CONFISCATION UPDATE

Environmental Crime Unit

Northern Ireland Environment Agency

Financial Investigation Conference

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Belfast

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Note: The author of this hand-out has endeavoured to ensure that statutory provisions cited in judicial decisions of England and Wales, have been changed herein to their NI equivalents. However, it is the responsibility of all practitioners to verify (and to satisfy themselves) that the citations and propositions stated herein are correct.
The hand-out does not deal with terrorism or terrorist related activities.

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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 157	"Recoverable amount"
section 158	"Defendant's benefit" – extent of his/her conduct
section 159	Definition of 'available amount'.
section 160	The four statutory assumptions, and the two exceptions;
Section 161	Time for payment of a confiscation order.
sections 164, 165	Postponement provisions;
section 166	Statement of Information (formerly 'prosecutor's statement')
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section 168	Provision of information by the defendant;
section 223	Meaning of 'criminal lifestyle';
section 224	Definition of 'criminal conduct';
section 224(2)	"General criminal conduct"
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section 224(4)-(6)	Definition of 'benefit' [and note section 158]
sections 225, 226, 229	Tainted gifts
sections 227, 228	Valuation of property (and benefit obtained);
section 231	Definition of 'realisable property'
section 230	Definition of 'free property';

2. Part 4 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.8 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:

   a. The court considers making a confiscation order under s.156 of the 2002 Act;[1]

   b. The court is required to consider the "criminal lifestyle" provisions of s.223; (note art.8 of SI 2003/333 as substituted by SI 2003/531); [2]

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[1] In Northern Ireland, **art.4** provides:
(1) Section 156 of the Act (making of confiscation order) shall not have effect where the offence, or any of the offences, mentioned in section 156(2) was committed before 24th March 2003.
(2) Section 177 of the Act (defendant convicted or committed absconds) shall not have effect where the offence, or any of the offences, mentioned in section 177(2) was committed before 24th March 2003.
(3) Section 178 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 24th March 2003.

[2] 8. -

c. The defendant absconds: see s.177 and s.178; and see arts.4(2) and 4(3), SI 2003/333.

4. 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, and see *Boughton-Fox*.[3]

5. However, it is important to note that it would seem that art.4(1) is to be read as if it read:

> "Section 156 of the Act (making of confiscation order) shall not have effect where the offence, or any of the offences, mentioned in section 6(2) in respect of which a confiscation order is sought was committed before 24 March 2003.": see *Stapleton* [2008] EWCA Crim 1308, [2009] 1 Cr App R (S) 38

6. The *Stapleton* construction was considered in *Onuigbo* [2014].[4] Lord Justice Pitchford explained that [judgment, para.35]:

> The effect of such a construction is to provide the prosecutor with the ability to elect to proceed under POCA only in relation to offences committed after 24 March 2003 without regard to earlier offences and thus to avoid the literal effect of the Commencement Order. The court in *Stapleton* was aware of the criticism of *Aslam* [[5]] made by the late Professor D A Thomas at [2005] Crim LR 145 but considered that *Aslam* should be followed.

7. Section 177 (defendant convicted or committed for sentence, but absconds) shall not apply to an offence(s) before March 24, and likewise, s.178 (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. NOTE that a private prosecutor is entitled to initiate confiscation proceedings under s.6 of POCA: *Virgin Media Ltd v Zingha*.[6]

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(1) This article applies where the court is determining under section 156(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 223(3)(a) of the Act where any of the three or more offences mentioned in section 223(3)(a) was committed before 24th March 2003.
(3) Where the court is applying the rule in section 223(5) of the Act on the calculation of relevant benefit for the purposes of determining whether or not the test in section 223(2)(b) of the Act is satisfied by virtue of conduct forming part of a course of criminal activity under section 223(3)(a) of the Act, the court must not take into account benefit from conduct constituting an offence mentioned in section 223(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 223(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 223(3)(b) were committed before 24th March 2003.
(5) Where the court is applying the rule in section 223(5) of the Act on the calculation of relevant benefit for the purposes of determining whether or not the test in section 223(2)(b) of the Act is satisfied by virtue of conduct forming part of a course of criminal activity under section 223(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 223(6) of the Act on the calculation of relevant benefit for the purposes of determining whether or not the test 0in section 223(2)(c) of the Act is satisfied, the court must not take into account benefit from conduct constituting an offence mentioned in section 223(6)(b) of the Act which was committed before 24th March 2003. [SI 2003/531 amending SI 2003/333]

3 [2014] EWCA Crim 227
4 [2014] EWCA Crim 65
5 [2004] EWCA Crim 2801, [2005] 1 Cr App R (S) 116.
6 [2014] EWCA Crim 52

9. A defendant's conviction for <u>any</u> 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).

10. Although the 2002 Act uses the expression 'confiscation order' [s.156][7], 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*'[8]] equal to the *value*[9] of the '*benefit*'[10] from his '*criminal conduct*'[11], or (if less) the '*available amount*', [12] or (as a last resort) a '*nominal amount*', if the available amount is nil.[13]

11. 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.156(5), s.224(4), and s.223). 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.

12. Benefit is not to be equated with "profit", or "gain", or even "ill-gotten gain" (a term often inappropriately used by politicians): see *Smith*,[14] *R v Aujla*.[15]

13. 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.157(1)-(3)).

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

15. 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 156(6) to make a confiscation order, and to do so for an amount "as the court believes is just" [s.157(3)].

16. Note also s.163(5) and (6) in respect of the making of a confiscation order, and a compensation order,[16] in circumstances where the court believes the defendant will have insufficient means to pay both orders: see *R v Matthews*.[17]

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7 And see s.233(6)(a) of the Act.
8 See section 157.
9 see section 227, and especially section 228.
10 section 156(4).
11 Section 156.
12 Section 157.
13 Section 157.
14 (1989) 89 Cr.App.R.235
15 [2008] EWCA Crim 637
16 That is to say, under art.14, Criminal Justice (NI) Order 1994 (SI 1994/2795 (NI15)), as amended.
17 [2012] EWCA Crim 321

Confiscation following conviction is an exercise in accountability – not culpability

Confiscation order as a "penalty"

17. A confiscation order is a "penalty" for the purposes of Art.7, ECHR (*Welch v the United Kingdom*),[18] 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:[19] *Phillips v UK*;[20] *R v Briggs-Price*,[21] and see *R v Clipston*.[22] [See below for elaboration.]

Confiscation order as a "sentence"

18. A confiscation order is a "sentence" for the purposes of the Criminal Appeal (Northern Ireland) Act 1980 (see the amendment to s.30 of the 1980 Act made by s.456 of the Proceeds of Crime Act 2002, Sch.11, para.9(1) and (2).[23]

19. 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*.[24] 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*,[25] and see *R v Pigott*.[26] However, earlier decisions have pointed the other way, treating 'totality' as a relevant factor: see *R v Siddique*;[27] and *Qema*,[28] where the Court did not doubt "that totality is a relevant factor"; *Valentine* (where the Court assumed that totality had been taken into account),[29] *Cukovic*;[30] *Walpole*;[31] *Atlan*,[32] *Middlekoop*.[33]

20. 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

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18 (1995) 20 E.H.R.R. 247
19 "Everyone charged with a criminal offence shall presumed innocent until proved guilty according to law."
20 (2001) 11 BHRC 280
21 [2009] UKHL 19; [2009] 1 AC 1026, esp. at [26] – [30]
22 [2011] EWCA Crim 446
23 S.30(3)… In this Part of the Act "sentence" also includes— (a) a confiscation order made by the Crown Court under the Proceeds of Crime (Northern Ireland) Order 1996; (b) an order varying such an order; (c) an order made by the Crown Court varying a confiscation order which was made by the High Court by virtue of Article 24 of the Order of 1996; (d) a confiscation order under Part 4 of the Proceeds of Crime Act 2002; (e) an order which varies a confiscation order made under Part 4 of the Proceeds of Crime Act 2002 if the varying order is made under section 171, 172 or 179 of that Act (but not otherwise). [NOTE (per LexisNexis): Sub-s (3): inserted by the Proceeds of Crime (Northern Ireland) Order 1996, SI 1996/1299, art 57(1), Sch 3, para 5, in force: 25 August 1996: see the Proceeds of Crime (Northern Ireland) Order 1996, SI 1996/1299, art 1(2). Sub-s (3): in para (b) word omitted repealed by the Proceeds of Crime Act 2002, ss 456, 457, Sch 11, paras 1, 9(1), (2), Sch 12, in force: 24 March 2003: see SI 2003/333, art 2(1), Schedule. Sub-s (3): paras (d), (e) inserted by the Proceeds of Crime Act 2002, s 456, Sch 11, paras 1, 9(1), (2), in force: 24 March 2003: see SI 2003/333, art 2(1), Schedule.]
24 [2009] EWCA Crim 2918
25 [2009] EWCA Crim 344
26 [2009] EWCA Crim 2292
27 [2005] EWCA Crim 1812
28 [2006] EWCA Crim 2806
29 [2006] EWCA Crim 2717
30 (1996) 1 CAR (S) 131
31 June 19, 1997, CA, unreported.
32 February 20, 1997.
33 October 25, 1996.

extinguish the debt (s.187(5)), and interest accrues on amounts unpaid under a confiscation order: s.162.

Generally

21. 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.166-168).

The incidence and standard of proof

22. 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*),[34] 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.

23. 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][35]; and see *Phillips v UK* [36].

24. 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*,[37] and the ECrtHR's admissibility decision in *Grayson and Barnham v UK*).[38]

25. 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].

26. 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].

27. The above seemed reinforced by the judgment of Lord Justice Moses in *R v Whittington* [emphasis added]:[39]

> 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 prosecution must prove the existence of that property to the civil standard of proof (s.156(7)).

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[34] (1995) 20 E.H.R.R. 247
[35] [2009] UKHL 19
[36] 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.
[37] (2001) 11 BHRC 280, para 40.
[38] Applications nos 19955/05 and 15085/06), 23 September 2008.
[39] [2009] EWCA Crim 1641.

> 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.160] indicate, may do so by proving that property has been transferred to the defendant [s.160(2)], that he has obtained property [s.160(3)] or that he has incurred expenditure after the relevant day [s.160(4)].
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> 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]).

28. 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.

29. 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,[40] and the civil standard of proof.

30. 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) [41] 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.

31. Accordingly, given the above, it appears *arguable* that the decision of *R v Whittington* is no longer authority for the proposition 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, and where (in an assumption case) the property would not come within any of the statutory assumptions (s.160, NI, POCA).

32. However, it is submitted that *Gale v SOCA* is unlikely to be the last word on the issue; and see *Sakhizada.*[42] In the latter case, the appellant's argument went too far because it appeared to involve the submission that even where the prosecution was simply seeking to establish the existence and quantum of the benefit arising out of the activities *in respect of which the appellant had pleaded guilty*, that the prosecution had to prove the fact of benefit to the criminal standard of proof [see para.33 of the judgment].

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

[41] 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."

[42] [2012] EWCA Crim 1036.

Twin track recovery

33. ***Standard benefit calculation*** ("particular criminal conduct"): 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".

34. ***Extended benefit analysis*** ("criminal lifestyle" cases): 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.224(2)). The court will only be able to do so if the defendant has a "criminal lifestyle" (defined by s.223), 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.

35. Where a defendant is deemed to have a "criminal lifestyle", the court is required to make the statutory assumptions under s.160 of POCA.

36. 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*.[43]

Sentencing and confiscation – which is imposed first?

37. It is preferable for confiscation proceedings to take place before the defendant is sentenced for the underlying offence *unless* proceedings are "postponed" under s.164 of POCA. The maximum permitted period of postponement (unless there are exceptional circumstances) 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.164, POCA.

38. The court is required to take account of the confiscation order before it imposes a fine on the defendant (s.163(2)(a)), or before it makes orders for forfeiture, deprivation, or other order (other than compensation)[44] specified in s.163(3): see s.163(2)(b)); and see s.100 (Scotland), and s.13 (E&W). This is reinforced by s.165(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*,[45] 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",[46] and see *Donohoe*.[47]

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[43] [2009] UKHL 19
[44] Note the words "other than" [under art.14 of the CJ(NI) Order 1994], as they appear in s.163(3)(a), POCA, and see *R v Jawad* [2013] EWCA Crim 644.
[45] [2010] EWCA Crim 28
[46] [2010] EWCA Crim 2406
[47] [2007] 1 Cr.App.R.(S.) 88

The procedure

Prosecution

39. In Northern Ireland (and in E&W), either the prosecutor or the court initiates confiscation proceedings: s.156 POCA. In Scotland, only the prosecutor can initiate confiscation proceedings.

40. A confiscation order cannot be made where the precondition under s.156(3) of POCA 2002 has not been complied with: consider *Meader*.[48]

41. The prosecution must serve a "*Statement of Information*" (s.166, 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.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.166(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.

42. NOTE: In recent years, a practice has emerged (at least in E&W) by which – in a criminal lifestyle case – Statements of Information assess the defendant's alleged "benefit" by reference to (a) his/her 'Particular Criminal Conduct' and (b) his/her 'General Criminal Conduct'. It is respectfully submitted that this is neither helpful nor consistent with the scheme enacted under POCA 2002. General Criminal Conduct will necessarily include property obtained as a result of or in connection with the defendant's criminal conduct reflected by charges in respect of which he or she has been convicted. It is further submitted, that this view is supported by observations expressed by the CACD in *R v Jawad*.[49] The Court was correct to dispel the notion that – *in a criminal lifestyle case* – Particular Criminal Conduct and General Criminal Conduct are mutually exclusive concepts:

> …..what is plainly wrong is the last stage of the argument, which is that benefit from general and from particular criminal conduct are concepts which are mutually exclusive. In a lifestyle case, general criminal conduct plainly includes the particular conduct charged in the count of which the defendant has been convicted. There is nothing in section [156] to say otherwise and it would be nonsense if there were. Moreover, section [224(2)] specifically provides that "general criminal conduct of the defendant is all his criminal conduct" (without further qualification), whilst particular criminal conduct is, by section [224(3)], the restricted sub-category of conduct constituting offences resulting in conviction or which are taken into consideration. (per Hughes LJ, para.25)

Defence

43. Upon service of the *Statement of Information*, the defence may serve a *Response* (s.167).

44. Although the Court may order the defence to provide a response there is no statutory obligation to do so.

45. 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.168, POCA.

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[48] [2011] EWCA Crim 2108
[49] [2013] EWCA Crim 644

46. 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 (s.168(4), and consider *R v Bhanji*).[50] Note that the court is not obliged to draw adverse inferences: *R v Leeming.*[51]

47. Self-incrimination is not a reasonable excuse, given the protection afforded by s.168(9).

48. Section 168(5) appears to leave open the prospect that a failure to comply with an order may be punishable as a contempt of court.

Generally

49. Even without the power now given to the courts by s.168 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)*,[52] (and see *Re O. (Restraint Order)*[53]).

50. The standard of proof with regards to the questions of whether D has a "criminal lifestyle", the value of any "benefit", and the "recoverable amount", are to be determined on a balance of probabilities: s.156(7), POCA.

Rules of evidence (as applied in England and Wales)

51. In England and Wales, strict rules of evidence in criminal proceedings do not apply to confiscation proceedings: see *Silcock*,[54] and *Clipston*.[55]

52. It is tentatively submitted that similar rules are apt to apply in Northern Ireland having regard to the fact that the hearsay provisions of the Criminal Justice Act 2003 are broadly mirrored in Part III of the *Criminal Justice (Evidence) (Northern Ireland) Order 2004* (hearsay evidence).[56]

53. In *Clipston*,[57] 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 Civil Evidence Act 1995 [E&W] 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 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

[50] [2011] EWCA Crim 1198
[51] [2008] EWCA Crim 2753; and see the postscript to *R v Lowe* (para 21) [2009] EWCA Crim 194.
[52] The Times, May 19, 1992
[53] [1991] 2 Q.B. 520
[54] [2004] EWCA Crim 408
[55] [2011] EWCA Crim 446
[56] 2004 No. 1501 (N.I. 10)
[57] [2011] EWCA Crim. 446, [2011] Crim LR 485

judgment, rather than via the CEA 1995 or, at least directly, by way of the CJA 2003.

