspirators, then all are liable for the whole of the benefit jointly obtained.

(b) If, however, it is not established that the total benefit was jointly received, but it is established that there was a certain sum by way of benefit which was divided between conspirators, yet there is no evidence on how it was divided, then the

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[100] 80 Value of property obtained from conduct
(1) This section applies for the purpose of deciding the value of property obtained by a person as a result of or in connection with his criminal conduct; and the material time is the time the court makes its decision.
(2) The value of the property at the material time is the greater of the following--
(a) the value of the property (at the time the person obtained it) adjusted to take account of later changes in the value of money;
(b) the value (at the material time) of the property found under subsection (3).
(3) The property found under this subsection is as follows--
(a) if the person holds the property obtained, the property found under this subsection is that property;
(b) if he holds no part of the property obtained, the property found under this subsection is any property which directly or indirectly represents it in his hands;
(c) if he holds part of the property obtained, the property found under this subsection is that part and any property which directly or indirectly represents the other part in his hands.
(4) The references in subsection (2)(a) and (b) to the value are to the value found in accordance with section 79

[101] [2008] EWCA Crim 239

[102] And see *Confiscation Proceedings: Adieu Layode and R v K?,* R. Fortson, Archbold News, Issue 8, 11th September 2007.

[103] [2010] EWCA Crim 412

[104] [2002] EWCA Crim 2456

[105] [2007] EWCA Crim 2688

[106] [2008] EWCA Crim 2649

[107] [2010] EWCA Crim 2

[108] Especially paras. 27, 32 and 46

[109] [2003] EWCA Crim 2940

court making the confiscation order is entitled to make an equal division as to benefit obtained between all conspirators.

(c) However, if the court is satisfied on the evidence that a particular conspirator did not benefit at all or only to a specific amount, then it should find that is the benefit that he has obtained.

86. Unfortunately, *R v Rooney* was neither cited nor discussed in the judgment of the Court of Appeal in *R v Lambert and Walding*.[110]

> L and W were convicted of drug trafficking offences. It was a joint criminal venture between L and W, and they were to benefit jointly [10]. There was evidence that L and W were to share net proceeds equally [7]. The benefit from the venture was assessed at £107,860. The judge made a confiscation order in that sum against each defendant.
>
> In dismissing the appeals against the making of the confiscation orders, the Court of Appeal (Criminal Division) noted that in *R v May*,[111] the Committee stated [para.46] that apportionment between parties jointly liable, would be "contrary to principle and unauthorised by statute" and that the statutory questions must be answered by "applying the statutory language, shorn of judicial glosses and paraphrases". This approach applies to the calculation of a defendant's "benefit" under section 4 of POCA 2002, the calculation of "recoverable amount" under s.7, and to the duty on the court under s.6(5) to make a confiscation order (per Pill LJ, para.42). The challenge, in *Lambert*, was based "on the potential for the amounts to be paid under the orders, if totalled, exceeding the total benefit obtained" [41]. The Court added that "Confiscation orders are made to deprive drug dealers of the profits of their crime and also to deter them and others from drug dealing" [per Pill LJ, para.47].

87. The judgment is measured, but a number of submissions were made to the Court that warrant further discussion and comment.

i. There is the use of the word "apportion". The effect of the decision of the House of Lords in *R v May*, was to cast the definition of "benefit" in terms of what the defendant had personally "obtained" (CJA/POCA), or "received" (DTA) from his or her criminal conduct. Subsequent decisions of the Court of Appeal, such as *Allpress*,[112] *Clark*,[113] *Ahmad*,[114] (and many others), are founded on that definition of "benefit". Subject to what is stated at para.45 in *May*, there is no room for apportioning benefit between defendants who had participated in a joint criminal venture. What came to be loosely described as 'apportionment' (in the wake of *Porter*,[115] and *Chrastny No.2*[116]), was actually a concession - rather than a hard and fast principle - made by the prosecution or by the sentencer, in order to keep the value of a defendant's "benefit" down to something approaching a just amount.[117]

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[110] [2012] EWCA Crim 421
[111] [2008] UKHL 28
[112] [2009] EWCA Crim 8
[113] [2011] EWCA Crim 15
[114] [2012] EWCA Crim 391
[115] [1990] 1 WLR 1260
[116] [1991] 1 WLR 1385
[117] See R. Fortson, *Law of the Misuse of Drugs and Drug Trafficking Offences*, 6th ed., chp.13-122, Sweet & Maxwell Ltd. 2012.

Unfortunately, in *Lambert*, no reference is made to *R v Rooney* where the Court - having considered *R v Olubitan*,[118] and *May* (particularly paras. 27, 32 and 46) said,

> "In short, the position is, as we understand it: (a) if a benefit is shown to be obtained jointly by conspirators, then all are liable for the whole of the benefit jointly obtained. (b) If, however, it is not established that the total benefit was jointly received, but it is established that there was a certain sum by way of benefit which was divided between conspirators, yet there is no evidence on how it was divided, then the court making the confiscation order is entitled to make an equal division as to benefit obtained between all conspirators. (c) However, if the court is satisfied on the evidence that a particular conspirator did not benefit at all or only to a specific amount, then it should find that is the benefit that he has obtained." [36].

It is submitted that identical principles apply to cases of joint enterprise. Accordingly, what may seem to be apportionment is no such thing. It is submitted that practitioners would be well-advised to avoid the use of the words "apportion" and "apportionment".

ii. Lord Bingham stated in *May*, para.45, that " There might be circumstances in which orders for the full amount against several defendants might be disproportionate and contrary to article 1 of the First Protocol, and in such cases an apportionment approach might be adopted". In *Lambert*, the Court said that it was common ground that the Committee was "summarising the findings of the Court of Appeal and not expressing its own view" [32]. However, at para.46, Lord Bingham went on to say "No error was shown in the reasoning of Keene LJ, with which the committee generally agrees, while stressing that in any given case the statutory questions must be answered by applying the statutory language, shorn of judicial glosses and paraphrases, to the facts of that case." The Committee did not disavow the proposition with regards to Article 1 of the First Protocol: a fact, about which the Court, in *Lambert*, expressed a "little surprise" [44]. However, it is perhaps arguable that the issue that troubled the Committee was whether the multiple recovery of the full value of the benefit, could be said to be "disproportionate" with regards to the enrichment of the state rather than the impoverishment of a given defendant. There are examples where the full value of the benefit from criminal conduct has been ordered to be recovered from more than one defendant: see *R v Ahmad* [2012] EWCA Crim 391.

iii. It had been submitted by the Crown and by the Intervenor that *Porter* had been "disapproved" by the Committee in *May* and not "distinguished" [29]. It is respectfully submitted that *Porter* was distinguished. That case has often been misunderstood. The point in issue was whether it is open to a judge to make two or more defendants "*jointly and severally*" liable under a confiscation order. The answer, given by the Court in *Porter*, was in the negative. In other words, the fact that D1 fails to pay a confiscation order does not oblige D2 to pay the balance. That remains the position. Accordingly, *Porter* is not concerned with the issue of so-called 'apportionment' and can thus be distinguished on that basis.

iv. It was submitted in *Lambert* that there is a requirement to "impose a further sentence if the sum ordered is not paid" [15]. Although a default term of

[118] [2004] 2 Cr App R (S) 70

imprisonment is a 'sentence' for the purposes of making an appeal to the Court of Appeal (Criminal Division), it is manifestly not a "sentence" as generally understood.

v. There appears to have been much discussion concerning the objectives of confiscation following conviction - whether, for example, "a deterrent approach is legitimate"[20]. It is questionable how useful such discussions are in the construction of the DTOA, DTA, CJA 1988, or POCA. None of those confiscatory regimes set out the stated aims of the legislation beyond recovering a defendant's "benefit" from his or her relevant criminal conduct. Expressions such a "draconian", "the legislative steer", "the deterrent approach" (and others), are often heard, but whether they reflect the actual intention of the legislature is another matter. Parliamentarians, who have debated confiscation regimes, often misstate their own legislation as measures that are designed to recover "ill-gotten gains" or "profits" - rather than "proceeds". A by-product of confiscation may be deterrence, but if deterrence is one of the aims of the legislation then this will invite a critical assessment of its effectiveness in that regard.

V. Making Statutory Assumptions

88. If the court decides that the defendant has a "criminal lifestyle", it must make the four assumptions specified in s.10 POCA.

89. The assumptions are used to help the court decide whether the offender has "benefited" from his "general criminal conduct", and deciding the *value* of his benefit from that conduct.

90. Note, that the statutory assumptions are engaged *only* if the court finds that the defendant has a 'criminal lifestyle' as defined by s.75 POCA.