54. 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 Criminal Justice Act 2003 regime [**CJ(E)(NI)O 2004**], 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) [**art.18(2)**] (together with the matters contained in s.116 [**art.20**]) of the CJA. However, when applying this regime - and especially the "interests of justice" test in s.114(1)(d) [**art.18(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) [**art.18(2)**] (and the matters set out in s.116 [**art.20**]) 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"

55. Section 224(1) of POCA defines "criminal conduct" as conduct that constitutes an offence in Northern Ireland, or which would constitute such an offence if it occurred there.

56. Note that there is no dual criminality requirement.

57. *Save in cases where benefit is limited to "Particular Criminal Conduct"*, [58] 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.

58. 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.

59. "Particular criminal conduct" is "criminal conduct" which (in essence) consists of the offence(s) on the indictment in respect of which D was convicted, plus offences that he has asked to be taken into consideration by the sentencing court: s.224(3).

60. "General criminal conduct" is all of D's "criminal conduct" in cases where D is found to have a "criminal lifestyle" (s.224(2)).

61. Note that when a court is determining the value of a defendant's benefit from his "general criminal conduct" (in respect of which the statutory assumptions apply), but a confiscation order had been made against him at an earlier time in respect of other such conduct (either under POCA, or under a statutory confiscation regime where the assumptions applied or could have been applied (e.g. CJA 1988/DTA 1994)), the court must have regard to s.160(9) and s.158(3)-(8) of POCA. This is so even if the earlier confiscation order had been made by agreement between the parties that includes the value of the defendant's benefit from his or her general criminal conduct: see *R v Barnett*.[59]

II. "Criminal Lifestyle"

62. Central to Part 4 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.156(4)(a).

63. 'Criminal lifestyle' triggers the statutory assumptions under section 160, and it broadens the definition of 'tainted gifts' [see section 225].

<u>The Definition of 'Criminal Lifestyle': s.223</u>

64. 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 5** [s.223(2)(a)];

    ii) the 'offence concerned'[60] is conduct that forms part of a "**course of criminal activity**" [s.223(2)(b)].

    iii) The 'offence concerned' was **committed over a period of at least 6 months** AND the defendant has benefited from that conduct [s,232(2)(c)].

65. In each case, the <u>offence</u> <u>concerned</u> [see s.156(9)] must have been committed on or after the 24th March 2003.[61]

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[58] NOTE: that in relation to "Particular Criminal Conduct", s.224(a) refers to "conduct which constitutes the <u>offence or offences concerned</u>". The words underlined are defined by s.236(1) and s.156(9), which make it plain that the offence(s) must be those in respect of which the defendant is convicted in proceedings before the Crown Court, and/or offences in respect of which he was committed to the Crown Court with a view to a confiscation order being considered (i.e., s.156(2)).

[59] [2011] EWCA Crim 2936

[60] See section 236(1) and note s.156(9).

(i) Schedule 5 offences

66. A conviction of one schedule 5 offence (e.g. supplying a controlled drug) is sufficient to constitute a 'criminal lifestyle'.

67. Note that are some important exceptions from schedule 5 (e.g. s.329, POCA, and the *cultivation* of cannabis[62]).[63]

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

69. 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

70. 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.223(2)(b), and s.223(3)(a). NOTE:

- 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*'[64] of at least £5000 [s.223(4)].
- That for the purposes of *relevant benefit*, the court can include offences to be taken into consideration – s.223(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.223(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 8 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.223(5).

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61 SI 2003/333, article 4(1). Article 8, as substituted by SI 2003/531, is relevant in respect of conduct forming part of a 'course of criminal activity'.

62 But, the production of cannabis (by cultivating it) that is charged under s.4, MDA 1971 is within schd.5.

63 Only two of the three money laundering offences are in Schedule 5 (namely, ss.327 and 328).

64 See the definition of 'relevant benefit' in s.223(5) and (6) of the 2002 Act.

(iii) Offences committed over six-month period: s.232(2)(c)

71. The offence must have been committed on or after the 24th March 2003 – note article 1(3), SI 2003/333;[65] and consider the cases of *Ahmed (Kurshid)*,[66] *Martin* (also known as 'Brown'),[67] *Palmer*,[68] *Clayton*,[69] *Simpson*,[70] and *Foggon*,[71] in the context of conspiracy or substantive continuing offences (the question is, "when was the offence committed"?).

72. The offence must be one from which the defendant has benefited: s.223(2)(c)

73. The court must find 'relevant benefit' of at least £5000: s.223(4).

74. "Relevant benefit" can include offences to be taken into consideration [s.223(6)] BUT the offences must not have been committed pre 24th March 2003: see article 8(6) SI 2003/333 as substituted by SI 2003/531.

75. In *R v Bajwa*[72] the CA(CD) held that s.223(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.223(2)(c), references to an offence that was committed over a period of 6 months, *must relate to the particular defendant's part in the offence* [para.55].[73] For example, where an offence was committed over a period of 8 months, but D was complicit for only two months, then D will not have a criminal lifestyle pursuant to s.232(2)(c).

76. In *Bajwa*, 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.223(2)(c)):

    i) The approach is consistent with the object of section 223, which is to identify particular defendants who have a "criminal lifestyle".

    ii) Section 223(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.223(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.

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65 "Where an offence is found to have been committed over a period of two or more days, or at some time during a period of two or more days, it shall be taken for the purposes of this Order to have been committed on the earliest of those days."

66 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.

67 [2001] EWCA 2761

68 [2002] EWCA Crim 2202

69 [2003] EWCA Crim 1209

70 [2003] EWCA Crim 1499

71 [2003] EWCA 270

72 [2011] EWCA Crim 1093

73 This point featured to the advantage of the appellants Sagoo and Rajput, in *R v Fields* [2013] EWCA Crim 2042, para.16.

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"

77. Section 224(4) defines benefit as:[74]

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

78. In cases where the defendant obtains a *pecuniary advantage* as a result of or in connection with conduct,[75] (see *Allingham* [NI]),[76] section 224(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".

79. By section 224(6)[77]:

> "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".

Overview

80. "Benefit" does not mean "profit": see *Smith*;[78] *Banks*;[79] *Comiskey*,[80] *McDonald*;[81] *R v Aujla*.[82]

81. However, recent cases make 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*,[83] *R v Jennings*,[84] and *R v Green*.[85] Those cases have provided an invaluable bedrock upon which a coherent set of principles is developing, notably, the cases of *Allpress,*[86] *Mitchell*,[87] *Seager*,[88] *Briggs-Price*,[89] *Sivaraman,*[90] *White and others,*[91] and *R v More*.[92] See also *R v Warwick* [2013] NICA 13.

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74 See Art.2(6) of the Proceeds of Crime (Northern Ireland) Order 1996; and its predecessor, Art.4(4) of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990; and s.71(4), Criminal Justice Act 1988, for comparative purposes.
75 See Art.2(6) of the Proceeds of Crime (Northern Ireland) Order 1996; and its predecessor, Art.4(5) of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990, and s.71(5), Criminal Justice Act 1988, for comparative purposes.
76 [2012] NICA 29
77 See Art 3(4) of the Proceeds of Crime (Northern Ireland) Order 1996; and its predecessor, Art.2(7) of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990, and s.102(5), Criminal Justice Act 1988, and s.63(2), Drug Trafficking Act 1994, for comparative purposes.
78 (1989) 89 Cr.App.R.235
79 [1997] 2 Cr.App.R.(S.) 110
80 (1990) 12 Cr.App.R.(S.) 562
81 (1990) 12 Cr.App.R.(S.) 457
82 [2008] EWCA Crim 637
83 [2008] UKHL 28
84 [2008] UKHL 29
85 [2008] UKHL 30
86 [2009] EWCA Crim 8
87 [2009] EWCA Crim 214
88 [2009] EWCA Crim 1303
89 [2009] 2 WLR 1101 (HL)
90 [2008] EWCA Crim 1736

82. 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[93] and others, but *nor does it operate by way of fine*.[94] 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 should be viewed with caution. *Guidance should ordinarily be sought in the statutory language rather than in the proliferating case law*.[95]

(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*.

83. It is self-evident that benefit must be the result of (or is "in connection with") the criminal conduct in question. However, it is easy for the principle to be lost in the details and

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91 [2010] EWCA Crim 978

92 [2010] EWCA Crim 1224

93 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".

94 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 (Northern Ireland) Act 1980 and constitutes a "penalty" in ECHR terms): see para.13 in *CPS v Jennings* (HL).

95 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).

complexities of a given case.[96] In *R v Sumal & Sons (Properties) Ltd v London Borough of Newham*,[97] s.96 (3) of the Housing Act 2004 (E&W) provided that: "*no rule of law relating to validity or enforceability of contracts in circumstances of illegality affects the validity or enforceability of the provisions of a tenancy or licence requiring payment of rent or of the other provisions.*" It therefore followed that such provisions, including the right to recovery, remain enforceable at the suit not only of the tenant but also the landlord notwithstanding that he has no licence for the house in question. That is inconsistent with the notion that the landlord is unlawfully obtaining rent as a result of or in connection with his breach of s.95(1). In those circumstances it was determined that the confiscation order made in relation to the benefits which were related to the rental receipts was unlawful and that part of the confiscation order made in relation to *Sumal & Sons (Properties) Ltd* was quashed.[98] See also, *Siaulys*.[99]

84. Clearly a person does not obtain a benefit by way of a pecuniary advantage if, for example, the defendant was not liable to pay the duty on goods (see *Mackle and oths*,[100] in which a number of decisions were considered[101]); and see *Middlecote*,[102] and *Tatham*.[103]

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

1) ***Cash couriers and custodians of drug moneys***: *R v Allpress and others*,[104] It is submitted that old cases, such as *Simpson*,[105] 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');[106] *Clark and Severn*;[107] *R v Smith and others*[108] "stolen illicit controlled drugs, a case decided in the context of the Theft Act 1968).

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[96] It is submitted that the decision in *Sumal* helps to answer illustrations posed in *ARA v Jones* [2007] EWHC 360 (QB) (albeit in the context of Part 5, POCA) when Tugendhat J said: "I raised in argument the sort of cases familiar from contract law, and discussed in Chitty on Contract 29th ed para 16-011. An example is the ship owner who had overloaded his vessel, and was held to be entitled to enforce his claims for freight, notwithstanding the illegality: *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267. The implication of Mr Weisselberg's submission seems to me to be that the ship owner would now face a civil recovery order for the freight he received. And if he had not yet paid all the costs of earning the freight (for example, if he had yet to pay for the bunkers consumed), he would not be able to deduct those costs. This is because the recovery order must be made in respect of property obtained, not in respect of profits obtained, unless property to pay the costs has already been disposed of (s.304(2)). The startling result of Mr Weisselberg's submission can be demonstrated by the same illustrations as Devlin J gave in *St John* at p281, including that of a lorry driven at a mile an hour over its permitted limit."

[97] [2012] EWCA Crim 184

[98] Applied in *Siaulys* [2013] EWCA Crim 2083, and *Graft* [2013] EWCA Crim 2036.

[99] [2013] EWCA Crim 2083

[100] [2014] UKSC 5

[101] *R v White* [2010] EWCA Crim 978, [2010] STC 1965, *R v Bajwa* [2011] EWCA Crim 1093, [2012] 1 WLR 601, *Chambers* [2008] EWCA Crim 2467, *R v Khan* [2009] EWCA Crim 588, and *Bell* [2011] EWCA Crim 6.

[102] [2011] EWCA Crim 548

[103] [2014] EWCA Crim 226.

[104] [2009] EWCA Crim 8

[105] [1998] 2 Cr.App.R.(S.) 111

[106] [2010] EWCA Crim 615

[107] [2011] EWCA Crim 15

[108] [2011] EWCA Crim 66

86. 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*;[109] and see *Glatt*;[110] and see *Gibbons*.[111]

87. The expression "he obtains property" does not mean that the property must pass through the defendant's hands. However, as explained by Hooper LJ in *R v White and Dennard*,[112] it is not sufficient merely to show that the defendant's acts "*contributed, to a non-trivial (that is, not de minimis) extent, to the getting of the property*". This was a statement of principle made by Laws LJ, in *Jennings* (CACD),[113] but that principle was overruled by the HL in *CPS v Jennings*, see para.14; and see *Seager*[114]). As stated above, the focus now is on the value of the benefit obtained by D, i.e., 'obtained by him'. With that revised principle in mind, consider *R v Newman*,[115] *Byatt* (where B withdrew from the conspiracy before the robbery took place and therefore did not obtain a 'benefit')[116], and see *Stanley* (which now needs to be treated with caution in this regard).[117] See also *ARA v Olupitan,*[118] and *Nadarajah*.[119] See also *Warwick* [NI].[120]

88. NOTE: where a defendant commits an offence behind or through a limited company, and ostensibly, the company has thereby received the proceeds of criminal conduct, there can be circumstances in which it will be open to the court in confiscation proceedings to 'pierce the corporate veil'. In *R v Sale*[121] (having regard to the UKSC decision in *Prest v Petrodel Resources Limited & Others*),[122] the CACD said that it saw "no reason why the analysis relevant to criminal confiscation proceedings made at paragraph 76 of *Seager & Blatch* should not continue to apply in criminal confiscation proceedings, subject to an understanding of *Prest*" (per Treacy LJ). In *Seager and Blatch*, the Court said (per Aikens LJ):

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109 [2006] EWCA Crim. 416
110 [2006] EWCA Crim 605 [para.82]
111 [2002] EWCA Crim 3161, [2003] Cr.App.R.(S.)34
112 [2010] EWCA Crim 978. Hooper LJ said, "In *Jennings* the House of Lords overruled the Court of Appeal (Laws, Longmore and Lloyd LJJ) [2005] EWCA Civ 746, [2006] 1 WLR 182, [2005] 4 All ER 391, which had held, in an advance fee fraud case, that all that is required is that the defendant's acts should have contributed, to a non-trivial extent, to the getting of the property. Laws LJ had said: [at para.38], "*What remains to be said about the meaning of the word 'obtain' in s.71(4) [of the Criminal Justice Act 1988]? Clearly it does not mean 'retain' or 'keep'. But no less clearly, in my judgment, it contemplates that the defendant in question should have been instrumental in getting the property out of the crime. His acts must have been a cause of that being done. Not necessarily the only cause: there may, plainly, be other actors playing their parts. All that is required is that the defendant's acts should have contributed, to a non-trivial (that is, not de minimis) extent, to the getting of the property. This is no more than an instance of the common law's conventional approach to questions of causation*". The House disapproved of this approach, saying [at para.14], "*... 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, which must be read as meaning 'obtained by him*'"".
113 [2005] EWCA Civ 746, [2006] 1 WLR 182, [2005] 4 All ER 391
114 [2009] EWCA Crim 1303, para.73, and the last few lines of para.41
115 [2008] EWCA Crim 816
116 [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 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]
117 [2007] EWCA Crim 2857
118 [2008] EWCA Civ 104
119 [2007] EWCA Crim 2688
120 [2013] NICA 13
121 [2013] EWCA Crim 1306
122 [2013] UKSC 34

In the context of criminal cases the courts have identified at least three situations when the corporate veil can be pierced.
First if an offender attempts to shelter behind a corporate façade, or veil to hide his crime and his benefits from it: see *Re H and others*, per Rose LJ at 402A; *Crown Prosecution Service v Compton and others* [2002] All ER (D) 395, paragraph 44-48, per Simon Brown LJ; *R v Grainger*, paragraph 15, per Toulson LJ.
Secondly, where an offender does acts in the name of a company which (with the necessary mens rea) constitute a criminal offence which leads to the offender's conviction, then "the veil of incorporation is not so much pierced as rudely torn away": per Lord Bingham in *Jennings v CPS*, paragraph 16.
Thirdly, where the transaction or business structures constitute a "device", "cloak" or "sham", ie. an attempt to disguise the true nature of the transaction or structure so as to deceive third parties or the courts: *R v Dimsey* [2000] QB 744 at 772 (per Laws LJ), applying *Snook v London and West Riding Investment Ltd* [1967] 2 QB 786 at 802, per Diplock LJ.

"Or in connection with the conduct"

89. *R v Ahmad and Ahmed*,[123] is an important case that considered two issues[124] 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 was the meaning of the expression "*in connection with [the commission of the offence]*" in s.71(4) of the 1988 Act.[125] 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*,[126] 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].

90. 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*

[123] [2012] EWCA Crim 391
[124] 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.
[125] NOTE that s.224(4) of POCA 2002 [NI] defines "benefit" in similar terms ("A person benefits from conduct if he obtains property as a result of or in connection with the conduct").
[126] [2008] 1 AC 1028 (para.43).

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].

91. The Court stressed that the instant case was not a case where the statutory assumptions applied [59]. It declined to follow *R v Waller*,[127] 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].

92. In *Ahmad and Ahmed*, the Court noted that, in *R v James and Blackburn*:[128]

> "[James] 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) [s.224(4)[NI]]" [para.52].

93. It is respectfully submitted that the judgment of the Court in *Ahmad and Ahmed* is correct.[129] 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 the appellants 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* [130] (see also *R v Osei*)[131]. 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*.

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[127] [2008] EWCA Crim 2037.
[128] [2011] EWCA Crim 2991
[129] 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.
[130] *Independent* March 26, 1991; and see R. Fortson, chp.13-081, '*Law on the Misuse of Drugs and Drug Trafficking Offences*' (6th ed., 2012, Sweet & Maxwell).
[131] (1988) 10 Cr.App.R.(S) 289.

d. In *Ahmad and Ahmed*, the Court held - in relation to *R v James and Blackburn*[132] - 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 and Blackburn*,[133] 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 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.

e. NOTE, that *Ahmad and Ahmed*, and *James and Blackburn*, were distinguished *in R v Harvey*,[134] on the grounds that the expenses in *James and Blackburn*, and the circulating funds in *Ahmad*, "were not property obtained as a result of the criminal conduct. Nor were they sufficiently connected with the criminal conduct" (per Jackson LJ, para.81).

IV. Value of property that constitute benefits

94. Under the 2002 Act, ss.227 and 228 provide rules for the valuation of property.

95. Section 228 specifically relates to the value of *benefits* obtained by the defendant – i.e. as a result of his/her criminal conduct.[135]

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[132] [2011] EWCA Crim 2991
[133] [2011] EWCA Crim 2991
[134] [2013] EWCA Crim 1104
[135] 228 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 227.

96. The leading case is *Nottinghamshire CPS v Rose*,[136] which examined the relationship between ss.227 [s.79, E&W] and 228 [s.80, E&W] POCA.[137]

97. However, *Nottinghamshire v Rose* now needs to read subject to the decision in *Waya*[138] insofar as it relates to the restoration of property.[139]

98. In relation to calculating changes in the value of money (see s.228(2)(a)), it was held in *R v Shepherd* [2014],[140] that "consistency and certainty is imperative and for that reason the use of the RPI in our judgment continues to be appropriate" (per Griffith Williams J, [15]). The Court added [17]:

> We note that a decision has been taken recently by the Serious Fraud Office and the CPS to adopt an improved variant of the RPI, known as the RPIJ in confiscation proceedings in the future. The revised index which meets international standards will result in a slightly lower increase in the change in the value of money

99. A useful exercise in the application of s.228 occurred in *R v Waya*,[141] and see *Walls*,[142] *Nadarajah*,[143] and *Roach*.[144]

<u>Benefit obtained in a joint venture – the misnomer of "apportionment"</u>

100. Two leading cases have discussed the circumstances in which a joint obtaining of property, by defendants acting together in a criminal venture, may be recovered in full from each defendant: *R v Lambert and Walding* (2012),[145] and *Fields and oths* (2013).[146] It is submitted that the decisions are consistent with *R v Leslie and Mooney* (NI).[147]

101. A detailed comment (by the author of this hand-out) regarding the decision in *Fields* appears in the *25 Bedford Row Newsletter* (January 2014), a copy of which is appended to this paper.

102. In *R v Rooney*,[148] the Court of Appeal - having considered a number of decisions including *R v May* (HL)[149] and *Olubitan*[150] - 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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136 [2008] EWCA Crim 239
137 And see *Confiscation Proceedings: Adieu Layode and R v K?,* R. Fortson, Archbold News, Issue 8, 11th September 2007.
138 [2010] EWCA Crim 412
139 *R v Waya*: para.30: "To the extent that *Rose* held at para 88 that the recovery and restoration intact of the stolen property was always irrelevant to the making of a confiscation order, that part of the decision should not be followed."
140 [2014] EWCA Crim 179.
141 [2010] EWCA Crim 412
142 [2002] EWCA Crim 2456
143 [2007] EWCA Crim 2688
144 [2008] EWCA Crim 2649
145 [2012] EWCA Crim 421
146 [2013] EWCA Crim 2042
147 [2008] NICA 28.
148 [2010] EWCA Crim 2
149 Especially paras. 27, 32 and 46
150 [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.

103. *R v Rooney* was neither cited nor discussed in the judgments of the Court of Appeal in *R v Lambert and Walding*,[151] or in *Fields*.[152] However, it is important to stress that in each of those two cases, the focus of the Court's attention was on cases where a finding of fact had been made by the trial judge in confiscation proceedings that the defendants had obtained the same property *jointly*. Accordingly, where property has not been obtained jointly, or where there is insufficient evidence that the proceeds had been obtained jointly, it is open to the judge to assess the respective shares of each confederate. It would seem that the cases of *Gibbons*,[153] *Rooney*,[154] *Allpress*, and *McCreesh*,[155] can be contrasted and considered in that context.

104. In *Lambert and Walding*:

> 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*,[156] 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 156(4) of POCA 2002,[157] the calculation of "recoverable amount" under s.157, and to the duty on the court under s.156(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].

105. 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

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[151] [2012] EWCA Crim 421
[152] [2013] EWCA Crim 2042
[153] [2002] EWCA Crim 16121
[154] [2010] EWCA Crim 2
[155] [2011] EWCA Crim 641
[156] [2008] UKHL 28
[157] The judgment refers to "section 4", but this must be a misprint for s.6(4) [E&W], and the NI equivalent provision in s.156(4).

Allpress,[158] *Clark*,[159] *Ahmad*,[160] (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*,[161] and *Chrastny No.2*[162]), 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.[163] Unfortunately, in *Lambert*, no reference is made to *R v Rooney* where the Court - having considered *R v Olubitan*,[164] 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].

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

[158] [2009] EWCA Crim 8
[159] [2011] EWCA Crim 15
[160] [2012] EWCA Crim 391
[161] [1990] 1 WLR 1260
[162] [1991] 1 WLR 1385
[163] See R. Fortson, *Law of the Misuse of Drugs and Drug Trafficking Offences*, 6th ed., chp.13-122, Sweet & Maxwell Ltd. 2012.
[164] [2004] 2 Cr App R (S) 70

the benefit from criminal conduct has been ordered to be recovered from more than one defendant: see *R v Ahmad*.[165]

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 in *Porter* 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 (and see *R v Fields* [2013] [166]).

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 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, the NI Orders (1990 and 1996), or POCA. None of those confiscatory regimes sets 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.

106. The decision in *Lambert* was followed in *Fields and oths*,[167] in which the Court of Appeal reviewed a large number of decisions including *Porter*,[168] *May*,[169] *Lambert*,[170] and *Waya,*[171] (but not *Rooney*).[172]

(a) In relation to the determination of the "recoverable amount", the Court rejected the argument that it would be disproportionate to order each defendant to pay the total amount of the benefit (on the footing that each had failed to disprove that he had available assets sufficient to discharge payment in that amount): see judgment, paras. 72-90.

(b) Less clear (it is submitted) is what the court's approach should be when determining a defendant's "available amount" (s.159, POCA) in circumstances where the extent

[165] [2012] EWCA Crim 391
[166] [2013] EWCA Crim 2042
[167] [2013] EWCA Crim 2042
[168] [1990] 1WLR 1260
[169] [2008] 1 AC 1028
[170] [2012] 2 Cr App R (S) 90
[171] [2013] 1 AC 294
[172] [2010] EWCA Crim 2.

of the defendant's wealth is ostensibly no more than the value of his or her share of the proceeds of the criminal conduct in question. In *Fields*, the Court said that to embrace concepts of apportionment "at any stage" would "*potentially involve impracticable inquiries into financial dealings between criminals and could lead to evasion, manoeuvring and chicanery on the part of defendants*" (per Davis LJ, para. 82(iv)).

Benefit and proportionality: *R v Waya* [2012] UKSC 51

Waya: The facts:

107. In late 2003, W contracted to buy a flat for £775,000. £310,000 came from his own resources. The balance of £465,000 was provided by way of a mortgage, which W obtained having made false statements about his employment and earnings. In April 2005, the mortgage was redeemed by way of a second loan (honestly obtained) in the sum of £838,943. By the date of confiscation proceedings, the open market value of the property was £1,850,000.
The trial judge assessed the benefit in the sum of £1,540,000 (£1.85M - £310K).
The CACD determined W's benefit in the sum of £1.11M (£1.85M x 60% (i.e. (£465K/£775K) x 100 = 60%).
The majority of the UKSC held that the correct determination was £392,400 (see para.80).
The minority held that the "real benefit" was no more that the money value of obtaining financing on better terms than might otherwise have been available (para.124).

Waya: General principles

108. In a nine-judge decision of the Supreme Court, the Justices were unanimous in respect of the following propositions (lead judgment, Lord Walker and Sir Anthony Hughes):
    1. "*Although the statute has often been described as "draconian" that cannot be a warrant for abandoning the traditional rule that a penal statute should be construed with some strictness. But subject to this and to HRA, the task of the Crown Court judge is to give effect to Parliament's intention as expressed in the language of the statute*." [8]
    2. Article 1 of the First Protocol to the ECHR ("A1P1") "*imports, via the rule of fair balance, the requirement that there must be a reasonable relationship of proportionality between the means employed by the State in, inter alia, the deprivation of property as a form of penalty, and the legitimate aim which is sought to be realised by the deprivation*." [12, citing *Jahn v Germany*, para.93][173]
    3. Any violation of A1P1 can be avoided by applying to POCA, and in particular to [s.156], the rule of construction required by section 3 of HRA. [14]
    4. It is possible to read s.156(5)(b) of POCA ("…make an order (a confiscation order) requiring him to pay that amount…") as subject to the qualification "except insofar as such an order would be disproportionate and thus a breach of Article 1, Protocol 1" and, it is necessary to do so in order to ensure that POCA remains Convention compliant. [16]
    5. Confiscation orders of the kind considered in cases such as *Morgan and Bygrave*,[174] and *Shabir*,[175] "*ought to be refused by the judge on the grounds that they would be*

[173] (2006) 42 EHRR 1084
[174] [2008] EWCA Crim 1323

wholly disproportionate and a breach of A1P1. There is no need to invoke the concept of abuse of process". [18]

6. The "*safeguard of the defendant's Convention right under A1P1 not to be the object of a disproportionate order does not, and must not, depend on prosecutorial discretion, nor on the very limited jurisdiction of the High Court to review the exercise of such discretion by way of judicial review*" [19]
7. However, "*the judge's responsibility to refuse to make a confiscation order which, because disproportionate, would result in an infringement of the Convention right under A1P1 is not the same as the re-creation by another route of the general discretion once available to judges but deliberately removed*". [24]
8. The severity of the regime "*will have a deterrent effect on at least some would-be criminals. It does not, however, follow that its deterrent qualities represent the essence (or the "grain") of the legislation. They are, no doubt, an incident of it, but they are not its essence. Its essence, and its frequently declared purpose, is to remove from criminals the pecuniary proceeds of their crime*". [21]
9. In "lifestyle cases" (see s.223, read with Schd.5, of POCA), although the starting point is that the assumptions "must" be made (section 160(1)), "*this duty is subject to two qualifications contained in section 160(6). The assumptions should not be made if they are shown to be incorrect: section 160(6)(a). Nor should they be made if making them would give rise to a risk of serious injustice: section 160(6)(b)*." [25]
10. To make a confiscation order where D "*has restored to the loser any proceeds of crime which he had ever had, is disproportionate. It would not achieve the statutory objective of removing his proceeds of crime but would simply be an additional financial penalty*." [28]
11. To the extent that *Rose* held (at para 88)[176] that the recovery and restoration intact of the stolen property was always irrelevant to the making of a confiscation order, "that part of the decision should not be followed". [30].
12. In *R v Smith (David)*,[177] the House "was not…considering the case in which the criminal property obtained has been restored to its owner undamaged." [33]
13. A legitimate, and proportionate, confiscation order may have one or more of three effects [26]:
    (a) It may require the defendant to pay the whole of a sum which he has obtained jointly with others;
    (b) Similarly, it may require several defendants each to pay a sum which has been obtained, successively, by each of them, as where one defendant pays another for criminal property;
    (c) It may require a defendant to pay the whole of a sum which he has obtained by crime without enabling him to set off expenses of the crime.

Waya: Property obtained and its value

109. By a majority (lead judgment, Lord Walker and Sir Anthony Hughes, with whom Lady Hale, Lord Judge, Lord Kerr, Lord Clarke and Lord Wilson agreed [Lord Phillips and Lord Reed dissenting]):

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[175] [2008] EWCA Crim 1809
[176] [2008] 1 WLR 2113
[177] [2001] UKHL 68, [2002] 1 WLR 54

1. In the case of an ordinary loan induced by fraud, "there is no doubt that the defendant does obtain the loan sum advanced." [48]
2. If a borrower repays a fraudulently induced loan, secured or unsecured, "*…a confiscation order which requires him to pay the same sum again is (lifestyle considerations apart) likely to be disproportionate and wrong. But that, likewise, does not mean that he did not obtain the loan sum advanced in the first place*." [48]
3. In the case of a mortgage advance of the kind relevant in Waya, W never acquired anything but the equity of redemption [53]..."*what Mr Waya obtained was the right to have the mortgage advance applied in the acquisition of his flat, subject from the moment of completion to the mortgage lender's security, which ensured the repayment of the advance. This thing in action had no market value at or immediately after completion, as the equity of redemption (or in everyday speech, the equity) represented Mr Waya's down-payment*." [53, emphasis added]
4. "*If the defendant and another person both hold interests in the same property, then it is the value of the defendant's limited interest which is to be taken for the purposes of calculating his benefit*." [65; noting ss.232(2)(b) and 79(3), POCA]
5. *Rose* and*, Ascroft*,[178] are correct in holding that the measure of the value of the interest in property stolen to the thief, for the purposes of confiscation, is what it would cost him to acquire it in the open market. [68]
6. In economic terms, W's benefit was so much of any appreciation in value as was attributable to the mortgage obtained by his dishonesty, which on the facts of his case, was 60 per cent (i.e. £465K (dishonestly obtained), over £775K (cost of acquisition) = 60%) of the appreciation in the net value of the flat, subject to the mortgage. [78; and see paras.71 and 80]
7. The effect of repayment by instalments of the principal sum *out of untainted funds* is not to have the paradoxical effect of diminishing the s.227(3) deduction and so increasing the severity of the confiscation order:

> "…..where the repayment was relatively small and seems to have been made at a time when most of the capital appreciation had already taken place, justice can be done by the simple adjustment of adding the amount of the repayment to the amount of the original down-payment. But in the case of a long-term instalment mortgage under which principal was repaid throughout the term, it might be more accurate (and fairer) to adjust the percentages of the original down-payment and the original mortgage advance so that a smaller proportion of the capital appreciation is treated as benefit. Elaborate and precise calculations would not be called for; in many cases experienced counsel would be able to agree on the appropriate adjustment and invite the judge to adopt it." [77]

Waya: Comment: interpreting POCA: adherence to language or policy?