91. The four assumptions are:

    i. That any property ***transferred*** to the defendant[119] in the period starting six years before he was charged with the offence, was obtained by him as a result of his general criminal conduct (s.10(2)).

    ii. That any property ***held*** by the defendant at any time (and which he still holds) was obtained by him as a result of his general criminal conduct (s.10(3)).

    iii. That any ***expenditure*** incurred by the defendant in the period starting six years before he was charged with the offence, was met from property obtained by him as a result of his general criminal conduct (s.10(4)).

    iv. The fourth assumption is that, for the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, he obtained it ***free of any other interests*** in it (s.10(5)).

92. In relation to the second assumption (s.10(3)), it does not matter when the defendant first acquired the property that he continues to hold: *Chrastny No.2*;[120] *Bentham and Clarke*;[121] and *Brett*.[122]

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[119] By s.84(2)(c) "property is transferred by one person to another (if the first one transfers or grants an interest in it to the second". The property is "obtained" (*i.e.* as a benefit) at the earliest time that he appears to have "held it" (see s.10((2)(b)). Section 84(2)(b) states that "property is held by a person if he holds an interest in it". The defendant need not have purchased the property. It is sufficient that the property was gifted to him.

[120] (1991) 93 Cr.App.R.406

93. Note that if the court makes any of the assumptions set out in s.10, it will be made on the basis that the property was obtained "as a result of" the defendant's criminal conduct (and not merely "in connection with" such conduct): the position is different under Part VI of the CJA 1988 (see *Ilyas v Aylesbury DC*).[123]

94. There are two important statutory exceptions (s.10(6)):[124]

    (a) The assumption is shown to be incorrect, or

    (b) There would be a serious risk of injustice if the assumption were made.

95. The burden (civil standard) will be on the defendant to show that the origin of the property was legitimate: see *Dickens*;[125] *Comiskey*;[126] *Enwezor*.[127]

96. In *R v Steed*,[128] S was unable to show the source of property and expenditure in respect of which the statutory assumptions applied: thus, he could not prove that the property was not held by him as a result of his general criminal conduct.

97. In *R v Ward*,[129] W obtained a re-mortgage on one property and purchased another with the assistance of a mortgage, but he had submitted false accounts in support of the mortgage applications. The monies transferred to W from the Building Society were caught by the assumptions. The case of *R v Walls* was distinguished on its facts (and see *Nadarajah*).[130]

98. An offender can only discharge the burden on him by producing clear and cogent evidence. Vague and generalised assertions, unsupported by evidence will rarely, if ever, be sufficient: *Walbrook and Glasgow*;[131] and see *R v Panesar*,[132] and *Dickens*.[133]

"Serious risk of injustice: second exception

99. The precise limits of this exception are uncertain. It certainly guards against double-counting: see *Delaney and Hanrahan* (May 14, 1999); or some other accounting error: consider *Mouldon*,[134] and see *Ul-Haq*,[135] and *Ahmed and Qureshi*.[136]

100. It is not clear whether a defendant can rely on this exception if he is no longer able to access records in order to show that he had obtained property legitimately: consider *Rowsell*;[137] and *Deprince*,[138] *Wenn*,[139] and *Adjebade*.[140]

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[121] (1997) 2 Cr.App.R.(S.) 99
[122] *The Times*, October 13, 1997
[123] [2008] EWCA Crim 1303
[124] Section 10(6) re-enacts the statutory exceptions found in Part VI of the 1988 Act (and indeed in the Drug Trafficking Act 1994).
[125] [1990] 2 Q.B. 102
[126] (1990) 12 Cr.App.R.(S.) 562
[127] (1991) 93 Cr.App.R.233
[128] [2011] EWCA Crim 75
[129] [2008] EWCA Crim 2955
[130] [2007] EWCA Crim 2688
[131] (1994) 15 Cr. App. R. (S) 783
[132] [2008] EWCA Crim 1526
[133] (1990) 91 Cr.App.R. 164
[134] [2004] EWCA Crim 2715 (cited in *Panesar* [2008] EWCA Crim 1526)
[135] [2004] EWCA Crim 143
[136] [2004] EWCA Crim 2599
[137] [2011] EWCA Crim 1894
[138] [2004] EWCA Crim 524. The sentencer made a percentage reduction to avoid injustice, rather than finding that the assumption in relation to certain items of property had been shown not to be correct as to the part of the disputed sum, The Court of Appeal held that this was not impermissible.

101. The "risk of injustice" does not seem to include personal hardship to the offender or to his family (e.g. loss of the family home): consider *Elton v United Kingdom*.[141] But, contrast with dicta in *Rezvi*,[142] which seems to suggest that the 'serious risk of injustice' exception serves as 'safety net' to prevent injustice.[143] See also *Jones and others*,[144] and *Dore*.[145]

VI. Determining the "Recoverable Amount": s.7 POCA 2002

The general rule

102. The court will endeavour to recover the full value of a defendant's "benefit" from his "criminal conduct" (whether 'particular criminal conduct', or 'general criminal conduct'): s.7, POCA 2002.

103. However, in practice, this is often not possible because (a) "benefit" is not based on profit but on the gross value of property obtained by the defendant, and (b) the defendant's personal wealth is now less than the value of the "benefit" he obtained. Accordingly, subject to one exception (see s.6(6)) the Court will adopt the following staged approach and attempt to recover:
    a. the full value of the benefit, or
    b. if less, the "available amount",[146] or
    c. if less, a "nominal amount" if the available amount is nil.

104. The effect of section 7 is that the court should determine the "available amount" in every case: and see *Jones and others*.[147]

105. The burden is on the defendant to show that his assets ("free property") are insufficient to satisfy a confiscation order for the full amount: *Barwick*,[148] and see *Ilsemann*,[149] and see *R v Summers*,[150] *R v Piggott*,[151] *R v Henson* (where H had sold drugs but retained the proceeds):[152] but contrast with *R v McMillan-Smith*).[153] In *Grayson and Barnham v UK*,[154] it was held that it was not incompatible with the notion of a fair hearing in criminal

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139 [2002] EWCA Crim 1467
140 [2006] EWCA Crim 368
141 (ECHR), 11 September, 1997
142 [2002] UKHL 1
143 Per Lord Steyn, ""....the role of the court *in standing back and deciding whether there is or might be a risk of serious or real injustice* and, if there is, or might be, in emphasising that a confiscation order ought not be made. The Crown accepted that this is how the court, seized with a question of confiscation, should approach its task. In my view this concession was rightly made." Similarly, in *Benjafield* [2002] UKHL 2 (a case decided in the context of the DTA 1994), Lord Steyn said: Making due allowance for the differences between the confiscation procedures under the 1988 Act and under the 1994 Act, the reasoning in *R v Rezvi* applies with equal force in this case. The 1994 Act pursues an important objective in the public interest and the legislative measures are rationally connected with the furtherance of this objective. The procedure devised by Parliament is a fair and proportionate response to the need to protect the public interest. *The critical point is that under the 1994 Act, as under the 1988 Act, the judge must be astute to avoid injustice. If there is or might be a serious or real risk of injustice, he must not make a confiscation order*.
144 [2006] EWCA Crim 2061
145 [1997] 2 Cr App R(S) 152
146 Calculated in accordance with s.9 POCA 2002.
147 [2006] EWCA Crim 2061
148 [2001] 1 Cr.App.R.(S) 445
149 (1990) 12 Cr.App.R.(S.) 398
150 [2008] EWCA Crim 872
151 [2009] EWCA Crim 2292
152 [2011] EWCA Crim 651
153 [2009] EWCA Crim 732
154 [2008] EHRR 1222

proceedings to have placed the onus on each applicant to give a credible account of his current financial situation.

106. Prosecutors are not bound to discover the extent of the defendant's wealth. However, in *R v Hartshorne*,[155] the Court of Appeal recognised that there could be circumstances in which it would be open to the judge to attempt to quantity the extent of a defendant's actual wealth derived from the offence having regard to (e.g.) the expenses of the criminal venture.

107. In *R v McIntosh*,[156] the Court of Appeal (CD) made it clear that "there is no principle that a court is bound to reject a defendant's case that his current realisable assets are less than the full amount of the benefit, merely because it concludes that the defendant has not revealed their true extent or value, or has not participated in any revelation at all. The court must answer the statutory question in s.7 in a just and proportionate way." (Moses LJ): and see *Telli v RCPO*,[157] noting *R. v May,*[158] and *Glaves v CPS*.[159]

<u>The position of victims: *Compensation* versus *Confiscation*</u>

108. The exception to the above staged approach concerns victims of the offender's conduct. The victim may be entitled to compensation. The aim of POCA is not to enrich the State to the detriment of the victim. The combined effect of s.6(6) and s.13(6) POCA, is to safeguard victims. Thus, s.13 provides that where a court makes both a compensation order and a confiscation order, but the defendant has insufficient means to pay both in full, the victim's claim takes priority.