110. Of the judges who considered the law pertaining to this case, all of them would doubtless say that they reached a determination of the value of W's "benefit" in a manner that was faithful to the language of POCA 2002 and yet, each tier (HHJ, CACD, and SC), assessed that value in a significantly different amount. Indeed, the two dissenting Supreme Court Justices held that "*The real benefit was no more than the money value of obtaining his financing on better terms than might otherwise have been available. To base the*

[178] [2004] 1 Cr App R (S) 326

confiscation order on the increase in value of the flat would be disproportionate. For this reason we consider that the judge should have applied A1P1 and reduced the confiscation order to reflect the modest benefit that Mr Waya may have enjoyed of obtaining the mortgage on better terms." [124].

111. Beyond para.34 of the judgment of the Supreme Court, the two dissenting Justices fundamentally disagreed with the reasoning and approach of the majority.

112. The true explanation (it is submitted) for the different determinations of W's benefit figure lies not only in the "*complexities and difficulties of confiscation cases, arising from the extremely involved statutory language*" (*Waya*, SC, para.4) but also in the markedly different reactions and views of the judiciary concerning the severity of outcomes and, policy considerations, of confiscation regimes (following conviction) such as POCA 2002 and earlier confiscation regimes that became largely stripped of judicial discretion to make determinations in a "just" amount: see also, R. Fortson, "Modern Notion of Benefit", Proceeds of Crime Review, 2011, Issue 5, pp.4-9 (Wildy's, London). See also *R v Seager*,[179] and *R v Worrell*,[180] in which it was held that the turnover of a business does not always equate to the value of a defendant's "benefit".

113. It is tentatively submitted that the issue of proportionality, as discussed in *Waya*, is not one that pertains (strictly speaking) to the valuation of a defendant's benefit from criminal conduct. On the facts in *Waya*, it was not the repayment of the initial principal sum that was determinative of the value of W's benefit, because the right to have the mortgage advance applied in the acquisition of W's flat, was a thing in action that had no market value. The issue of proportionality concerns the duty of the court under s.156(5)(a) to "decide the recoverable amount" – an expression defined by s.157. Section 157(1) states that the "recoverable amount" is equal to D's benefit from the conduct concerned, unless s.157(2) is satisfied. Thus, it would seem that the issue of proportionality is a qualification to s.156(5)(a). Accordingly, benefit determinations are calculated in accordance with the provisions of POCA, <u>but</u> the final decision as to the "recoverable amount" takes subject to any issue of proportionality.

Waya: Comment: A1P1: a novel and imaginative approach?

114. Lord Phillips and Lord Reed described the "identification of A1P1" as "novel and imaginative" (para.83), but A1P1 has often been cited in appellate decisions concerning confiscation following conviction. What is novel is the unanimous decision of the Supreme Court to use A1P1 as the means by which the reach of confiscation regimes can be kept within the limits of what is "proportionate" to the "legitimate aim which is sought to be realised by the deprivation [of property]". [12]

Waya: Comment: will supposedly 'dead' arguments be resurrected?

115. The decision of the SC in *Waya* is bound to result in arguments being advanced in confiscation proceedings that had previously been thought to be unarguable. The SC has made it clear that A1P1 does not vest the sentencer with a general discretion (see para.24). But, one practical effect of the decision of the UKSC is that even if D has "obtained property" as a benefit from "criminal conduct", there may be circumstances in which it would be disproportionate (A1P1) to make a confiscation order in a sum that

[179] [2009] EWCA Crim 1303
[180] [2012] EWCA Crim 1150

would otherwise be recoverable (s.6(5), POCA, and see judgment paras.15 and 16). The Supreme Court gave a few examples of the circumstances in which A1P1 would be engaged, but it did not (and could not) provide a closed list of such circumstances.

116. In 'criminal lifestyle' cases, the Supreme Court (in *Waya*) alluded to the two exceptions to the making of statutory assumptions under s.10 POCA. Interestingly, the majority said "*The assumptions should not be made if they are shown to be incorrect: [section 160(6)(a)]. Nor should they be made if making them would give rise to a risk of serious injustice: [section 160(6)(b)]. The combination of these provisions, and especially the latter, ought to mean that to the extent that a confiscation order in a lifestyle case is based on assumptions it ought not, except in very unusual circumstances, to court the danger of being disproportionate because those assumptions will only be applied if they can be made without risk of serious injustice*." [25] Given what the Court has stated in relation to A1P1, it is arguable that the "serious risk of injustice" exception will have a wider application than seemed to have been permitted under pre-existing case law: consider *Delaney and Hanrahan*,[181] *Mouldon*[182] (cited in *Panesar*),[183] *Ul-Haq*,[184] *Rowsell*,[185] *Deprince*,[186] *Elton v United Kingdom* (ECHR):[187] and see R. Fortson '*Misuse of Drugs and Drug Trafficking Offences*' (Sweet and Maxwell Ltd, 6th ed. 2012), chp.13-131. Would it now be "disproportionate" and a "serious risk of injustice" (in a criminal lifestyle case) to make a confiscation order where the only asset (albeit a 'benefit') is a modest 'family home' occupied by the defendant and his family?

Waya: Comment: no new concept of 'real benefit'

117. Although the majority rejected the notion that A1P1 amounts to "creating a new governing concept of 'real benefit'" (para.26), the majority appear to have regarded as a relevant factor, when determining the value of a defendant's benefit, the level of his or her culpability. Thus, the Court noted that W had been sentenced to "80 hours' community service" and that, "[d]epriving him of that prospective capital gain, or a proportionate part of it, would therefore be the appropriate way of making the confiscation order fit the crime" [42; italics added] This approach may say something about the nature of a confiscation order as a 'penalty', but it also begs the question, "what are the true objects of confiscation regimes following conviction?"

<u>Post *R v Waya* decisions: restoration of criminal proceeds</u>

118. In *R v Harvey*,[188] the CACD expressed the following conclusions as to the status of pre-*Waya* cases:

    i) *Smith*[189] and *May*[190] are still good law as the Supreme Court has expressly approved them.

    ii) *Singh*[191] was correctly decided in the light of *Waya* paragraphs 25 and 26.

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181 May 14, 1999
182 [2004] EWCA Crim 2715
183 [2008] EWCA Crim 1526
184 [2004] EWCA Crim 14
185 [2011] EWCA Crim 1894
186 [2004] EWCA Crim 524
187 11 September, 1997
188 [2013] EWCA Crim 1104
189 [2001] UKHL 68, [2002] 1 WLR 54
190 [2008] UKHL 28, [2008] 1 AC 1028

iii) *Morgan*[192] is still good law because the Supreme Court has approved it. The only reason why *Morgan* survives is that M had failed to make full restoration by the date of the hearing and had not indicated any willingness to make full restoration: see paragraph 39 of Hughes LJ's judgment in *Morgan*. Even so we are bound to say that *Morgan* seems to be a decision which is close to the line, since M had restored to V 81% of the money which M had taken from her.

iv) *Xu and Xu*[193] is still good law as the reasoning of the Court of Appeal seems to be entirely consistent with *Waya*.

v) *Baden Lowe*[194] is probably no longer good law, as this was a case in which there was full restoration of the relevant property to V.

vi) *Del Basso*[195] is another case which is close to the line. This was a "criminal lifestyle" case where the statutory assumptions applied. The Court of Appeal proceeded on the basis that the expenses which Ds incurred in administering the car park and the football club should not be deducted. Thus paragraphs 25 and 26 of Waya would seem to suggest that *Del Basso* was correctly decided. On the other hand the final decision does seem excessively harsh and may arguably be characterised as disproportionate.

vii) *James and Blackburn*[196] must still stand, as it is consistent with *Waya*.

viii) *Ahmad*[197] would also appear to be consistent with the decision in *Waya*.

119. In *Hursthouse*,[198] it was pointed out that "*Waya* does not distinguish between mechanisms of restoration; it looks at whether or not there has been a *full* restoration" [para.28]:[199]

> *Waya* makes clear that where property obtained by a criminal has been restored or stands ready to be restored in full to a victim of a crime in circumstances where there is no additional benefit to the offender, a confiscation order will be disproportionate and a breach of A1P1. An order which required the offender to pay the same sum again would amount to a further pecuniary penalty, rather than achieving the legislative objective of removing from a defendant his proceeds of crime. What would in effect amount to double recovery would be disproportionate.

Examples of Waya restorations of property that reduced the value of D's benefit

120. Appeals were allowed (applying Waya) in *Chapman*,[200] and *Axworthy*[201] (where the property which D obtained through his crime, namely the motor car, was restored in good

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[191] [2008] EWCA Crim 243
[192] [2008] EWCA Crim 1323
[193] [2008] EWCA Crim 2372
[194] [2009] EWCA Crim 194
[195] [2010] EWCA Crim 1119
[196] [2011] EWCA Crim 2991
[197] [2012] EWCA Crim 391, [2012] 1WLR 2335
[198] [2013] EWCA Crim 517. H forged a will in an attempt to obtain property under it. In the event, the property was distributed in accordance with the terms of the will. Confiscation order quashed.
[199] Despite the reference to "full restoration", it is submitted that this is not to be rigidly applied. It is submitted that there must be significant/substantial restoration of property. For example, if there had been more than one transaction/obtaining of property from V1, V2 and V3, but D made full restoration to V1, the value of D's confiscation order should be reduced accordingly.
[200] [2013] EWCA Crim 1370
[201] [2012] EWCA Crim 2889

condition to V. Accordingly the CACD held that the value of the car should be excluded from the assessment of D's benefit). Likewise *Hursthouse*,[202] where there was total restoration to V of the property which D had wrongfully obtained. Accordingly the Court of Appeal quashed the confiscation order. Similarly, *Jawad*,[203] was also a case of total restoration, that being the premise upon which the Court of Appeal reduced the confiscation order.

Residual value after significant use of criminal property is not deductible

121. However, *residual* value of property after unlawful acquisition and/or use (see *Harvey*) need not be deducted:

> There is nothing in the wording of POCA which requires the court to deduct the residual value of chattels after prolonged use. Nor does A1P1 require that such a deduction be made. If D steals or otherwise unlawfully obtains someone else's property and uses it for a number of years thereby materially reducing its value, a confiscation order based upon the original value of that property without any deduction is not disproportionate.[204]

Seizure of criminal property by law enforcers

122. It would seem that the seizure of drugs is not analogous to the restoration of property: consider *Mahmood*.[205]

123. Similarly, the seizure of cigarettes or tobacco in respect of which duty/tax was evaded, does not amount to the restoration of property (in the *Waya* sense) because such seizure was administrative or possibly penal, but not compensatory: see *Louca*.[206]

Sundry cases following Waya

124. In *Warwick*,[207] W pleaded guilty to a total of 17 charges. Seven of these relate to money laundering offences, three to charges relating to forgery, two to charges relating to offences involving VAT fraud and the laundering of proceeds thereof, one to a charge relating to a mortgage fraud and one to a charge in respect of deception. The CA(NI) had regard to *Waya* albeit that at the heart of Warwick's case was the proposition that he did not enjoy the fruits of monies deposited into certain bank accounts or if he did enjoy some of the fruits thereof they were of a very limited nature with most of the monies in question going elsewhere to others involved in the criminal enterprise. Warwick had obtained the monies as a result of or in connection with his criminal conduct, and nothing said in *Waya* criticised the analysis of the House of Lords in *R v May*. The facts of *Warwick* were not analogous to restoring property. Accordingly, the issue was not (it is submitted) about proportionality (and there had been no restoration of property), and thus *Waya* was of limited relevance.

125. It was held by the CACD in *Oyebola*,[208] that there is nothing in the principle established in *Waya* that undermines the common-sense of the conclusion in *Pattison*,[209] namely, that

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[202] [2013] EWCA Crim 517
[203] [2013] EWCA Crim 644
[204] *Harvey* [2013] EWCA Crim 1104
[205] [2013] EWCA Crim 325
[206] [2013] EWCA Crim 2090
[207] [2013] NICA 13
[208] [2013] EWCA Crim 1052, para.39.
[209] [2007] EWCA Crim 1536

rental income from property that had been obtained by criminal conduct, constitutes a "benefit" in the hands of recipient.

V. Making Statutory Assumptions

126. If the court decides that the defendant has a "criminal lifestyle", it must make the four assumptions specified in s.160 POCA.

127. 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.

128. Note, that the statutory assumptions are engaged *only* if the court finds that the defendant has a 'criminal lifestyle' as defined by s.223 POCA.

129. The four assumptions are:

    i. That any property ***transferred*** to the defendant[210] 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.160(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.160(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.160(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.160(5)).

130. In relation to the second assumption (s.160(3)), it does not matter when the defendant first acquired the property that he continues to hold: *Chrastny No.2*;[211] *Bentham and Clarke*;[212] and *Brett*.[213]

131. Note that if the court makes any of the assumptions set out in s.160, 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*).[214]

132. Be careful of s.160(9), the effect of which is that where a confiscation order was made within the relevant 6-year period, under a regime where the court was required or entitled to make statutory assumptions (see s.158(8)), the relevant date is the date when D's benefit was calculated: see *R v Barnett*.[215]

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[210] By s.232(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.160((2)(b)). Section 232(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.

[211] (1991) 93 Cr.App.R.406

[212] (1997) 2 Cr.App.R.(S.) 99

[213] *The Times*, October 13, 1997

[214] [2008] EWCA Crim 1303

[215] [2011] EWCA Crim 2936.

133. There are two important statutory exceptions (s.160(6)):[216]

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

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

134. The burden (civil standard) will be on the defendant to show that the origin of the property was legitimate: see *Dickens*;[217] *Comiskey*;[218] *Enwezor*.[219]

135. In *R v Steed*,[220] 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.

136. In *R v Ward*,[221] 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*).[222]

137. 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*;[223] and see *R v Panesar*,[224] and *Dickens*.[225]

<u>"Serious risk of injustice": second exception</u>

138. 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*,[226] and see *Ul-Haq*,[227] and *Ahmed and Qureshi*.[228]

139. 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*;[229] and consider *Deprince*,[230] *Wenn*,[231] and *Ajibade*,[232] where judges have tried to do their best to make a common-sense judgment of monies obtained legitimately rather than as the proceeds of crime.

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[216] Section 160(6) re-enacts the statutory exceptions in art.10, of the Proceeds of Crime (Northern Ireland) Order 1996; and its predecessor, at least in part ("shown to be incorrect"), found in art.6 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990 [drug trafficking], and similarly in Part VI of the 1988 Act (and indeed in the Drug Trafficking Act 1994).

[217] [1990] 2 Q.B. 102

[218] (1990) 12 Cr.App.R.(S.) 562

[219] (1991) 93 Cr.App.R.233

[220] [2011] EWCA Crim 75

[221] [2008] EWCA Crim 2955

[222] [2007] EWCA Crim 2688

[223] (1994) 15 Cr. App. R. (S) 783

[224] [2008] EWCA Crim 1526

[225] (1990) 91 Cr.App.R. 164

[226] [2004] EWCA Crim 2715 (cited in *Panesar* [2008] EWCA Crim 1526)

[227] [2004] EWCA Crim 143

[228] [2004] EWCA Crim 2599

[229] [2011] EWCA Crim 1894

[230] [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.

[231] [2002] EWCA Crim 1467

[232] [2006] EWCA Crim 368

140. 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*.[233] But, contrast with dicta in *Rezvi*,[234] which seems to suggest that the 'serious risk of injustice' exception serves as 'safety net' to prevent injustice.[235] See also *Jones and others*,[236] and *Dore*.[237]

141. It is submitted that in 'criminal lifestyle case' a major loose-end that is left by *R v Waya* (UKSC), and by *Jawad*,[238] is the scope of the 'serious risk of injustice' exception to the making of statutory assumptions under POCA 2002.

VI. Determining the "Recoverable Amount": s.157 POCA 2002

The general rule

142. 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.157, POCA 2002.

143. 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 often worth less than the value of the "benefit" he obtained. Accordingly, subject to one exception (see s.156(6)), the Court will adopt the following staged approach and it will attempt to recover:

    a. the full value of the benefit, or
    b. if less, the "available amount",[239] or
    c. if less, a "nominal amount" if the available amount is nil.

144. The effect of section 157 is that the court should determine the "available amount" in every case: see *Jones and others*.[240]

145. 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*,[241] and see *Ilsemann*,[242] and see *R*

[233] (ECHR), 11 September, 1997
[234] [2002] UKHL 1
[235] 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*.
[236] [2006] EWCA Crim 2061
[237] [1997] 2 Cr App R(S) 152
[238] [2013] EWCA Crim 644
[239] Calculated in accordance with s.159 POCA 2002.
[240] [2006] EWCA Crim 2061
[241] [2001] 1 Cr.App.R.(S) 445
[242] (1990) 12 Cr.App.R.(S.) 398

v Summers,[243] *R v Piggott*,[244] *R v Henson* (where H had sold drugs but retained the proceeds):[245] but contrast with *R v McMillan-Smith*).[246]

146. In *Grayson and Barnham v UK*,[247] it was held that it was not incompatible with the notion of a fair hearing in criminal proceedings to have placed the onus on each applicant to give a credible account of his current financial situation.

147. In *R v McIntosh*,[248] 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*,[249] noting *R. v May,*[250] and *Glaves v CPS*.[251]

148. Prosecutors are not bound to discover the extent of the defendant's wealth. However, in *R v Hartshorne*,[252] 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. This is sometimes referred to as "*Comiskey* approach":[253] see *Versluis* (noting the judgment of Hooper LJ).[254]

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

149. 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.156(6) and s.163(6) POCA, is to safeguard victims. Thus, s.163 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.

150. ***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 Article 14 of the Criminal Justice (Northern Ireland) Order 1994:[255] see *Faithfull (R on the application of) v Ipswich Crown Court*,[256] and see *R v Goodenough*.[257]

151. In *R v Mitchell*,[258] 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

[243] [2008] EWCA Crim 872
[244] [2009] EWCA Crim 2292
[245] [2011] EWCA Crim 651
[246] [2009] EWCA Crim 732
[247] [2008] EHRR 1222
[248] [2011] EWCA Crim 1501
[249] [2008] 2 Cr. App. R. (S.) 48
[250] [2008] 1 AC 1028
[251] [2011] EWCA Civ 69.
[252] [2010] EWCA Crim 1283
[253] (1991) 93 Cr.App.R 227
[254] [2004] EWCA Crim. 3168, [2005] 2 Cr.App.R (S) 26.
[255] In E&W, see s.130 of the Powers of Criminal Courts (Sentencing) Act 2000.
[256] [2007] EWHC 2763 (Admin)
[257] [2004] EWCA Crim 2260
[258] [2001] 2 CAR (S) 141; decided under the 1988 Act as amended by PCA 1995.

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.

152. ***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*;[259] *Williams*,[260] *Mitchell*;[261] *Jannaway*.[262] Imposing both a confiscation order and compensation is not analogous to a fine: see Williams.[263]

153. ***Confiscation and compensation: proportionality:*** *R v Jawad*[264] explains the relationship (post *R v Waya* UKSC) between compensation orders [Article 14 of the Criminal Justice (Northern Ireland) Order 1994] and confiscation orders made under POCA 2002.

154. In giving the judgment of the Court, Hughes LJ observed that [s.163] POCA does not necessarily mean that the court must deal with a POCA confiscation order first and, in doing so, to ignore any compensation order which it is also being asked to make. The effect of [s.163] is that the amount of a compensation order is not to be reduced by a POCA confiscation order. The method of calculation of a POCA confiscation order is tightly prescribed by the Act, but it is now clear (following *R v Waya* SC) that disproportion must be avoided:

> "....it follows that the question of compensation might be relevant to that issue, if compensation means that money which is restored to the loser will be counted again in the POCA confiscation order. Therefore in principle it must be possible either to consider the two issues together or to have in mind, when considering the disproportion question, any compensation order which has been or is going to be made. Nevertheless....ordinarily the concern of the judge will be less with an order for compensation than with whether actual restoration to the loser is assured" [para.15].

155. At para.21, the Court said:

> "we do not agree that the mere fact that a compensation order is made for an outstanding sum due to the loser, and thus that that money may be restored, is enough to render disproportionate a POCA confiscation order which includes that sum. What will bring disproportion is the certainty of double payment. If it remains uncertain whether the loser will be repaid, a POCA confiscation order which includes the sum in question will not ordinarily be disproportionate."

156. Where there is timely restoration of property (or repayment) to the loser, credit will be given for it against a POCA confiscation order [consider, judgment, para.23]

157. There is no mandatory duty under the Act to take the POCA confiscation order into account when deciding whether to make a compensation order (noting s.163(3)(a), POCA) and, therefore, *Jawad* does not disturb those decisions in which it has been held that it is open to a court to make both a compensation order and a confiscation order in respect of the same offence.

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[259] January 12, 1995.
[260] [2001] 1 Cr.App.R(S) 500
[261] [2001] 2 Cr.App.R.(S) 141
[262] [2003] EWCA 459
[263] [2001] 1 Cr.App.R. (S) 500
[264] [2013] EWCA Crim 644

158. However, following *R v Waya*, there is now the important qualification that "What will bring disproportion is the certainty of double payment" (*Jawad*, para.21; underlining added). Accordingly, "*What a court should not entertain, because there is no need to do so, are expressions of well-meaning intentions on behalf of a defendant which are not backed by assurance of repayment. Still less is a court likely to be receptive to pleas to adjourn the confiscation hearing for the defendant to seek ways of making repayment*" [23]. See also *R v Hursthouse*.[265]

VII. How the "available amount" is calculated: s.159, POCA 2002

Steps in the calculation of the "available amount"

159. The "available amount" is calculated in accordance with s.159 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.227 POCA. Note the cases of *Stack v Dowden* (HL)[266] that is discussed and explained by the Supreme Court in *Jones v Kernott*.[267]

(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.227(2)). If there are third party interests in the property, the court should assess the value of the defendant's beneficial interest (s.227(3): see *Modjiri*,[268] 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).

(c) The Courts in England and Wales have tended to say that 3rd party interests are best determined at the "enforcement stage" (consider *Re Norris*[269]). However, it has long been argued by this commentator that there is no reason why this should be so, given the language of s.227(3).[270] Indeed, this seems to be the current view of the courts: see *McKeirnan* [2004] NICA 18, but consider *R v Lewis (Colin Mark)*,[271] *Ahmed and Qureshi*,[272] *Greet*,[273] noting para.139 in the judgment, and *McKinsley*.[274]

(d) In *Rowsell*[275] (cited in *Ghori*),[276] the court confirmed that in applying the Proceeds of Crime Act 2002 the court cannot ignore ordinary rules of property

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[265] [2013] EWCA Crim 517
[266] [2007] UKHL 17, [2007] 2 AC 432
[267] [2011] UKSC 53
[268] [2010] EWCA Crim 829
[269] [2001] 3 All ER 961.
[270] "(3) But if at that time another person holds an interest in the property its value, in relation to the person mentioned in subsection (1), is the market value of his interest at that time, ignoring any charging order under a provision listed in subsection (4)."
[271] [2010] EWCA Crim 3288
[272] [2004] EWCA Crim 2599
[273] [2005] EWCA Crim 205
[274] [2006] EWCA Civ 1092
[275] [2011] EWCA Crim 1894
[276] [2012] EWCA Crim 1115

and trust law without specific statutory authority. For the importance of adhering to this principle, see *Gangar and White*,[277] (where the Court quashed confiscation orders made against the defendants insofar as they were based upon treating the jointly held assets as 100% available to both of them).[278]
As the Court of Appeal pointed out in *Harriott*:[279]

> "…it is true that, as explained in cases like *Norris*, the scheme of the Drug Trafficking Act 1994 is that third party interests are to be advanced at the enforcement stage in the High Court. However, the question for the Crown Court was still the extent of the Appellant's realisable assets, the available amount."

(e) Genuine debts. There may be a genuine debt (i.e. not a sham debt) which is not realistically recoverable by the defendant. The correct approach is for the court to treat that debt as an available asset but which has no value: see *Najafpour*, [280] applied in *Smith (Kim)*.[281] The case of *Smith (Kim)* shows that the position is different in relation to "tainted gifts" because "[t]here is nothing in [s.229] which links the value of the gift to its recoverability, even though it contemplates the situation where the recipient of the gift has parted with it" (per Davis LJ, para.13).

(f) Pensions. For pensions which may not be immediately realisable, It is submitted that the case of *Chen*[282] is the leading decision for the purposes of POCA and which considered both the cases of *Ford*,[283] and *Cornfield*.[284] The latter two cases were decided in the context of Part VI of the CJA 1988. In each of the three cases, the issue was whether pensions policies had a market value for the purposes of determining the "available amount" (POCA) or, the "amount that might be realised" (CJA 1988).

(g) Costs of sale. The courts will often make a deduction for costs likely to be incurred in selling the property: *Cramer*,[285], and see *Allingham* (NI).[286] Note that s.228 is concerned with the value of property obtained by a defendant as a "benefit" – i.e. from his or her criminal conduct.

(h) Secured incumbrances. 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*,[287] and consider *SFO v Lexi Holdings*[288]). If the incumbrance is a sham (and the court is satisfied about that) then its apparent value will be left out of

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277 [2012] EWCA Crim 1378
278 The case of *Chellapermal* [2012] EWCA Crim 576, decided some three months earlier, is best viewed as confined as a 'once only' decision.
279 [2012] EWCA Crim 2294
280 [2009] EWCA Crim 2723, para.32.
281 [2013] EWCA Crim 502
282 [2009] EWCA Crim 2669
283 [2009] 1 Cr App R (S) 68
284 [2007] 1 Cr App R (S) 771
285 13 Cr.App.R(S) 390
286 [2012] NICA 29
287 [2007] EWCA Crim 1536
288 [2008] EWCA Crim 1443

account. Similarly, if the incumbrance cannot, or will not, be enforced, the court is not obliged to take it into consider it: *Harvey.*[289]

Step 2: *Deduct* "obligations which have priority" (s.159(1)) [the CJA/DTA spoke of 'obligations having priority']. Such obligations are few in number and the expression is defined in s.159(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*.[290]

- A loan is not an "obligation having priority": see *McQueen*,[291] and see *McDonald* (1990).[292]
- Legal costs do not amount to an "obligation having priority": *Martin and White*.[293]

Step 3: *Add* the value of "tainted gifts" (note *Dickens*;[294] and see *Wallace Duncan Smith*;[295] and see *Liverpool Magistrates Court, Ex. p. Ansen*;[296] and note *Gokal*[297]). 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*,[298] where a gift was included in the value of the amount recoverable under the confiscation order.

Note the case of *Smith (Kim)* which shows that the position with regards to "tainted gifts" differs from the notion of "free property" because "[t]here is nothing in [s.229] which links the value of the gift to its recoverability, even though it contemplates the situation where the recipient of the gift has parted with it" (per Davis LJ, para.13).[299]

Rules relating to property

160. 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 (particularly in relation to Scotland).

161. In *Larkfield Ltd v RCPO*,[300] 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.

162. In relation to pension funds, see *Chen*,[301] Ford,[302] and *Cornfield*.[303]

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289 July 31, 1998, Court of Appeal (Criminal Division).
290 [1998] 1 Cr.App.R.(S) 42; [1997] Crim.L.R. 606
291 [2001] EWCA Crim 2460
292 (1990–91) 12 Cr. App. R. (S.) 457
293 (1988) 2 Cr.App.R(S.)385
294 [1990] 2 Q.B. 102
295 [1996] 2 Cr.App.R. 1
296 [1998] 1 All E.R. 692, at p.701
297 [2001] EWCA Civ 368
298 [2011] EWCA Crim 1233
299 [2013] EWCA Crim 502. Although not cited in *Smith (Kim)*, the decision is actually consistent with *R v Dickens* (1990) 12 Cr.App.R.(S.) 191 which was then concerned with the provisions of the Drug Trafficking Offences Act 1986.
300 [2010] EWCA Civ 521
301 [2009] EWCA Crim. 2669
302 [2009] 1 Cr. App. R. (S) 68
303 [2007] 1 Cr. App. R. (S) 771

163. In relation to trust property, see (as examples), *Modjiri*,[304] *Anderson*,[305] *Shahid*,[306] *R. v W,*[307] and *RCPO v May*.[308]

164. It is important to note the decision of the House of Lords in *Stack v Dowden*[309] in which a considerable number of cases including *Midland Bank v Cooke*,[310] *Pettitt v Pettitt*,[311] *Gissing v Gissing*,[312] were reviewed, and to read the decision of the Supreme Court in *Jones v Kernott*[313] (UKSC). Note also *Gibson v RCPO*,[314] and see *Re Ali*.[315]

165. 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 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.

166. 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:

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304 [2010] EWCA Crim. 829
305 [2010] EWCA Crim. 615.
306 [2009] EWCA Crim. 831
307 [2011] EWCA Crim. 103
308 [2009] EWHC 1826 (QB)
309 [2007] UKHL 17
310 [1995] 4 All E.R.562
311 [1970] AC 777
312 [1971] AC 886
313 [2011] UKSC 53
314 [2008] EWCA Civ 645
315 [2012] EWHC 2302 (Admin)

(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*).[316] 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*.[317] 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)).

167. In *CPS v Piper*[318] - where property was held in the offender's sole name - it was explained that different principles apply where the defendant (a) holds property in his or her sole name and (b) where a third party holds property jointly with the defendant. The Court applied the following principles (in the context of husband and wife):

(1) The starting point is that equity follows the law, and that the beneficial interest is held by H who is the sole registered owner of the property. The burden of proof is upon W to displace that presumption or starting point on the balance of probability.

(2) The court should first ask: was it intended by H and W, as a common intention, that W should have any beneficial interest in the property? (*Jones v Kernott*, paragraph 52, third sentence).

(3) Their common intention is to be deduced objectively from their conduct (*Jones v Kernott*, paragraphs 51(3) and 52, sixth sentence). The short passage from *Gissing v Gissing* quoted with approval in *Jones and Kernott* at para.51(3) applies, and see para.69 of *Stack v Dowden*.[319]

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316 [1971] AC 886, 906
317 [2005] Fam 211, para 69
318 [2011] EWHC 3570 (Admin)
319 [2007] UKHL 17, [2007] 2 AC 432

(4) In answering question at (2) above, if W has made some financial contribution referable to the transfer of the property to H, it can readily be inferred that it was intended that W should have a beneficial interest in that property (*Stack v Dowden*, para.61, 4th sentence).