109. ***Role of the prosecutor with regard to victims***. Even if the court determines that the defendant has not benefited from "relevant criminal conduct", it may go on to make a compensation order to a named victim under s.130 of the Powers of Criminal Courts (Sentencing) Act 2000: see *Faithfull (R on the application of) v Ipswich Crown Court*,[160] and see *R v Goodenough*.[161]

110. In *R v Mitchell*,[162] the Court reiterated, citing *Brazil*, that there is "no objection" to making both a confiscation and compensation order when there are assets sufficient to cover both (p.145). However, it should not do so, if the result would be to prejudice a victim's claim to recover in full for loss suffered.

111. ***Defendant has assets to pay a confiscation order and compensation***. Where the defendant has sufficient assets to pay both a *compensation* order and a *confiscation* order, then both orders may be imposed. Section 71(1) of the 1988 Act (before it was amended by the Proceeds of Crime Act 1995), gave the court discretion as to the amount to be recovered under a confiscation order (see s.16(5) PCA 1995). This is no longer the case: see *Brazil*;[163] *Williams*,[164] *Mitchell*;[165] *Jannaway*.[166]

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[155] [2010] EWCA Crim 1283
[156] [2011] EWCA Crim 1501
[157] [2008] 2 Cr. App. R. (S.) 48
[158] [2008] 1 AC 1028
[159] [2011] EWCA Civ 69.
[160] [2007] EWHC 2763 (Admin)
[161] [2004] EWCA Crim 2260
[162] [2001] 2 CAR (S) 141; decided under the 1988 Act as amended by PCA 1995.
[163] January 12, 1995.
[164] [2001] 1 Cr.App.R(S) 500
[165] [2001] 2 Cr.App.R.(S) 141
[166] [2003] EWCA 459

112. Imposing both a confiscation order and compensation is not analogous to a fine: see Williams.[167]

VII. How the "available amount" is calculated: s.9, POCA 2002

Steps in the calculation of the "available amount"

113. The "available amount" is calculated in accordance with s.9 of POCA.

Step 1: Look at the "free property" held only by the defendant. "Free Property" means that the defendant's property is not subject to a forfeiture order, or a deprivation order (s.82, POCA).

(a) "Free property" is valued in accordance with s.79 POCA. Note the cases of *Stack v Dowden* (HL)[168] that is discussed and explained by the Supreme Court in *Jones v Kernott*.[169]

(b) Assess the value of the defendant's interest in property. If the defendant owns property, in respect of which nobody else enjoys an interest, the value of his interest is the market value of the property (s.79(2)). If there are third party interests in the property, the court should assess the value of the defendant's beneficial interest (s.79(3): see *Modjiri*,[170] where it was said that the wording of this provision was "not very clear", but it is submitted that it manifestly relates to the value of the defendant's interest as a proportion of the value of the property as a whole).

The courts will often make a deduction for costs likely to be incurred in selling the property: *Cramer*.[171] Note that s.80 is concerned with the value of property obtained by a defendant as a "benefit" – i.e. from his or her criminal conduct.

(c) POCA 2002 does not make express provision for the deduction of the value of any incumbrance in respect of the defendant's beneficial interest. Accordingly, ***deduct*** the value of any *secured* incumbrance on the defendant's beneficial interest in property. Disregard any unsecured loan (*Pattison*,[172] and consider *SFO v Lexi Holdings*[173]). If the incumbrance is a sham (and the court is satisfied about that) then its apparent value will be left out of account. Similarly, if the incumbrance cannot, or will not, be enforced, the court is not obliged to take it into consider it: *Harvey.*[174]

Step 2: ***Deduct*** "obligations which have priority" (s.9(1)) [the CJA/DTA spoke of 'obligations having priority']. Such obligations are few in number and the expression is defined in s.9(2). Debts that remain owing by the defendant as a result of holding property with a negative equity, do not have priority over the amount to be recovered under a confiscation order: see *Ghadami*.[175]

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[167] [2001] 1 Cr.App.R. (S) 500
[168] [2007] UKHL 17, [2007] 2 AC 432
[169] [2011] UKSC 53
[170] [2010] EWCA Crim 829
[171] 13 Cr.App.R(S) 390
[172] [2007] EWCA Crim 1536
[173] [2008] EWCA Crim 1443
[174] July 31, 1998, Court of Appeal (Criminal Division).
[175] [1998] 1 Cr.App.R.(S) 42; [1997] Crim.L.R. 606

- A loan is not an "obligation having priority": see *McQueen*.[176]
- Legal costs do not amount to an "obligation having priority": *Martin and White*.[177]

Step 3: *Add* the value of "tainted gifts" (note *Dickens*;[178] and see *Wallace Duncan Smith*;[179] and see *Liverpool Magistrates Court, Ex. p. Ansen*;[180] and note *Gokal*[181]). The court no longer has discretion in relation to gifts as it did under s.74A(10) of the Criminal Justice Act 1988: see *R v Wadsworth*,[182] where a gift was included in the value of the amount recoverable under the confiscation order.

Rules relating to property

114. Rules relating to what constitute "property" - and for the purpose of ascertaining whether a person holds a "legal" or "beneficial" interest in property - are very complex. Furthermore, the rules relating to property differ in each jurisdiction of the United Kingdom (E&W, Scot., and NI).

115. In *Larkfield Ltd v RCPO*,[183] the Court of Appeal (Civil Division) expressed the view that when identifying realisable property for the purposes of a confiscation order, conventional property principles are to be applied save where statute clearly provides otherwise.

116. In relation to pension funds, see *Chen*,[184] Ford,[185] and *Cornfield*.[186]

117. In relation to trust property, see (as examples), *Modjiri*,[187] *Anderson*,[188] *Shahid*,[189] *R. v W,*[190] and *RCPO v May*.[191]

118. It is important to note the decision of the House of Lords in *Stack v Dowden*[192] in which a considerable number of cases including *Midland Bank v Cooke* [1995] 4 All E.R.562, *Pettitt v Pettitt*,[193] *Gissing v Gissing*,[194] were reviewed, and to read the decision of the Supreme Court in *Jones v Kernott*[195] (Supreme Court). Note also *Gibson v RCPO*.[196]

119. In *Stack v Dowden* Lady Hale said:

> [56] Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is

176 [2001] EWCA Crim 2460
177 (1988) 2 Cr.App.R(S.)385
178 [1990] 2 Q.B. 102
179 [1996] 2 Cr.App.R. 1
180 [1998] 1 All E.R. 692, at p.701
181 [2001] EWCA Civ 368
182 [2011] EWCA Crim 1233
183 [2010] EWCA Civ 521
184 [2009] EWCA Crim. 2669
185 [2009] 1 Cr. App. R. (S) 68
186 [2007] 1 Cr. App. R. (S) 771
187 [2010] EWCA Crim. 829
188 [2010] EWCA Crim. 615.
189 [2009] EWCA Crim. 831
190 [2011] EWCA Crim. 103
191 [2009] EWHC 1826 (QB)
192 [2007] UKHL 17
193 [1970] AC 777
194 [1971] AC 886
195 [2011] UKSC 53
196 [2008] EWCA Civ 645

joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.

[58].....at least in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved.

[60/61]....The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it....the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended.

[68] The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way.

[69] In law, 'context is everything' and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses.....cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual.

120. In *Jones v Kernott*, Lord Walker and Lady Hale (in a joint judgment) stated that the following principles are applicable where a family home is bought in the joint names of a cohabiting couple (whether married or not) who are both responsible for any mortgage, but without any express declaration of their beneficial interests:

(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.

(2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.

(3) Their common intention is to be deduced objectively from their conduct: "the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party" (Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden*, at para 69.

(4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not

possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property": Chadwick L.J. in *Oxley v Hiscock* [2005] Fam 211, para 69. In our judgment, "the whole course of dealing … in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).

Gifts tainted with criminality

121. POCA gives an extended meaning to the concept of "gift", namely, the transfer of property for a consideration "*significantly less*" than the value of the property at the time of transfer (s.78(1)):

> (1) If the defendant transfers property to another person for a consideration whose value is significantly less than the value of the property at the time of the transfer, he is to be treated as making a gift.
> (2) If subsection (1) applies the property given is to be treated as such share in the property transferred as is represented by the fraction--
> (a) whose numerator is the difference between the two values mentioned in subsection (1), and
> (b) whose denominator is the value of the property at the time of the transfer.
> (3) References to a recipient of a tainted gift are to a person to whom the defendant has made the gift.
>
> *83 Realisable property*
> Realisable property is--
> (a) any free property held by the defendant;
> (b) any free property held by the recipient of a tainted gift.