(5) If W does have a beneficial interest in the property, and the court deduces a common intention as to the size of that interest by direct evidence or by inference, then that is W's interest.

(6) If it is not possible to ascertain by direct evidence or by inference what the common intention as to the size of that interest is, then the size of that interest is that which the court considers fair having regard to the whole course of dealing between H and W in relation to the property. The 'whole course of dealing' is to be given a broad meaning (*Jones v Kernott*, para.52, 7th sentence, and para.51(4)). The law has moved on from what Lord Bridge of Harwich said in *Lloyds Bank v Rosset*[320] (see *Abbott v Abbott*,[321] paras.5,6 and 19); per Holman J.

Gifts tainted with criminality

168. 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.226(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.

231 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.

169. In *R v Richards*,[322] 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

[320] [1991] 1 AC 107 at 132, 133
[321] [2007 UKPC 53
[322] [2008] EWCA Crim 1841

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.

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 [s.173, NI] 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) [s.173, NI], for example, would be otiose if such were the effect in law". (per Toulson LJ, para.22]

v) Note the decision of *Smith (Kim)*,[323] referred to above.[324]

VIII. Enforcement of confiscation orders

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

171. 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 (it is submitted), and only in the circumstances prescribed by s.35 of the Criminal Justice Act (Northern Ireland) 1945.[325]

172. The second route is by way of the appointment of an enforcement receiver. In this regard, it will not necessarily be disproportionate (in ECHR terms) to sell property if a third party affected by an order of sale (e.g. the matrimonial home) turned a blind eye to the fact that the property was tainted from the proceeds of criminal conduct: consider *Dawes*.[326]

<u>Term of imprisonment in default of payment</u>

173. When a confiscation order is made, the Court must make an order fixing a term of imprisonment in default (see s.35 of the Criminal Justice Act (Northern Ireland) 1945

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[323] [2013] EWCA Crim 502

[324] Although not cited in *Smith (Kim)*, the decision is actually consistent with *R v Dickens* (1990) 12 Cr.App.R.(S.) 191 which was then concerned with the provisions of the Drug Trafficking Offences Act 1986.

[325] Unlike in England and Wales, Crown Court fines in Northern Ireland are not enforced by or through the magistrates' court: see para.250, Explanatory Notes to the POCA 2002.

[326] [2012] EWHC 3575 (Admin)

(function of court as to fines)[327] albeit that a failure to do so does not invalidate the confiscation order: consider *Ellis*.[328]

174. 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*.[329]

175. The current default terms of imprisonment are (s.35, 1945 Act):

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

Time to pay: s.161, POCA 2002

176. 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*.[330]

177. Note that s.161 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.

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

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[327] Section 35 - Powers of Crown Court or county court in relation to fines and forfeited recognizances - [subs (4) to (7) not reproduced)
(1) Subject to the provisions of this section, where a fine is imposed by, or a recognizance is forfeited before, [F15 the Crown Court or a county court], the court may by order— (a) allow time for the payment of the amount of the fine or the amount due under the recognizance; (b) direct such payment to be made by instalments of such amounts and on such dates respectively as may be specified in the order; (c) fix a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered; (d) in the case of a recognizance, discharge the recognizance or reduce the amount due thereunder. (e) on the application of the person liable to make the payment, allow further time for payment or vary an order for payment by instalments.
(2) The periods set out in the second column of the following Table shall be the maximum periods of imprisonment or detention which may be fixed under subsection (1)(c) applicable respectively to the amounts set out opposite thereto— [see above]…
(3) Where any person liable for the payment of a fine or a sum due under a recognizance to which this section applies is sentenced by the court to a term of imprisonment, the court may order that any term of imprisonment fixed under paragraph (c) of sub-section (1) of this section shall commence at the expiration of that term of imprisonment.

[328] [1996] 2 Cr.App.R.(S)403

[329] (1998) 162 J.P. 359; The Times, March 17, 1998

[330] *The Times,* March 17, 1998

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

180. 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

181. The defendant must have served all other terms of imprisonment before the default term begins to run (s.187(2)).

182. Serving a term of imprisonment in default of payment, will not extinguish the debt under a confiscation order. This is because, by s.233(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.

183. Section 235(1) POCA, provides that a confiscation order is satisfied when no amount is due under it.

184. Section 187(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.

185. 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*[331] 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).

186. 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*.[332] However, the Magistrates retain a discretion to inquire into the defendant's means before issuing a warrant of commitment, the rationale being that the 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*,[333] per Richards LJ, citing *Hastings and Rother Justices case*, and *R v Liverpool Magistrates' Court, ex parte Ansen*;[334] see also, *RCPO v Taylor*.[335]

IX. Absent defendants

187. POCA 2002 makes provision for the making of a confiscation order against a defendant who was convicted but who *then* absconded (s.177). A confiscation order may be made under a modified process set out in s.177, POCA. Note that the statutory assumptions do not apply if either s.177 or s.178 applies: and note the interesting situation that arose in *R (CPS) v Cambridge Crown Court*,[336] but which did not call for resolution by want of jurisdiction on an application for Judicial Review.

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[331] [2008] EWHC 67 (Admin)
[332] [1998] Crim.L.R. 812
[333] [2009] EWHC 755 (Admin), at [10]
[334] [1998] 1 All ER 692
[335] [2010] EWHC 715 (Admin)
[336] [2010] EWHC 663 (Admin).

188. On the question of defending counsel's duties in relation to absconders, see *Okedare* [2014].[337]

189. POCA 2002 also makes provision for defendants against whom proceedings for an offence have been started,[338] but who are neither convicted nor acquitted. Again, a confiscation order can be made under a modified process set out in s.178 POCA.

190. 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.177 cannot apply because the absconding occurred before D was convicted, and that s.178 cannot apply where a verdict has been returned.[339] Attractive as the argument is, it is submitted that one solution is to give s.177 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".

191. 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). However, civil recovery is limited to property that is or represents property obtained through unlawful conduct (ss.304-310, POCA 2002). Thus, the scheme under Part 5 is very different from confiscation orders made under Part 4 of the Act, which are money orders payable out of assets whether legitimately acquired or not.

192. 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*,[340] *R v Spearing*,[341] *R v McCormick*,[342] *R v Bhanji*,[343] and consider *Robb v NCA* [2014].[344]

X. Legal representation, advice, and assistance

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

194. 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)*,[345] 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 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.

[337] [2014] EWCA Crim 228
[338] Defined by s.233, POCA 2002. Proceedings are typically started by summons, or warrant (s.233(1)(a)), or when charged with an offence (s.233(1)(b)) or when an indictment is preferred as specified in s.233(1)(c), POCA.
[339] 'Confiscation against defendants convicted in absence: a lacuna?', Adam King; Archbold Review, 2013, Issue 6.
[340] [2010] EWCA Crim 2727
[341] [2010] EWCA Crim 2169
[342] [2010] EWCA Crim 1556
[343] [2011] EWCA Crim 1198
[344] [2014] EWCA Civ 171.
[345] [2011] EWCA Crim 393

195. In *Obikile*,[346] 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

196. 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:

    a. 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.169.

    b. The court 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.170.

    c. 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.171.

    d. Reconsideration of the "available amount": the prosecutor or the receiver may apply to the Crown Court for an upward variation of the "available amount" – and thus the amount recoverable – under a confiscation order: s.172. 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*,[347] and *In re Maye* [NI].[348]

    In *Padda*,[349] the CACD held that s.172(4)(a)[350] preserves an obligation on the court (and a discretion) to make an order which it "believes is just". The court can take all relevant circumstances into account when deciding this issue. The court must also take into account the legislative policy in favour of maximising the recovery of the proceeds of crime, even from assets acquired legitimately post conviction:[351] "*It is in the very highest degree unlikely that any order which is 'just' will be found to be disproportionate, so as to infringe A1P1 of the European Convention of Human Rights*" (per Irwin J, para.44; underlining added).

    "*In that context, it is entirely appropriate for a court to consider such matters as the amount outstanding, the additional amount which might now be available for a further payment, the length of time since the original confiscation order was made, the impact on the Defendant of any further payment contemplated and indeed any other consideration which might properly be thought to affect the justice of the case*" (per Irwin J, para.45).

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346 [2011] EWCA Crim 1658
347 [2012] UKSC 5.
348 [2008] 1 WLR 315.
349 [2013] EWCA Crim 2330
350 Section 22(4)(a) POCA 2002, England and Wales.
351 One issue of policy concerns offenders who have rehabilitated themselves and re-built successful, legitimate, careers. This was an issue touched upon in *R v Padda*.

e. 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.173.

197. Sections 169-173 of POCA have a six-year time limit, but s.172 (upward variation of "available amount") has no time limit, and four sections (ss.169-172) 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.

198. The general rule is that a defendant is not entitled to invoke s.173 POCA in order to re-litigate determinations made by the sentencer, and this includes the extent of the defendant's wealth: *Joyce*,[352] *Barker*,[353] *R v C*,[354] *R v W*,[355] *Gokal v SFO*,[356] *Briggs*;[357] but consider *Forwell*,[358] and *In The Matter of N'guessan*.[359] See, also, *Alves*,[360] 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).[361]

199. 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.173, involves an assessment of what the defendant is truly worth at the date of the application for a downward variation of the "available amount".

200. In *Glaves v CPS*,[362] 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.[363]

201. *In the Matter of Re L*,[364] 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.

[352] [2009] EWCA Crim. 2605
[353] [2011] EWCA Crim 1028
[354] Unreported, November 18, 1997.
[355] Unreported, 29th January, 1998.
[356] [2001] EWCA Civ 368
[357] [2003] EWCA Crim 3298
[358] [2003] EWCA Civ 1608
[359] [2002] EWCA Civ 215
[360] [2011] EWCA Crim 1375
[361] [2011] EWCA Crim 2444
[362] [2011] EWCA Civ 69
[363] See *R v McIntosh* [2011] EWCA Crim 1501
[364] [2010] EWHC 1531 (Admin)

XII. Criminal memoirs (Exploitation proceeds of crime)

202. 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.

203. Note: Part 7 applies to NI (except ss.158(1) and (2), 170(2) and 171 and Schd.19): see s.181(2)(d), Coroners and Justice Act 2009.

CASH FORFEITURE REGIME – AN OUTLINE

I. Introduction

Weaknesses in the regime under Part II of the DTA 1994

204. Five main weaknesses existed under the cash forfeiture regime as it existed prior to the enactment of POCA 2002.

    a. Pt II of the DTA was confined to cash, and it did not include cheques, or other money orders.
    b. The power was confined to cash imported into, or exported out of, the United Kingdom. "Exported" included cash being brought to any place in the United Kingdom for the purpose of being exported (s.48 DTA): the chances of the Crown being able to prove that matter, was slender.
    c. There was no express power to search for cash. Accordingly, although a cash seizure under the DTA might have be intelligence-led, the use of the power under s.42 DTA 1994 amounted to little more than a power to intercept and to seize cash.
    d. Although the power under Pt II of the 1994 Act was exercisable by a constable, as well as by customs' officer, the reality was that the police had little scope for seizing and detaining cash under s.42 DTA 1994.
    e. The cash had to be linked to drug trafficking.

The changes under POCA

205. Six significant changes to the cash forfeiture regime were enacted under POCA 2002:

    1) The definition of "cash" could not be wider (s.316(1), s.289(6) and (7)), and means, when found at any place in the United Kingdom:
        (a) Notes and coins in any currency;
        (b) Personal orders;
        (c) Cheques of any kind including travellers' cheques;
        (d) Banker's drafts; and
        (e) Bearer bonds and bearer shares.

        Cash also includes "any kind of monetary instrument which is found at any place in the United Kingdom, if the instrument is specified by the Secretary of State by an order made after consultation with the Scottish ministers": s.289(7), POCA 2002.

    2) The powers may be exercised anywhere in the United Kingdom by a "customs officer", a "constable", or an "accredited financial investigator" (see s.303A; and see s.294(2), as amended by the Serious Crime Act 2007).

3) There is power to seize cash even if only part of it is suspected by the officer (on reasonable grounds) to be either "recoverable property" (defined by s.316, ss.304-310), or intended for use in "unlawful conduct": see s.294(1) and (2). It would appear that by "part" is meant an "indivisible part", for example a cheque for £50,000, where only £20,000 is suspected to be "recoverable property": see *Home Office Circular 71/2002*.

4) The definition of "recoverable property" is wider than cash that "directly or indirectly represents [unlawful conduct]" (as that expression is used for the purposes of (e.g.) s.42, DTA 1994). By s.316(1) POCA "recoverable property" is to be read in accordance with ss.304 to 310. The essence of "recoverable property" is that it has been "obtained through unlawful conduct". Confusingly, both s.304 and s.242 are headed "property obtained through unlawful conduct". In fact, s.304 defines property that is "recoverable", whereas s.242 defines the circumstances in which property has been obtained "through unlawful conduct".

5) Fifthly, the concept of "unlawful conduct" (s.241) is narrower than "criminal conduct". Dual criminality is a feature of the definition of "unlawful conduct" as it appears in s.241 POCA, whereas there is no dual criminality requirement in respect of Pts 2-4, and Pt 7 of POCA (except to the extent provided for by amendments made to Pt 7 by SOCPA 2005 in relation to money laundering offences.

6) Sixthly, under Ch.3 to Pt 5 of POCA, there is power for an officer of Customs and Excise, or for a constable, to search property or persons for "cash" (s.289). It is a power that may not be exercised without obtaining approval (unless it is not practicable to do so). "Approval" means approved by a Magistrate (or in Scotland, by a Sheriff), or by a "senior officer" (defined by s.290 (4), (5)).

Property that is "recoverable"

206. Section 340 provides:

"Property obtained through unlawful conduct"

(1) Property obtained through unlawful conduct is recoverable property.

(2) But if property obtained through unlawful conduct has been disposed of (since it was so obtained), it is recoverable property only if it is held by a person into whose hands it may be followed.

(3) Recoverable property obtained through unlawful conduct may be followed into the hands of a person obtaining it on a disposal by--

(a) the person who through the conduct obtained the property, or

(b) a person into whose hands it may (by virtue of this subsection) be followed.

207. Section 305 makes provision for the tracing of "recoverable property" which, in this instance, relates to "cash":

305 Tracing property, etc

(1) Where property obtained through unlawful conduct ("the original property") is or has been recoverable, property which represents the original property is also recoverable property.

(2) If a person enters into a transaction by which--

(a) he disposes of recoverable property, whether the original property or property which (by virtue of this Chapter) represents the original property, and

(b) he obtains other property in place of it,

the other property represents the original property.

(3) If a person disposes of recoverable property which represents the original property, the property may be followed into the hands of the person who obtains it (and it continues to represent the original property).

208. Thus, on each occasion that the proceeds of unlawful conduct are transferred, or converted, a new seam of "recoverable property" is created, and therefore each seam can create new ones, as property changes hands. However, despite the sprawling effects of ss.304-310, in practice the courts look for cogent evidence that cash is the proceeds of unlawful conduct, or that it is intended for use in unlawful conduct.

The "unlawful conduct" through which the property was obtained

209. As stated above, s.242 describes the circumstances in which property is obtained "through unlawful conduct" (with particular reference to s.242(2)(b)):

"Property obtained through unlawful conduct"

(1) A person obtains property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct.

(2) In deciding whether any property was obtained through unlawful conduct--

(a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct,

(b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.

Must a precise criminal activity be identified?