122. In *R v Richards*,[197] the Court of Appeal made a number of observations regarding the tainted gift provisions under POCA:

i) The tainted gift provisions only apply where there has been a transfer of property. Whether there has been a transfer of property and, if so, what is the nature of the proprietorial interest that has been transferred are matters to be determined by the law of property.

ii) If there has been a transfer at a significant undervalue, the consequence in terms of the Act is not to prevent the transfer having such legal effect as it may have as a matter of property law. "This is unsurprising for it is well established as a matter of property law that property can pass under an illegal transaction: see *Singh v Ali* [1960] AC 167" [para.19]. The effect under the Act is that the value of the property transferred at a significant undervalue is to be included in the valuation of the amount available to the defendant to satisfy the confiscation order.

[197] [2008] EWCA Crim 1841

iii) The scheme adopted by the Act is to enable property transferred at a significant undervalue to be included in the calculation of the available amount:

> "It is true that the interest to be valued is still his interest in such property, although the mechanism for its valuation is set out in the Act. But, dependent on the circumstances, a court may readily infer that the recipient is a nominee or in any event likely to be receptive to the transferor's wishes and can be expected to value the defendant's interest accordingly. If it transpires that a defendant genuinely cannot recover property (as distinct from having a lack of willingness to do so), section 23 provides for the possibility of a re-assessment." (per Toulson LJ, para.21]

iv) There is nothing in this scheme whereby the Act operates to re-vest property transferred at an undervalue in the transferor: "If Parliament had so intended, it would have been easy enough to provide that a transfer at a significant undervalue shall have no effect in law, or to provide for a re-vestment of the transferred interest on a defined occurrence such as a ruling by the court. The Act does not adopt that approach....The provisions of section 23(5), for example, would be otiose if such were the effect in law". (per Toulson LJ, para.22]

VIII. Enforcement of confiscation orders

123. There are two main routes by which a confiscation order may be enforced.

124. The first, and usual method, is to treat the value of a confiscation order as a fine. If the order is not paid, the defaulter is liable to be imprisoned, but only as a last resort, and only in the circumstances prescribed by s.139(3) of the Powers of the Criminal Courts (Sentencing) Act 2000.

125. The second route is by way of the appointment of an enforcement receiver.

Term of imprisonment in default of payment

126. When a confiscation order is made, the Court must make an order fixing a term of imprisonment in default under s.139(2) albeit that a failure to do so does not invalidate the confiscation order: *Ellis*.[198]

127. The date of commencement of the defendant's default sentence for non payment of a confiscation order is the day on which he is released from custody: *R. v. City of London Justices, ex.p. Chapman, (*1998) 162 J.P. 359; *The Times,* March 17, 1998.

128. The current default terms of imprisonment are:

Amount	Max Term
Not exceeding £200	7 days
Over £200, not exceeding £500	14 days
Over £500, not exceeding £1,000	28 days
Over £1,000, not exceeding £2,500	45 days
Over £2,500, not exceeding £5,000	3 months
Over £5,000, not exceeding £10,000	6 months
Over £10,000, not exceeding £20,000	12 months
Over £20,000, not exceeding £50,000	18 months
Over £50,000, not exceeding £100,000	2 years

[198] [1996] 2 Cr.App.R.(S)403

Amount	Max Term
Over £100,000, not exceeding £250,000	3 years
Over £250,000, not exceeding £1 million	5 years
Over £1 million	10 years

129. Early release provisions apply in relation to defaulters.

Time to pay: s.11, POCA 2002

130. It is desirable that the court should specify a date for the payment of a confiscation order: see *R. v. City of London Justices, ex.p. Chapman*.[199]

131. Note that section 11 of the 2002 Act gives the court limited power to allow the defendant time to pay a confiscation order. The maximum period is 6 months. The defendant can apply within that period for further time to pay, but he must show exceptional circumstances, and the extended period must be no more than 12 months from the date the confiscation order was made.

132. Note that there is no provision in the Act for the payment of a confiscation order by instalments.

133. Serving a term of imprisonment in default of payment will not extinguish the debt.

134. Note that there is early release available in connection with terms of imprisonment imposed in default of payment of a confiscation order: see s.258 CJA 2003.

Committal to prison for non-payment

135. The defendant must have served all other terms of imprisonment before the default term begins to run (s.38(2)).

136. Serving a term of imprisonment in default of payment, will not extinguish the debt under a confiscation order. This is because, by s.85(5), POCA, confiscation proceedings are "concluded" when the order is satisfied or discharged, or if the order is quashed and there is no further possibility of an appeal against that decision.

137. Section 87(1) POCA, provides that a confiscation order is satisfied when no amount is due under it.

138. Section 38(5) of POCA provides that serving a default term does not prevent the confiscation order from continuing to have effect so far as any other method of enforcement is concerned.

139. The term of imprisonment in default of payment should be reduced in proportion to the amount paid into court as it relates to the value of the confiscation order: consider *Hansford v Southampton Magistrates' Court*[200] where the prosecutor appears to have conceded (correctly it is submitted) that where a defendant is committed to prison in default of payment of a confiscation order, the judge must impose a term that gives the defendant 'credit' for the amount paid into court (e.g. by a receiver).

140. It is not necessary for magistrates to conduct a means inquiry before committing a defendant to prison for failing to pay a confiscation order: *R. v Hastings and Rother Justices Ex p. Anscombe*.[201] However, the Magistrates retain a discretion to inquire into the defendant's means before issuing a warrant of commitment, the rationale being that the

[199] *The Times,* March 17, 1998
[200] [2008] EWHC 67 (Admin)
[201] [1998] Crim.L.R. 812

determination by the Crown Court includes a finding that the defendant has sufficient realisable assets to meet the confiscation order: see *R (on the application of Rustim Necip) v. City of London Magistrates' Court*,[202] per Richards LJ, citing *Hastings and Rother Justices case*, and *R v Liverpool Magistrates' Court, ex parte Ansen*;[203] see also, *RCPO v Taylor*.[204]

IX. Absent defendants

141. POCA 2002 makes provision for the making of confiscation orders against a defendant who was convicted but who *then* absconds (s.27). A confiscation order may be made under a modified process set out in s.27, POCA.

142. POCA 2002 also makes provision for defendants against whom proceedings for an offence have been started,[205] but who are neither convicted nor acquitted. Again, a confiscation order can be made under a modified process set out in s.28 POCA.

143. It has been said that there is a lacuna in the legislation (POCA) where D absconds after being charged, and who is *convicted* in his or her absence. It is said that s.27 cannot apply because the absconding occurred *before* D was convicted, and that s.28 cannot apply where a verdict has been returned.[206] Attractive as the argument is, it is submitted that one solution is to give s.27 a purposive construction – consistent with the effect of s.111 POCA (Scotland) – so that the word "absconder" (and concomitant expressions) refers to a defendant who is "unlawfully at large".

144. Under POCA, it is not possible to make a confiscation order against a defendant who was convicted but who died before sentence and/or confiscation proceedings. It may be possible for the prosecution to apply for an asset recovery order under Part 5 of POCA (civil recovery).

145. There may circumstances in which a court can make a confiscation order against defendants who are involuntarily absent (e.g. due to illness): see *R v Gavin and Tasie*,[207] *R v Spearing*,[208] *R v McCormick*,[209] and *R v Bhanji*.[210]

X. Legal representation, advice, and assistance

146. The courts will always strive to ensure that defendants in confiscation proceedings are legally represented.

147. However, there are occasions when a defendant will dismiss his legal team as a tactical device. Where a judge is of the view that the judicial process is being manipulated in that way, he or she is not necessarily obliged to adjourn or to postpone confiscation proceedings to enable another legal team to be instructed: see, for example, *R v Mayhew (Paul Stephen)*,[211] where, having dismissed his legal team M declined to instruct the lawyers who were available at court. The judge proceeded to deal with the substantive

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[202] [2009] EWHC 755 (Admin), at [10]
[203] [1998] 1 All ER 692
[204] [2010] EWHC 715 (Admin)
[205] Defined by s.85, POCA 2002. Proceedings are typically started by summons, or warrant (s.85(1)(a)), or when charged with an offence (s.85(1)(b)) or when an indictment is preferred as specified in s.85(1)(c), POCA.
[206] '*Confiscation against defendants convicted in absence: a lacuna?*', Adam King; Archbold Review, 2013, Issue 6.
[207] [2010] EWCA Crim 2727
[208] [2010] EWCA Crim 2169
[209] [2010] EWCA Crim 1556
[210] [2011] EWCA Crim 1198
[211] [2011] EWCA Crim 393

hearing having "yet again" considered M's interest. The learned judge decided that it was fair to proceed given the delay, the simplified nature of the issues, and given the fact that even without lawyers, justice could be done. In *Obikile*,[212] it was held that it was impossible that O - who had been legally represented but later represented himself - was not fully aware of the nature of confiscation proceedings and their consequences.

XI. Revised determinations

148. POCA 2002 makes provision for the Crown Court to reconsider determinations that it has made in relation to confiscation proceedings. Put shortly, the circumstances that enable a court to make redeterminations are as follows:

149. Where the prosecution – on the evidence then available to it – did not initiate confiscation proceedings but new evidence has come to light that would have justified the court embarking on confiscation proceedings: s.19.

150. The court had embarked on confiscation proceedings but, in the light of the evidence then available to the prosecution, the court ruled that the defendant had not benefited from his offending. A revised determination may be made in the light of the evidence now available: s.20.

151. The *value* of a defendant's benefit was greater than was first thought (in the light of evidence not available to the prosecutor at the time of the confiscation proceedings). The prosecution may apply to the Court for a redetermination of the value of the defendant's benefit: s.21.

152. Either the prosecutor or the receiver applies to the Crown Court for an upward variation of the "available amount" – and thus the amount recoverable – under a confiscation order: s.22. Although that section does not say so, the provision tends to be used where the value of the defendant's assets is greater than was first thought. For the position under the DTA 1994, see *In the Matter of Peacock*.[213]

153. The defendant, or the receiver, applies for a downward variation of the "available amount" – usually on the grounds that the value of the defendant's wealth was less than thought at the time the original confiscation order was made: s.23.

154. Sections 19-21 of POCA have a six-year time limit, but s.22 (upward variation of "available amount") has no time limit, and all four sections allow the prosecution to return to court after a confiscation order was made in order to seek a variation that will be (and is intended to be) to the defendant's financial detriment. It has sometimes been said that these measures have the potential to "hound" a defendant, and that they do not sit comfortably with the notion that there should be finality in sentencing, as close to the moment of conviction as possible. The signs are that the courts will be on their guard against overzealous applications rather than achieving the purpose of the legislation.

155. The general rule is that a defendant is not entitled to invoke s.23 POCA in order to re-litigate determinations made by the sentencer, and this includes the extent of the defendant's wealth: *Joyce*,[214] *Barker*,[215] *R v C*,[216] *R v W*,[217] *Gokal v SFO*,[218] *Briggs*;[219] but

[212] [2011] EWCA Crim 1658
[213] [2012] UKSC 5.
[214] [2009] EWCA Crim. 2605
[215] [2011] EWCA Crim 1028
[216] Unreported, November 18, 1997.
[217] Unreported, 29th January, 1998.

consider *Forwell*,[220] and *In The Matter of N'guessan*.[221] See, also, *Alves*,[222] where it was conceded that A in fact had no interest in two items of property, and thus the value of the order was reduced on appeal). The decision of the CA(CD) in *McGoldrick* must be viewed on its exceptional (arguably unique) facts).[223]

156. Accordingly, it will be rare that a defendant can use (if ever) the procedure to assert that he never had the assets at the time that the confiscation order was made. However, the ultimate issue for the court, in relation to an application under s.23, involves an assessment of what the defendant is truly worth at the date of the application for a downward variation of the "available amount". In *Glaves v CPS*,[224] the Court of Appeal rejected the argument that, in the absence of full disclosure by the defendant of the whereabouts of hidden assets, he was debarred as a matter of law from pursing a downward variation in the "available amount" under a confiscation order.

157. *In the Matter of Re L*,[225] it was said that where the value of a gift has been included in the amount of a confiscation order, it is "not open to a defendant later to seek a certificate of inadequacy on the basis that he cannot realise or recover that gift.

XII. Criminal memoirs (Exploitation proceeds of crime)

158. Part 7 (ss.155 to 172) of the Coroners and Justice Act 2009 (in force, 6 April 2010: SI 2010/816) makes detailed provision for the recovery of proceeds/profits derived by an offender from his "exploitation" of any material (for example, memoirs) pertaining to the offence in respect of which the offender had participated.

[218] [2001] EWCA Civ 368
[219] [2003] EWCA Crim 3298
[220] [2003] EWCA Civ 1608
[221] [2002] EWCA Civ 215
[222] [2011] EWCA Crim 1375
[223] [2011] EWCA Crim 2444
[224] [2011] EWCA Civ 69
[225] [2010] EWHC 1531 (Admin)

THE SENTENCING COUNCIL DEFINITIVE GUIDELINE 2012

General

159. On the 24th January 2012, the Sentencing Council published definitive guidelines for drug offences. The Guidelines apply to offenders aged 18 and older, who are sentenced on or after the 27th February 2012, *regardless of the date of the offence*.

160. For offenders under 18 years of age, see the Sentencing Council's Definitive Guideline: "***Overarching Principles – Sentencing Youths***" [see *Blackstone's Criminal Practice; Supplement 1; part 18*]

161. Separate Guidelines have been issued for cases before:

    a. the Crown Courts: http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Definitive_Guideline_final_(web).pdf

    b. and the Magistrates' Courts: http://sentencingcouncil.judiciary.gov.uk/docs/MCSG_Update_6_-_January_2012_(web).pdf

162. Every court must follow sentencing guidelines "relevant to the offender's case….unless the court is satisfied that it would be contrary to the interests of justice to do so": s.125(1), Coroners and Justice Act 2009.

Overview (Crown Court Guidelines) and personal observations

163. The Sentencing Council is to be given considerable credit for the painstaking work that it undertook in the preparation of the Definitive Guidelines.

164. A number of useful papers, research and analysis bulletins, appear on the Sentencing Council website:

    a. "Research into the effects of the draft drug offences guideline on sentencing practice"[226]

    b. "Research into the effects of the draft drug offences guideline – Appendices"[227]

    c. "Analysis and research bulletin - drug offences"[228]

    d. "Analysis and research bulletin - drug offences data tables"[229]

    e. "Drug offences - draft resource assessment"[230]

    f. "Drug 'mules': twelve case studies"[231]

    g. "Public attitudes to the sentencing of drug offences"[232]

    h. "Drug offences definitive guideline – Resource assessment"[233]

    i. Press Release[234]

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226 http://sentencingcouncil.judiciary.gov.uk/docs/Drug_offences_guideline_research_bulletin_(web).pdf
227 http://sentencingcouncil.judiciary.gov.uk/docs/Drug_offences_guideline_research_Appendices_(web).pdf
228 http://sentencingcouncil.judiciary.gov.uk/docs/Analysis_and_Research_Bulletins_-_Drugs_Offences.pdf
229 http://sentencingcouncil.judiciary.gov.uk/docs/Analysis_and_Research_Bulletins_-_Data_Tables.xls
230 http://sentencingcouncil.judiciary.gov.uk/docs/Consultation_stage_resource_assessment_drugs.pdf
231 http://sentencingcouncil.judiciary.gov.uk/docs/Drug_mules_bulletin.pdf
232 http://sentencingcouncil.judiciary.gov.uk/docs/Drugs_research_report.pdf
233 http://sentencingcouncil.judiciary.gov.uk/docs/Drugs_final_resource_assessment_(web).pdf
234 http://sentencingcouncil.judiciary.gov.uk/media/674.htm

165. The Council consulted widely, receiving both written and oral representations.[235]

166. The Definitive Guidelines differ markedly from the Council's proposals in its 2011 Consultation Paper.

167. The following points are tentatively advanced:

    a. Vulnerable drug couriers, who have been exploited and preyed upon to commit a drug trafficking offence, can expect to receive a significantly lower sentencing starting point than hitherto. [*NOTE that the expression "drug mule" can be derogatory*]

    Example: vulnerable drug courier imported 5 kgs of cocaine. Starting point = Lesser role = 8 years' imprisonment. Previously, the starting point (assuming 5 kgs at 100% purity; and a contested trial) would have been in the region of 12 years' imprisonment (consider *R v Martin* [2007] 1 Cr.App.R(S) 14.

    b. Personal characteristics of the offender will (arguably) afford greater mitigation than hitherto (by how much is unclear). Mitigation can include "serious medical conditions requiring urgent, intensive or long-term treatment",[236] and "mental disorder or learning disability". The lists of mitigating and aggravating factors are not exhaustive.

    c. There appears to be greater emphasis on moral responsibility (note the move away from the purity of the substance as determinative of quantity and harm).

    d. Persons in *simple possession* of a controlled drug can expect to receive a non-custodial sentence – save in cases, for example, where there has been persistent flouting of the law.