210. The question as to whether and to what extent the alleged criminal activity must be identified, has been usefully summarised by Coulson J in *Bavi v Snaresbrook Crown Court* (underlining has been added):[365]

> 6. For some time, there was uncertainty as to the extent, if at all, to which the police or the relevant authority had to show that the money which was the subject of the forfeiture proceedings arose from any particular unlawful conduct. In *Muneka v Commissioner of Customs and Excise* [2005] EWHC 495 (Admin), Moses J (as he then was) held that the Crown did not have to show any particular criminal conduct. However, in *Director of Assets Recovery Agency v Geoffrey David Green* [2005] EWHC 3168 (Admin), Sullivan J (as he then was) did not accept that approach, although he distinguished *Muneka* on the basis that he was considering asset recovery in civil proceedings, rather than in cash forfeiture litigation, which was the subject matter of *Muneka*.
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> 7. Subsequently, other decisions have indicated that, for money laundering allegations for example, it was not enough for the prosecution merely to rely on single possession of a large quantity of cash, and the Crown had to identify at least the class of crime in question: see *R v NW* [2009] 1 WLR 965. More recently, all of these authorities were considered by the Divisional Court in *Carol Angus v UKBA* [2011] EWHC 461 (Admin). In giving the judgment of the court, Nicola Davies J held that, "by reference to Section 242(2)(b) of PoCA, in a case of cash forfeiture , a customs officer does have to show that the property seized was obtained through conduct of one of a number of kinds each of which would have been unlawful conduct." That has authoritatively set out the approach to be adopted under s.298(2)(a), namely that unlawful conduct which is said to have generated the money in question needs to be identified. There is no direct authority on the operation of s.298(2)(b) (the 'intended' unlawful conduct).

[365] [2013] EWHC 4015 (Admin).

> 8. An issue which arose in a number of the cases identified above concerns the credibility of the person who is the subject of the forfeiture claim. The general approach has been that, if the person in question is found to have lied about the origins of the money or its intended use, then the court was entitled to draw an inference from that lie that the money had been obtained through, or was intended for use in, unlawful conduct. Subject to the requirement now that any unlawful conduct said to have generated the money in the first place has to be identified, it seems to me that that approach is reasonable, and in accordance with the purposes of PoCA.

211. Further support for the above proposition may be derived from the decision in *Secretary of State for the Home Department v Tuncel & Anor*.[366]

212. But, what degree of specificity about the nature of the alleged criminal conduct, must be shown? In *Wiese v UKBA*,[367] the Court regarded as "formally" correct the submission of counsel for W, that (in the case of money laundering at least) "*….the court will need more specificity about the nature of the conduct alleged before it can conclude that the cash sought to be forfeited constitutes recoverable property*."[368] The reason is, in part, that the person, against whom forfeiture is sought, is entitled to know the details of the case which he or she is meeting.

213. It is important to note that Part 5, POCA, including the cash forfeiture provisions, must be applied in compliance with Article 1 of Protocol 1 of the ECHR: see *Ahmad v HMRC*.[369]

214. Section 242(2)(b) is *not* to be interpreted in two different ways depending upon whether the litigation is High Court civil recovery proceedings or magistrates/Crown Court cash forfeiture. In *Angus v UKBA*,[370] the Administrative Court made it clear that the section makes no such distinction:

> "the wording is clear, the Explanatory Note underlines the unified approach...To read into section 242 two separate tests, is to place upon it a meaning which is not simply strained and unreasonable, it is wrong in law."

215. Accordingly, the reasoning of Sullivan J (as he then was), in *The Director of Assets Recovery Agency and Others v Jeffrey David Green and Others*[371] – which has been applied in subsequent cases decided under Part 5 of POCA (e.g. *ARA v Szepietowski*,[372] and *Olupitan & Others v ARA*[373]) – also applies to the cash forfeiture provisions of that Act.[374]

II. Practice and procedure

<u>The civil nature of the proceedings</u>

216. It is well established, and beyond argument, that powers of forfeiture under Ch.3 are civil in nature. This was also the position under Pt II of the DTA: and see *Mudie v Kent*

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366 [2012] EWHC 402 (Admin)
367 [2012] EWHC 2549 (Admin)
368 Per Underhill J, para.42.
369 [2013] EWHC 2241 (Admin)
370 [2011] EWHC 461 (Admin)
371 [2005] EWHC 3168 (Admin)
372 [2007] EWCA Civ 766,
373 [2008] EWCA Civ 104
374 For a discussion of this provision written before the case of *Angus* was decided, see J Laws 'Proving the Unknown' (Proceeds of Crime Review; 2008, Issue 1, p.36, Wildy & Sons Ltd); and for a critique of *Angus v UKBA*, see J. Laws, the Proceeds of Crime Review, 2011, Issue 5, p.56.

Magistrates';[375] and see *Best*.[376] As a result, the forfeiture of cash does not constitute a criminal sanction, or give rise to a "criminal charge" for the purposes of the ECHR. In *Butler v the United Kingdom* (June 20, 2002), the European Court of Human Rights said that, in its opinion, (and in the context of Pt II of the DTA):

> "....the forfeiture order was a preventative measure and cannot be compared to a criminal sanction, since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs".

217. The ECHR stressed that the legal burden of proving the link between the cash seized, and the unlawful conduct, "rests on the relevant authority seeking a detention or forfeiture order", but the Court's reference to "money which was *presumed* to be bound up with the international trade in illicit drugs" is puzzling. This must be a slip, because there are no presumptions that operate under Pt II of the DTA, or that operate under Chp.3 to Pt 5 of POCA. In *Butler v the United Kingdom*,[377] the applicant's submission appears to have been that a "criminal charge" arose because he was "compelled to bear the burden of proving beyond reasonable doubt (the criminal standard) that the money at issue was unconnected with drug trafficking". If that was the submission, it was hopelessly misconceived. There is no such burden of proof on the person from whom the money was seized, or on any person to whom the money belongs.

218. It is worth repeating that Part 5, POCA, including the cash forfeiture provisions, must be applied in compliance with Article 1 of Protocol 1 of the ECHR: see *Ahmad v HMRC*.[378]

219. Given that proceedings are civil in nature, the Administrative Court held in *HMRC v Pisciotto*[379] that the answer to each of the following four questions is to be answered in the negative:

    (i) Whether an officer must caution a person ("D") under Code C10, of the [Police and Criminal Evidence (Northern Ireland) Order 1989], if he proposes to ask D questions about money found in his possession when he does not propose (although he does not know this) to use the answers in criminal proceedings;

    (ii) Whether, on its proper construction, paragraph 10.1 of Code C requires a caution to be given in circumstances where the answers or silence are later proposed to be given in evidence to a court exercising jurisdiction in civil proceedings and not in a prosecution;

    (iii) Whether the answer to question (ii) is any different in a case where the officer has not informed D that he did not intend to use any answers given by D for any purpose other than civil proceedings;

    (iv) Whether [art.76 of the PACE (NI) Order 1989] applies in proceedings for forfeiture of cash under s.298 and s.299 of the POCA 2002.

<u>Standard of proof</u>

220. The standard proof is the civil standard. This is now well-established. In *Butt v HMCE*,[380] the Divisional Court held that the appropriate standard was the civil standard of proof, or

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375 [2003] EWCA Civ 237
376 *Best* (unreported, May 23, 1995, DC).
377 (2002) application no 41661/98
378 [2013] EWHC 2241 (Admin)
379 [2009] EWHC 1991 (Admin)
380 [2001] EWCH (Admin) 1066

(to adopt the phase used by the judge at first instance, her Honour Judge Adele Williams), "the civil standard, but with great care".

221. The Divisional Court said:

> 27. I have obtained considerable guidance from *B v Chief Constable of Avon and Somerset Constabulary* referred to us by counsel, but also from the speech of Lord Nicholls in *In Re H (minors)*, House of Lords 1996 at page 586, referred to counsel by my Lord, Kennedy LJ, during the course of argument. Lord Nicholls said this:
>
> > 'The balance of probability standard means that a court is satisfied an event has occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."'

222. In *R (Director of ARA) v Jia Jin He (No.2)*,[381] the court said:

> "As a general rule, no doubt, criminal conduct may be regarded as less probable than non criminal conduct. But where there is evidence from which a court can be satisfied that it is more probable than not that criminal conduct has been involved, it does not seem to me that that is something that is so improbable as to require a gloss on the standard of proof. However, I recognise, and it is no doubt right, that since it is necessary to establish that there has been criminal conduct in the obtaining of the property, the court should look for cogent evidence before deciding that the balance of probabilities has been met. But I have no doubt that Parliament deliberately referred to the balance of probabilities, and that the court should not place a gloss upon it, so as to require that the standard approaches that appropriate in a criminal case."

223. The standard of proof under Pt 5 of POCA was considered in *The Matter Of Warnock* [2005] NIQB16, and the court reached a similar conclusion; and see *Daura v HMCE*.[382]

224. There is no question of any "penalty" involved in cash forfeiture proceedings so as to engage Article 7 of the ECHR. In *R (Director of ARA) v Jia Jin He*,[383] the Court accepted that property cannot be recoverable unless, at the time it was acquired, it was obtained through unlawful conduct that must have been criminal at that time, "*[to] that extent, the prohibition against retrospectivity will apply, but only because the Act says that the property must be property which was obtained by criminal conduct. In those circumstances, it is quite clear that Article 7 has no application*" [para.69]: see, also, *Director of Assets Recovery Agency in Charrington and Oths*,[384] *Director of Assets Recovery Agency v Walsh*;[385] *The Scottish Ministers (Petitioners) v McGuffie and Oths*;[386] *The Scottish Ministers v Buchanan*,[387] and see *Director of the Assets Recovery Agency v Ashton*.[388]

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381 [2004] EWHC 3021 (Admin)
382 (unreported, 2002; Admin Crt)
383 [2004] EWHC 3021 (Admin)
384 [2005] EWCA Civ 334
385 [2005] NICA 6
386 [2006] CSOH 34
387 [2006] CSOH 121
388 [2006] EWCA Civ 1477

The prescribed amount

225. The minimum amount that may be seized under s.294 POCA, was lowered from the 31st March 2006 from £5000 to £1000: see Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2006 (SI 2006/1699). There had been an earlier scaling down of the minimum amount (on March 16, 2004) from £10,000 to £5,000 (see S.I. 2004/420).

226. It was held in *Chief Constable of Merseyside Police v Hickman*,[389] that money that had been seized under the provisions of the [Police and Criminal Evidence (NI) Order 1989 (e.g. s.21)] can be re-seized under POCA 2002 and, furthermore, that there can be a re-seizure under POCA 2002 when - at the time of the first seizure - the legal minimum allowed under POCA was then higher *provided that* at the time of the seizure under s.294 the amount was above the statutory minimum which then applied [para.28].

227. Note that it is permissible for an officer to detain, and for the court to forfeit, cash with an aggregate value of £1,000 or more that had been seized from more than one person. This may not apply if individuals who are apparently unconnected, hold cash. It is therefore permissible to aggregate sums if it can be shown that the money came from a common source, or had a common destination, or purpose: see *Commissioners of Customs and Excise v Duffy*.[390]

228. The "minimum amount" requirement features in s.289 (search) and s.294 (seizure), but the amount is not mentioned in s.295 (detention of cash) or s.298 (forfeiture of cash). It is submitted that this leaves unanswered a question raised by Professor Ormerod [2002] Crim.L.R. 583, namely, whether a Magistrates' Court is entitled to forfeit a sum of cash, if the amount falls below £1,000 (for example, because the remainder of the money seized is shown not to be "recoverable property''). It is tentatively submitted that the court does not lose jurisdiction because, by then, there will either be evidence to prove (to the civil standard) that the money is "recoverable property" or there is no such evidence. A contrary construction would result in the money (that could be shown to be "recoverable property'') being unrecoverable under this provision.

229. Note that the officer must suspect that the amount he/she intends to seize is worth £1,000 or more. The officer might be wrong, but if there is a dispute about the precise amount of money involved, the officer must count it as soon as practicable: see Home Office Circular 71/2002; para.20.

230. Seized cash must be placed at the first opportunity in an interest-bearing account (see s.298). An application for forfeiture may be made to a Magistrates' Court (see s.298(1), below).

III. Searches

Premises

231. Section 289 POCA (as amended) provides:

> (1) If an officer of Revenue and Customs, a constable or an accredited financial investigator is lawfully on any premises [and] has reasonable grounds for suspecting that there is on the premises cash—

[389] [2006] EWHC 451 (Admin)
[390] [2002] EWCA, (admin) 425; and see the commentary to this case by Professor David Ormerod [2002] Crim.L.R. 583.

(a) which is recoverable property or is intended by any person for use in unlawful conduct, and
(b) the amount of which is not less than the minimum amount,
he may search for the cash there.

232. The officer must be lawfully on premises - for example, acting under a search warrant. The officer must have reasonable grounds to suspect that the cash is "on the premises" and that it is either "recoverable'' property' as defined by ss.304 to 310 (*i.e.* that it is or represents property obtained through unlawful conduct), or that the cash is *intended for use* in unlawful conduct by any person. The amount of cash must be for the 'minimum amount' (s.303) - a figure specified by the Secretary of State, currently £1000: see the Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2006 (SI 2006/1699).

Persons

233. Section 289 POCA (as amended) provides:

(2) If an officer of Revenue and Customs, a constable or an accredited financial investigator has reasonable grounds for suspecting that a person (the suspect) is carrying cash—
(a) which is recoverable property or is intended by any person for use in unlawful conduct, and
(b) the amount of which is not less than the minimum amount,
he may exercise the following powers.
(3) The officer, constable or accredited financial investigator may, so far as he thinks it necessary or expedient, require the suspect—
(a) to permit a search of any article he has with him,
(b) to permit a search of his person.
(4) An officer, constable or accredited financial investigator exercising powers by virtue of subsection (3)(b) may detain the suspect for so long as is necessary for their exercise.

234. These provisions need to be read in conjunction with ss.290 to 293 inclusive. Powers are exercisable under subs.(2) if the officer suspects that a person is carrying cash, and his suspicion is on reasonable grounds. An officer may require the suspect to permit a search of his person (other than an intimate or strip search: see s.289(8)), or to permit a search of any article he has with him *e.g.* a suitcase or a car (s.289(3)(a)). If the suspect declines to cooperate voluntarily, the officer may detain the suspect for so long as is necessary for that purpose: s.289(4). What is not clear is whether an officer has power to search a person who is concealing a high value monetary instrument in an intimate place. The answer, by virtue of s.289(8) seems to be "no'', and Ch.3 POCA makes no provision for a power of arrest to carry out an intimate search.

Approval

235. In cases where an officer performs a search on his/her own initiative (or with the prior authority of a senior officer), and the searching officer *either* fails to seize cash that is recoverable property, *or* he is duty-bound to return the cash within 48 hours after seizing it, that officer must submit a written report to a person approved by (in relation to Northern Ireland) a person appointed by the Department of Justice (s.290(6)). The report must include particulars as to why it was not practicable to obtain the approval of a Justice of the Peace (s.290(7)(b)). It follows that no report need be completed if the searching officer obtains prior approval from a Justice of the Peace. The thinking of the legislature appears to be that it can be assumed that a court is impartial and will only give prior

approval for a search after carefully examining the merits of the application. The role of the "appointed person" is to monitor the circumstances and manner in which the powers conferred by s.289 have been exercised, and to make recommendations to Government: see s.291.