    e. The Starting Points for simple possession are marginally lower than those stated in the Consultation Paper. BUT this is probably intended to do no more than to emphasise the importance of **health** and **education** initiatives in relation to drug use – rather than imposing terms of imprisonment.

    f. This approach is NOT "depenalisation" – still less "decriminalisation" – as tends to be reported in the media.

    g. The guidelines apply only where a person has been convicted of an MDA offence.

    h. The Starting Points and Category Ranges that are specified in the Consultation Paper, have been substantially reworked:

        i. The quantities stated in the Definitive Guidelines represent benchmarks for sentencing. The Consultation Paper proposals involved *quantity ranges* (e.g. 2.5kg to 10 kgs). The Definitive Guidelines state specific quantities that are directly referable to the sentencing Starting Points (e.g. 5 kgs of heroin; "leading role"; starting point = "14 years").

        ii. The Definitive Guidelines are more coherent than the CP proposals in that they group offences of similar seriousness together (e.g. importation - production - the 'supply' offences - permitting premises - simple possession)

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[235] "*Drug offences guideline – Response to the consultation*": http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Response-(web).pdf

[236] Perhaps the word "care" might have been preferable to "treatment" (not all conditions are susceptible to treatment).

i. It is tentatively submitted that, *in most cases, definitive guidelines are likely to achieve outcomes that are broadly comparable to those imposed under the judicial guidelines*.

j. HOWEVER, there is one category of case, where significantly higher outcomes are likely to result. This concerns those cases where the purity of the drug is very low. This is because the sentencing thresholds are not based on purity.

> Example: D imports 500 grams of cocaine at 100% purity -- D will be sentenced somewhere between ***Category 2*** (1 kg) and ***Category 3*** (150 grams).

k. *But*, if D imports 5 kgs of powder containing 1% cocaine, D falls to be sentenced as a ***category 1*** offender (5 kgs)

l. Starting points for heroin, cocaine, and LSD, seem (at first sight) to have been based on leading judicial guideline cases (5 kgs (heroin/cocaine – 14 years' – *R v Aranguren* (1994) 16 Cr.App.R(S) 211; LSD - 250,000 units – 14 years' – *R v Hurley* [1998] 1 Cr.App.R.(S) 299). However, the guidelines cases were based on the purity of the drug.

m. There appears to be a ratcheting up of the tariff for "Ecstasy". The 14-year starting point in *R v Warren and Beeley* [1996] 1 Cr.App.R.(S) 233, was based on *50,000* or more tablets (assuming 100mg of ecstasy per tablet). By contrast, the same starting point - under the guidelines – applies to a person playing a "leading role", where the quantity is in the order of *10,000* tablets.[237]

n. There appears to be a scaling down of the tariff with regards to *substanital* quantities of amphetamine and cannabis (no distinction is made in the guidelines between herbal cannabis and cannabis resin).

o. In the case of amphetamine (Class B), *20 kgs* carries a starting point of 8 years' imprisonment if D played a "leading role" (6 years' if the role was "significant"). By contrast – applying *R v Wijs* [1998] 2 Cr.App.R.436 – *15 kgs+* carried a sentence between 10 to 14 years' imprisonment.

p. Where the quantity of cannabis (Class B) is in the region of *200 kgs*, the starting point is 8 years' imprisonment for a person playing a "leading role" (6 years' for a "significant" role). By contrast, the *Ronchetti* guidelines[238] are *100 kgs*: 7 to 8 years' imprisonment, and 10 years' for 500 kgs or more.

q. The Definitive Guidelines do NOT:

   i. Cater for massive amounts of a controlled drug.
   ii. Not all drugs are included – e.g. Opium; "magic mushrooms";
   iii. Makes no provision for Temporary Class Drugs
   iv. The pre-existing Judicial Guidelines may continue to be relevant in the cases mentioned in ix above.

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[237] Consider *R v Davidson* [2002] EWCA Crim 879.

[238] [1998] 2 Cr.App.R.(S) 100. In *Ronchetti*, the Court of Appeal gave guidance to sentencers "by way of addendum" to *Aramah*. Thus: • 100 kilograms: 7 to 8 years' imprisonment; • 500 kilograms or more: 10 years' imprisonment; • "larger importations": will attract a higher starting point. The guidelines were expressed on the basis that the defendant had contested the case and that s/he played more than a subordinate role.

Steps to be followed by sentencers

168. The steps are as follows:

i. Determine the "offence category".

The relevant factors depend on the offence for which D falls to be sentenced:

- Importation / exportation, possession with intent to supply, supply (etc.), production and cultivation.

  Two principal factors are relevant:

  a) The offender's *culpability* based on **role**: Leading; Significant; Lesser.
  b) *Harm* -- based on the **quantity**. There are four categories (in effect, four categories of harm). Quantity is typically determined by the weight of the substance. Purity is disregarded at this stage. Note:
     - The quantity of Ecstasy is expressed in terms of the number of tablets (but not all 'ecstasy' appears in pill form, and many drugs come within the generic label 'ecstasy').
     - The quantity of LSD is determined by the number of dosage units ("squares"), but LSD can appear in other forms too.
     - In cases of cannabis cultivation/production, quantity is variously expressed by reference to its weight, or the number of plants, or "operation capable of producing ['industrial' (category 1) or 'significant' (category 2)] quantities for commercial use"

- "Permitting premises" (s.8, MDA),

  a) *Culpability* is based on "**extent of the activity**". Factors include whether the property is used primarily as a drug 'den' (or not); or for substantial gain (or not).
  b) *Harm* is assessed by reference to the "**quantity** of drugs". Factors of harm seem to overlap with culpability (e.g. frequent or infrequent drug-related activity).

  There are three sentencing categories:

  i. Higher culpability **and** greater harm
  ii. Lower culpability **and** greater harm; **or** higher culpability and lesser harm;
  iii. Lower culpability **and** lesser harm

- Simple possession (s.5, MDA).

  Culpability is based on the Class of drug (i.e. Class A, B, or C).
  There are three sentencing categories (Class A, B, and C)

NOTE:

- Purity is not taken into account at this stage.
- The Class of drug is directly relevant to Step 2.

ii. ***Determine the <u>Starting Point</u> and the <u>Category Range</u>***:

a) Different tables apply to each Class of controlled drug (i.e. Classes A, B, and C).

[*Although not spelt out in the Guidelines, a Temporary Class Drug will be punished under the MDA 1971 as if it were a drug of Class B.*][239]

b) Different **roles** attract different ***Starting Points***. Leave out of account guilty pleas and, any previous convictions.

c) The ***Category Range*** (i.e. penalties above or below the starting point).

- Take into account aggravating and mitigating factors (which may include personal mitigation, and good character or previous convictions).
- High or low purity of a drug may be taken into account at this stage. [*The sentencing guidelines appear to be based on moral culpability*]
- Leave out of account a guilty plea [this is relevant to step 4].

iii. ***Consider factors which indicate a reduction for assistance given:*** e.g. ss.73 and 74 Serious Organised Crime and Police Act 2005.

iv. ***Reduction for guilty pleas:*** in accordance with s.144 of the CJA 2003 and the Guilty Plea guideline.

v. ***Totality principle***

vi. ***Confiscation and ancillary orders (if applicable)***

vii. ***Give reasons*** (s.174, CJA 2003)

viii. ***Time on remand (if any).***

Further (personal) observations: determining "harm" by quantity rather than purity of the substance

169. It is submitted that the shift away from the purity thresholds is an error (and opposed by the Working Party of the Criminal Bar Association for England and Wales).[240] The CBA Response is available from the Criminal Bar Association, or it can be downloaded from the author's website.[241]

170. Purity is now a mitigating or aggravating factor – but this goes only to the "Category Range" and has no bearing on the "Offence Category". The correctness of the positioning

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[239] "The punishments which may be imposed on a person convicted of the offence summarily or (as the case may be) on indictment in relation to the temporary class drug are the same as those which could be imposed had the person been convicted of the offence in that way in relation to a Class B drug (see the fifth column of Schedule 4)" (see s.25(2B) of the MDA 1971, inserted by s.151 and, para.17(2) of schedule 17, to the Police Reform and Social Responsibility Act 2011 (in force from the 15th November 2011: see The Police Reform and Social Responsibility Act 2011 (Commencement No. 1) Order 2011; 2011 No. 2515).

[240] It is pointed out that this commentator chaired the Working Party. Other members of that Party were Kate Lumsdon, and Monica Stevenson.

[241] www.rudifortson4law.co.uk/legaltexts/CBA_Response_to_the_Sentencing_Council_Consultation_Paper.pdf

of various substances within Schedule 2 to the MDA (i.e. Classes A, B and C) is itself a highly contentious issue.

171. It is not possible to tinker with the benchmark quantities specified in the Definitive Guidelines because this would be to re-determine the "Offence Category" (step 1). The Guidelines state that "purity is not taken into account at Step 1".

172. Given that purity is left out of the reckoning at Step 1, it might be said that references in the Guidelines to the "quantity of drug" is misleading because, in the majority of cases, what will be weighed are substances that *contain* the offending drug (e.g. cocaine). The point has some force:

    a. Section 2(1) of the MDA 1971 defines a "controlled drug" as "any substance or product for the time being specified in Parts Part I, II or III of Schedule 2" (i.e. Class A, B, or C) or a Temporary Class Drug.

    b. The "substance[s] and product[s]" are those listed in para.1 to each Part of Schedule 2 (e.g. cocaine, heroin, cannabis). Those substances or products may appear in various *forms* (e.g. as a "salt", "ester" or "ether").

    c. The MDA also controls "Any preparation or other product containing a substance or product" (e.g. a preparation or other product that contains cocaine).

    d. However, (iii) above, merely brings us back to the list of 'substances and products' specified in para.1 to Parts 1 to 3.

173. Determining quantity by weight will not always be meaningful or practical:[242]

    a. Not all substances appear as dry powders, or in tablet form.

    b. In cases where a drug (e.g. cocaine) is suspended in liquid,[243] is it proposed that the court should have regard to the gross weight of the liquid?

    c. In cases where a drug appears as a paste, is the weight of the substance determinative of the quantity of drug?

    d. In a case that involves a large quantity of 'Magic mushrooms' (in which *psilocin* subsists: Class A), how should a court determine drug quantity? Is it by the number of mushrooms (if whole), or by their weight, or (as the case may be) the weight of the dried material?

    e. Not all amphetamine (typically amphetamine sulphate) is dry.

    f. Do cases that involve cannabis oil, fall outside the guidelines?

174. The UK does *not* have an offence, under the MDA, of adulterating a controlled substance with a noxious non-controlled substance. Such conduct would nonetheless be an aggravating factor. But, in cases where there is no such evidence of noxious/toxic adulteration of a controlled drug, purity is (it is submitted) a powerful indicator of potential harm.

175. It is not evident whether purity analysis will now be routinely carried out, or whether analysts will confine themselves to statements such as "low", "medium", "high purity"; or whether any determination of purity will routinely be carried out. In the absence of

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[242] The author expresses his thanks to a number of criminal law practitioners, and medical practitioners, for their comments on this issue.

[243] For example, *R v Campbell* [2011] EWCA Crim 1017, *R v George* [2003] EWCA Crim 1238;

analysis carried out by the prosecution, will the burden now fall on the defence to carry out such tests?

176. ***Example***– importation: Determining the offence category:

Culpability demonstrated by offender's role One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.
LEADING role: • directing or organising buying and selling on a commercial scale; • substantial links to, and influence on, others in a chain; • close links to original source; • expectation of substantial financial gain; • uses business as cover; • abuses a position of trust or responsibility.
SIGNIFICANT role: • operational or management function within a chain; • involves others in the operation whether by pressure, influence, intimidation or reward; • motivated by financial or other advantage, whether or not operating alone; • some awareness and understanding of scale of operation.
LESSER role: • performs a limited function under direction; • engaged by pressure, coercion, intimidation; • involvement through naivety/exploitation; • no influence on those above in a chain; • very little, if any, awareness or understanding of the scale of operation; • if own operation, solely for own use (considering reasonableness of account in all the circumstances).

Category of harm Indicative quantity of drug concerned (upon which the starting point is based):
Category 1 • heroin, cocaine – 5kg; • ecstasy – 10,000 tablets; • LSD – 250,000 squares; • amphetamine – 20kg; • cannabis – 200kg; • ketamine – 5kg.
Category 2 • heroin, cocaine – 1kg; • ecstasy – 2,000 tablets; • LSD – 25,000 squares; • amphetamine – 4kg; • cannabis – 40kg; • ketamine – 1kg.
Category 3 • heroin, cocaine – 150g; • ecstasy – 300 tablets; • LSD – 2,500 squares; • amphetamine – 750g; • cannabis – 6kg; • ketamine – 150g.
Category 4 • heroin, cocaine – 5g; • ecstasy – 20 tablets; • LSD – 170 squares; • amphetamine – 20g; • cannabis – 100g; • ketamine – 5g.

CLASS A	Leading role	Significant role	Lesser role
Category 1	**Starting point** 14 years' custody	**Starting point** 10 years' custody	**Starting point** 8 years' custody
	Category range 12 – 16 years' custody	**Category range** 9 – 12 years' custody	**Category range** 6 – 9 years' custody
Category 2	**Starting point** 11 years' custody	**Starting point** 8 years' custody	**Starting point** 6 years' custody
	Category range 9 – 13 years' custody	**Category range** 6 years 6 months' – 10 years' custody	**Category range** 5 – 7 years' custody
Category 3	**Starting point** 8 years 6 months' custody	**Starting point** 6 years' custody	**Starting point** 4 years 6 months' custody
	Category range 6 years 6 months' – 10 years' custody	**Category range** 5 – 7 years' custody	**Category range** 3 years 6 months' – 5 years' custody

TEMPORARY CLASS DRUGS

Temporary Class Drugs as "controlled drugs"

177. NOTE that s.2 of the MDA 1971 is amended by the *Police Reform and Social Responsibility Act* (PRSRA) 2011, s. 151 and sch. 17, para. 2 (in force from 15 November 2011: see the *Police Reform and Social Responsibility Act 2011 (Commencement No. 1) Order 2011* (SI 2011 No. 2515).

178. Section 2(1) of the MDA 1971 now reads as follows:

> (1) In this Act —
> (a) the expression 'controlled drug' means any substance or product for the time being specified [~~in Part I, II, or III of Schedule 2 to this Act; and~~] —
> *(i) in Part I, II or III of Schedule 2, or*
> *(ii) in a temporary class drug order as a drug subject to temporary control (but this is subject to section 2A(6));*
> (b) the expressions 'Class A drug', 'Class B drug' and 'Class C drug' mean any of the substances and products for the time being specified respectively in Part I, Part II and Part III of that Schedule; and the provisions of Part IV of that Schedule shall have effect with respect to the meanings of expressions used in that Schedule, *and*
> *(c) the expression 'temporary class drug' means any substance or product which is for the time being a controlled drug by virtue of a temporary class drug order;*

179. Prior to s.2 of the MDA 1971 being amended by the PRSA 2011, the only 'substances and products' that were 'controlled drugs' for the purposes of the Act, were those specified as Class A, B or C drugs (Parts 1 to III respectively, of Schedule 2 to the Act).

180. The effect of amended s.2 MDA is that all drug substances and drug products which are the subject of a ***Temporary Class Drug Order*** are also 'controlled drugs' (see s.2(1)(a)(ii), as amended). The relevant penalties are those that apply to Class B drugs (s.25(2B) of the MDA (inserted by s. 151, and para.17 of Sch.17, of the PRSRA).

Methoxetamine ("mexxy") made a TCD

181. On April 5, 2012, the ***Misuse of Drugs Act 1971 (Temporary Class Drug) Order 2012*** (SI 2012/980) came into force. The following substances are specified under s 2A(1) of the MDA 1971 as drugs subject to temporary control, namely:

> (a) 2-(ethylamino)-2-(3-methoxyphenyl)cyclohexanone;
> (b) any stereoisomeric form of 2-(ethylamino)-2-(3-methoxyphenyl)cyclohexanone;
> (c) any ester or ether of a substance specified in paragraph (a) or (b);
> (d) any salt of a substance specified in any of paragraphs (a) to (c); and
> (e) any preparation or other product containing a substance specified in any of paragraphs (a) to (d).

182. Nolte that the *Misuse of Drugs (Safe Custody) Regulations 1973* apply to the substances mentioned above. Furthermore, the aforementioned substances are to be treated as if they were controlled drugs to which ***Schedule 1*** of the Misuse of Drugs Regulations 2001 apply.

183. See also Home Office Circular 008/2012: http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2012/008-2012/

Offences under the MDA that apply to temporary class drugs

184. Subject to a statutory exception or exemption (and noting s.28 of the MDA, it is unlawful and an offence to:
    a. Import or to export a temporary class drug (s.3, MDA 1971, amended by s.151, Sch.17, PRSRA).
    b. Supply, or offer to supply, etc., a temporary class drug (s.4(1), MDA (as amended); and s.4(3), MDA).
    c. Produce a temporary class drug (s.4(2), MDA 1971.
    d. Possess a temporary class drug, *intending to supply it* (s.5(3), MDA 1971): but note, below, the saving in relation to the *simple possession* of a temporary class drug.

185. There can be circumstances in which s. 8, MDA 1971, and s.19, MDA 1971 apply in relation to temporary class drugs.

186. Section 9A(1) of the MDA is amended by s.151 and Sch.17 (para.9) of the PRSRA, so that the administration of a temporary class drug is unlawful unless "*the administration by any person of a temporary class drug to himself in circumstances where having the drug in his possession is to be treated as excepted possession for the purposes of this Act*" (see s.7A(2)(c)).

187. It is neither unlawful nor a criminal offence, to be in *simple possession* of a temporary class drug (see 5(2A) of the MDA, inserted by s.152, Sch.17 of the PRSRA).

188. Confusingly, new s.7A(2)(c), states that a Temporary Class Order may stipulate the circumstances "in which a person's possession of the drug is to be treated as excepted possession for the purposes of this Act". It would seem that this provision is not intended to limit the circumstances in which the simple possession of a temporary class drug is lawful under the MDA 1971: see the Explanatory Notes to the PRSA, paras. 410–417.

Procedure for making 'Temporary Class Drug Orders'

189. Sections 2A and 2B of the MDA 1971 (inserted by s. 151 of the PRSRA and Sch.17 of that Act), provide three routes by which the Secretary of State may make 'temporary class drug orders' under the 1971 Act in respect a substance or a product that is being misused, or which is likely to be misused, and the misuse is having (or is capable of having) harmful effects (see s.2A(4), MDA 1971).

190. Broadly stated, the three routes are:
    a. where the Secretary of State has consulted the Advisory Council on the Misuse of Drugs (ACMD);
    b. the Secretary of State has received a recommendation from the ACMD, or
    c. the 'urgency condition' applies.

191. Section of the MDA 1971 provides:

> (1) The Secretary of State may make an order (referred to in this Act as a "temporary class drug order") specifying any substance or product as a drug subject to temporary control if the following two conditions are met.
> (2) The first condition is that the substance or product is not a Class A drug, a Class B drug or a Class C drug.
> (3) The second condition is that—
> (a) the Secretary of State has consulted in accordance with s. 2B and has determined

that the order should be made, or

(b) the Secretary of State has received a recommendation under that section that the order should be made.

(4) The Secretary of State may make the determination mentioned in subs. (3)(a) only if it appears to the Secretary of State that—

(a) the substance or product is a drug that is being, or is likely to be, misused, and

(b) that misuse is having, or is capable of having, harmful effects.

(5) A substance or product may be specified in a temporary class drug order by reference to—

(a) the name of the substance or product, or

(b) a description of the substance or product (which may take such form as the Secretary of State thinks appropriate for the purposes of the specification).

(6) A substance or product specified in a temporary class drug order as a drug subject to temporary control ceases to be a controlled drug by virtue of the order—

(a) at the end of one year beginning with the day on which the order comes into force, or

(b) if earlier, upon the coming into force of an Order in Council under s.2(2) by virtue of which the substance or product is specified in Part 1, 2 or 3 of Sch.2.

(7) Subsection (6)—

(a) is subject to subs.(10), and

(b) is without prejudice to the power of the Secretary of State to vary or revoke a temporary class drug order by a further order.

(8) The power of the Secretary of State to make an order under this section is subject to s.2B.

(9) An order under this section is to be made by statutory instrument.

(10) An order under this section—

(a) must be laid before Parliament after being made, and

(b) ceases to have effect at the end of the period of 40 days beginning with the day on which the order is made unless before the end of that period the order is approved by a resolution of each House of Parliament.

(11) In calculating that period of 40 days no account is to be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than 4 days.

(12) Subsection (10)(b)—

(a) is without prejudice to anything previously done or to the power of the Secretary of State to make a new order under this section;

(b) does not apply to an order that only revokes a previous order under this section.

192. Section 2B of the MDA 1971, makes provision for the role to be played by the Advisory Council on the Misuse of Drugs:

(1) Before making an order under s.2A the Secretary of State—

(a) must consult as mentioned in subs.(2), or

(b) must have received a recommendation from the Advisory Council to make the order.

(2) The Secretary of State must consult—

(a) the Advisory Council, or

(b) if the order is to be made under s.2A(1) and the urgency condition applies, the person mentioned in subs.(3).

(3) The person referred to in subs.(2)(b) is—

(a) the person who is for the time being the chairman of the Advisory Council appointed under para.1(3) of Sch.1, or

(b) if that person has delegated the function of responding to consultation under ss.(1)(a) to another member of the Advisory Council, that other member.

(4) The "urgency condition" applies if it appears to the Secretary of State that the misuse of the substance or product to be specified in the order as a drug subject to

temporary control, or the likelihood of its misuse, poses an urgent and significant threat to public safety or health.

(5) The duty of the Advisory Council or any other person consulted under ss.(1)(a) is limited to giving to the Secretary of State that person's opinion as to whether the order in question should be made.

(6) A recommendation under subs.(1)(b) that a temporary class drug order should be made may be given by the Advisory Council only if it appears to the Council that—
  (a) the substance or product is a drug that is being, or is likely to be, misused, and
  (b) that misuse is having, or is capable of having, harmful effects.

Making the handling of Temporary Class Drugs legal, or not criminal*, in specified cases*

193. Section 7A of the MDA 1971 (inserted by s.151 and sch.17, para.8, of the PRSRA), empowers the Secretary of State to make lawful activities that would otherwise be unlawful in respect of a temporary class drug:

7A Temporary class drug orders: power to make further provision

(1) This section applies if a temporary class drug order specifies a substance or product as a drug subject to temporary control.

(2) The order may—
  (a) include provision for the exception of the drug from the application of s.3(1)(a) or (b) or 4(1)(a) or (b),
  (b) make such other provision as the Secretary of State thinks fit for the purpose of making it lawful for persons to do things in respect of the drug which under s.4(1) it would otherwise be unlawful for them to do,
  (c) provide for circumstances in which a person's possession of the drug is to be treated as excepted possession for the purposes of this Act, and
  (d) include any provision in relation to the drug of a kind that could be made in regulations under s.10 or 22 if the drug were a Class A drug, a Class B drug or a Class C drug (but ignoring s.31(3)).

(3) Provision under subs.(2) may take the form of applying (with or without modifications) any provision made in regulations under ss.7(1), 10 or 22.

(4) Provision under subs.(2)(b) may (in particular) provide for the doing of something to be lawful if it is done—
  (a) in circumstances mentioned in s.7(2)(a), or
  (b) in compliance with such conditions as may be prescribed by virtue of s.7(2)(b).

(5) Section 7(8) applies for the purposes of this section.

(6) Section 31(1) (general provision as to regulations) applies in relation to a temporary class drug order that contains provision made by virtue of this section as it applies to regulations under this Act.

Misuse of Drugs (Amendment No.2) (England, Wales and Scotland) Regulations 2012

194. Note that as from the 23rd April 2012, the *Misuse of Drugs (Amendment No.2) (England, Wales and Scotland) Regulations 2012* and shall come into force (SI 2012/973).

195. S.I. 2012/973 heavily amends the Misuse of Drugs Regulations 2001. Many of the amendments are of particular relevance to medical practitioners and they are unlikely to be encountered very often by criminal law practitioners.

196. However, note that the heading to Part II to Schedule 4 of the MD Regulations 2001, is amended. Note that the words "in the form of a medicinal product" are omitted and that

it is now a requirement that the act in question (e.g. possession, importation) is carried out "in person for administration to that person": -

> **PART II**
> ~~CONTROLLED DRUGS EXCEPTED FROM THE PROHIBITION ON POSSESSION WHEN IN THE FORM OF A MEDICINAL PRODUCT; EXCLUDED FROM THE APPLICATION OF OFFENCES ARISING FROM THE PROHIBITION ON IMPORTATION AND EXPORTATION WHEN IMPORTED OR EXPORTED IN THE FORM OF A MEDICINAL PRODUCT BY ANY PERSON FOR ADMINISTRATION TO HIMSELF; AND SUBJECT TO THE REQUIREMENTS OF REGULATIONS 22, 23, 26 AND 27~~
> **Controlled Drugs Excepted From the Prohibition on Possession; Excluded from the Application of Offences Arising from the Prohibition on Importation and Exportation when Carried Out in Person for Administration to That Person; and Subject to the Requirements of Regulations 22, 23, 26 and 27.**[244]

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For detailed treatment of the matters summarised in this handout, see R. Fortson, '*Law on the Misuse of Drugs and Drug Trafficking Offences*', 6th ed., Sweet & Maxwell Ltd., London, 2011).

[244] Substituted wording inserted by SI 2012/973.