IV. Powers for the seizure of cash

236. Section 294 of POCA (as amended) provides:

(1) An officer of Revenue and Customs, a constable or an accredited financial investigator may seize any cash if he has reasonable grounds for suspecting that it is—
(a) recoverable property, or
(b) intended by any person for use in unlawful conduct.
(2) An officer of Revenue and Customs, a constable or an accredited financial investigator may also seize cash part of which he has reasonable grounds for suspecting to be—
(a) recoverable property, or
(b) intended by any person for use in unlawful conduct,
if it is not reasonably practicable to seize only that part.
(2A) The powers conferred by this section are exercisable by an officer of Revenue and Customs only so far as the officer is exercising a function relating to a matter other than an excluded matter.
(2B) But the powers may be exercised by the officer in reliance on a suspicion that relates to an excluded matter.
(2C) The reference in subsection (2A) to an excluded matter is to a matter specified in section 54(4)(b) of, or in any of paragraphs 3, 5, 7, 10, 12 and 14 to 30 of Schedule 1 to, the Commissioners for Revenue and Customs Act 2005.
(3) This section does not authorise the seizure of an amount of cash if it or, as the case may be, the part to which his suspicion relates, is less than the minimum amount.
(4) This section does not authorise the seizure by an accredited financial investigator of cash found in Scotland.

237. The officer may seize cash if he has reasonable grounds for suspecting that it is either "recoverable property" or "intended...for use in unlawful conduct" (s.294(1)), and he may seize cash even if his suspicion relates to "part" of it (s.294(2)) - but *that* part must be worth at least the "minimum amount" (see s.294(3)). The latter provision may only be exercised if it is not reasonably practicable to seize the relevant "part" - for example, the officer finds a wealth of monetary instruments of which "part" is suspected to be used in unlawful conduct, but only by careful and time consuming examination of the remainder, would it be practicable to seize the relevant portion.

238. The officer must have reasonable grounds for this suspicion. Matters that might give rise to suspicion include whether the cash was concealed; explanations offered by persons who have an interest in the cash; the circumstances in which the cash was being handled (see *Bassick and Osbourne*, March 22, 1993, unreported, D.C.); the amount of cash that was being transported; whether traces of a controlled drug were detected on part or all of the cash (see *Thomas*, January 20, 1995, unreported, D.C.). It is not necessary for the officer to suspect that the person carrying the cash has himself been engaged in unlawful conduct, or that he intended to use the cash for that purpose: see *Thomas*.

V. Detention of seized cash

<u>Detention of seized cash</u>

239. Section 295 POCA (as amended) provides:

295 Detention of seized cash

(1) While the officer of Revenue and Customs, constable or accredited financial investigator continues to have reasonable grounds for his suspicion, cash seized under section 294 may be detained initially for a period of 48 hours.

(1A) The period of 48 hours mentioned in subsection (1) is to be calculated in accordance with subsection (1B).

(1B) In calculating a period of 48 hours in accordance with this subsection, no account shall be taken of—

(a) any Saturday or Sunday,

(b) Christmas Day,

(c) Good Friday,

(d) any day that is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom within which the cash is seized, or

(e) any day prescribed under section 8(2) of the Criminal Procedure (Scotland) Act 1995 as a court holiday in a sheriff court in the sheriff court district within which the cash is seized.

(2) The period for which the cash or any part of it may be detained may be extended by an order made by a magistrates' court or (in Scotland) the sheriff; but the order may not authorise the detention of any of the cash—

(a) beyond the end of the period of [six months] beginning with the date of the order,

(b) in the case of any further order under this section, beyond the end of the period of two years beginning with the date of the first order.

(3) A justice of the peace may also exercise the power of a magistrates' court to make the first order under subsection (2) extending the period.

(4) An application for an order under subsection (2)—

(a) in relation to England and Wales and Northern Ireland, may be made by the Commissioners of Customs and Excise, a constable or an accredited financial investigator,

(b) in relation to Scotland, may be made by the Scottish Ministers in connection with their functions under section 298 or by a procurator fiscal,

and the court, sheriff or justice may make the order if satisfied, in relation to any cash to be further detained, that either of the following conditions is met.

(5) The first condition is that there are reasonable grounds for suspecting that the cash is recoverable property and that either—

(a) its continued detention is justified while its derivation is further investigated or consideration is given to bringing (in the United Kingdom or elsewhere) proceedings against any person for an offence with which the cash is connected, or

(b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.

(6) The second condition is that there are reasonable grounds for suspecting that the cash is intended to be used in unlawful conduct and that either—

(a) its continued detention is justified while its intended use is further investigated or consideration is given to bringing (in the United Kingdom or elsewhere) proceedings against any person for an offence with which the cash is connected, or

(b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.

(7) An application for an order under subsection (2) may also be made in respect of any cash seized under section 294(2), and the court, sheriff or justice may make the order if satisfied that—

(a) the condition in subsection (5) or (6) is met in respect of part of the cash, and

(b) it is not reasonably practicable to detain only that part.

(8) An order under subsection (2) must provide for notice to be given to persons affected by it.

240. Section 295 POCA is derived from s.42(2) and (3) of the DTA 1994. An order for the detention of cash cannot endure for a period longer than six months (s.295(2); formerly 3 months). Further orders can be made by the court, provided that the total period of detention does not exceed two years from the date of the first order (s.295(2), formerly s.42(3) of the DTA 1994).

241. It should be noted that these powers may be exercised even if no criminal proceedings have been instituted (or even contemplated) against any person for an offence in connection with cash seized. Where criminal proceedings are instituted, or where application is made to forfeit the money on the basis that it represents the proceeds of unlawful conduct, or that it is intended to be used for that purpose, the cash is not to be released until the relevant proceedings have been concluded: see s.295(5)(b) and s.296(6)(b).

242. The fact that there has been a defect in the process by which the application was made, for example, an inappropriate form was used, will probably not render the detention of cash unlawful: see *Luton JJ Ex.p. Abecasis*;[391] and see *Halford v Colchester Magistrates' Court* (October 25, 2000); and *Chief Constable of Merseyside v Reynolds*;[392] and consider *Soneji,*[393] and *Knights*.[394]

243. For a consideration of the relationship between [art.21, PACE (NI) Order 1989], and [art.24 of that Order] (which confers power to detain 'so long as is necessary in all the circumstances'), and ss.294 and 295 of POCA, see *Iqbal (R on the application of) v Luton & South Bedfordshire Magistrates Court*,[395] where it was held that if a decision is taken to apply to retain the money under s.294 of the 2002 Act within a reasonable time - which in the circumstances must be a short time (in the context of [art.24 PACE(NI)O 1989 powers) - the s.294 power under POCA may be exercised without first returning the money to the claimant.[396]

Release of detained cash

244. Section 297 of POCA (as amended) provides:

> *297 Release of detained cash*
> (1) This section applies while any cash is detained under section 295.
> (2) A magistrates' court or (in Scotland) the sheriff may direct the release of the whole or any part of the cash if the following condition is met.
> (3) The condition is that the court or sheriff is satisfied, on an application by the person from whom the cash was seized, that the conditions in section 295 for the detention of the cash are no longer met in relation to the cash to be released.
> (4) An officer of Revenue and Customs], constable [or accredited financial investigator or (in Scotland) procurator fiscal may, after notifying the magistrates' court, sheriff or justice under whose order cash is being detained, release the whole or any part of it if satisfied that the detention of the cash to be released is no longer justified.

245. A party who seeks the release of cash, seized under s.294 POCA, has two possible routes.

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391 (2000) 164 J.P. 265
392 [2004] EWHC 2862 (Admin)
393 [2005] UKHL 49
394 [2005] UKHL 50
395 [2011] EWHC 705 (Admin)
396 See the case commentary, the Proceeds of Crime Review, 2011, Issue 5, p.49.

a. First, he may attempt to negotiate the return of the cash with the agency that seized it. The relevant agency can only do so if it is satisfied that the detention of the cash is no longer justified. The agency must inform the court that it proposes to release the money.

b. The usual route for the release of cash will be by way of an application to the Magistrates' Court (or to the Sheriff in Scotland) under s.297. The applicant must be the person from whom the cash was seized (s.297(3)): this restriction exists to prevent the court from becoming immersed in a dispute between the person from whom the cash was seized, and the person claiming to be the rightful owner of the cash.

246. There is separate statutory provision under s.301 of the Act for victims and those beneficially entitled to the cash, or any part of it, to make an application to the court for the release of the cash, or part of it.

247. The applicant must establish that the conditions justifying the detention of the cash no longer exist. In this regard, consider *Customs and Excise Commissioners v Shah* (1999) 163 J.P. 759 (a DTA case). It is arguable that the wording of s.295 and s.297 might lead to a different result.

VI. Forfeiture under a court order

General principles

248. Section 298 POCA (as amended) provides:

> *298 Forfeiture*
> (1) While cash is detained under section 295, an application for the forfeiture of the whole or any part of it may be made—
> (a) to a magistrates' court by the Commissioners of Customs and Excise, an accredited financial investigator or a constable,
> (b) (in Scotland) to the sheriff by the Scottish Ministers.
> (2) The court or sheriff may order the forfeiture of the cash or any part of it if satisfied that the cash or part—
> (a) is recoverable property, or
> (b) is intended by any person for use in unlawful conduct.
> (3) But in the case of recoverable property which belongs to joint tenants, one of whom is an excepted joint owner, the order may not apply to so much of it as the court thinks is attributable to the excepted joint owner's share.
> (4) Where an application for the forfeiture of any cash is made under this section, the cash is to be detained (and may not be released under any power conferred by this Chapter) until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded.

249. In *Ahmad v HMRC*,[397] the Administrative Court has held that in the light of *R v Waya*,[398] s.298 must be read down as to be compatible with A1P1 of the ECHR:

> ….in my judgment, in light of *R v Waya* (supra) section 298 of the Act must be read down so as to be compatible with Article 1 of the Convention. Thus it should be treated as saying that the court may order the forfeiture of the cash or any part of it if it is satisfied that the cash or part of it is recoverable property "except insofar as such an order would be disproportionate

[397] [2013] EWHC 2241 (Admin)
[398] [2012] UKSC 51

> and thus a breach of Article 1 Protocol 1". Thus read, Part 5 can be given effect in a manner which is compliant with the Convention right. [per Carr J, para.50]

250. As far as s.298(2)(b) is concerned, it was held in *Fletcher v Chief Constable of Leicestershire*,[399] that "any" person can include use by an innocent finder of property that had been concealed by (e.g.) the thief:

> The subsection applies when "any" person intends to use the money for criminal conduct. That must include not only use by the innocent finder but by the person who hid the money. It is not possible to carve out an exception under section 298(2)(b) for innocent finders.

251. In *Harrison v Birmingham Magistrates' Court*,[400] the Court expressed concern about the lack of any statutory safeguard in a case where a person did not know about a forfeiture hearing and only learnt about it too late to appeal to the Crown Court. However, the Court was prepared to provide a remedy founded on the fundamental principle of *audi alterem partem*, "*that no man or woman is to be condemned unheard, is one of the oldest rules of our administrative law*" (per Munby LJ), but the outcome might be different if the defendant had taken steps to prevent notice being given to him or her (see para. 47, per Hooper LJ).

252. It is not necessary to establish that *the person from whom the cash was seized*, obtained the cash through unlawful conduct or that he/she intended that the cash should be used in unlawful conduct: consider *Thomas* (January 20, 1995, unreported, DC); and see *Pruijsen v HMCE* (October 18, 1999).

253. It must be proved (to the civil standard of proof) that the property is either "recoverable property" (s.304(1), and s.298(2)(a)), or that someone intended to use the cash in connection with unlawful conduct (s.298(2)(b)).

254. The court is entitled to look at all the surrounding circumstances including explanations given by those who, for example, intended to use the cash, or why it was being transported in a particular way; the circumstances in which the cash was packaged/concealed; the presence (or absence) of traces of a controlled drug on the cash (see *Thomas*, and *Bassick*).[401]

255. The fact that the person from whom the cash was seized has been acquitted of criminal charges in respect of the unlawful conduct alleged, does not necessarily prevent the Crown adducing the same facts in evidence in forfeiture proceedings: *HMCE v Thorp* (November 28, 1996).

256. The enactment of s.298(3) was necessary by reason of the nature of a joint ownership/tenancy. Such tenancies create potential legal difficulties under the Act because joint tenants are treated as a single owner of property. For example, H and W might be joint tenants of property that was acquired by each drawing from their own resources. It is the respondent's contribution that is intended to be recoverable under Pt.5. If "cash" is held jointly, similar problems might arise without express statutory provision. Subsection (3) is intended to ensure that in such a case the third party is an "excepted joint owner" against whom his share of the cash is not recoverable under Ch.3.

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399 [2013] EWHC 3357 (Admin)
400 [2011] EWCA Civ 332
401 March 22, 1993, unreported, D.C.

Appeals

257. Section 299 broadly corresponds to s.44 of the DTA 1994.

258. Note that the time limit is 30 days, beginning on the day the forfeiture order is made. Appeal is to the Crown Court and it is an appeal by way of a rehearing.

259. There is no power to extend the period for an appeal: *West London JJ Ex.p. Lamai* (July 6, 2000).

260. Unlike s.44 (4) of the Drug Trafficking Act 1994, there is no provision for the release of forfeited cash to meet reasonable legal expenses: and see *Commissioners of C & E v Harris* (January 29, 1999).

261. The prosecution also has a right of appeal: see s.101, Serious Organised Crime and Police Act 2005.

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APPENDIX A: Extracts, Part 4, POCA 2002 (as at 1st February 2014)

156 Making of order

(1) The Crown Court must proceed under this section if the following two conditions are satisfied.
(2) The first condition is that a defendant falls within either of the following paragraphs—
  (a) he is convicted of an offence or offences in proceedings before the Crown Court;
  (b) he is committed to the Crown Court in respect of an offence or offences under section 218 below (committal with a view to a confiscation order being considered).
(3) The second condition is that—
  (a) the prosecutor . . . asks the court to proceed under this section, or
  (b) the court believes it is appropriate for it to do so.
(4) The court must proceed as follows—
  (a) it must decide whether the defendant has a criminal lifestyle;
  (b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;
  (c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.
(5) If the court decides under subsection (4)(b) or (c) that the defendant has benefited from the conduct referred to it must—
  (a) decide the recoverable amount, and
  (b) make an order (a confiscation order) requiring him to pay that amount.
(6) But the court must treat the duty in subsection (5) as a power if it believes that any victim of the conduct has at any time started or intends to start proceedings against the defendant in respect of loss, injury or damage sustained in connection with the conduct.
(7) The court must decide any question arising under subsection (4) or (5) on a balance of probabilities.
(8) The first condition is not satisfied if the defendant absconds (but section 177 may apply).
(9) References in this Part to the offence (or offences) concerned are to the offence (or offences) mentioned in subsection (2).

157 Recoverable amount

(1) The recoverable amount for the purposes of section 156 is an amount equal to the defendant's benefit from the conduct concerned.
(2) But if the defendant shows that the available amount is less than that benefit the recoverable amount is—
  (a) the available amount, or
  (b) a nominal amount, if the available amount is nil.
(3) But if section 156(6) applies the recoverable amount is such amount as—
  (a) the court believes is just, but
  (b) does not exceed the amount found under subsection (1) or (2) (as the case may be).
(4) In calculating the defendant's benefit from the conduct concerned for the purposes of subsection (1), any property in respect of which—
  (a) a recovery order is in force under section 266, or
  (b) a forfeiture order is in force under section 298(2),
  must be ignored [the following must be ignored—
  (a) any property in respect of which a recovery order is in force under section 266,
  (b) any property which has been forfeited in pursuance of a forfeiture notice under section 297A, and
  (c) any property in respect of which a forfeiture order is in force under section 298(2)].[402]
(5) If the court decides the available amount, it must include in the confiscation order a statement of its findings as to the matters relevant for deciding that amount.

[402] LexisNexis NOTE: "Sub-s (4): words from "any property" to the end in italics repealed and subsequent words in square brackets substituted by the Policing and Crime Act 2009, s 112(1), Sch 7, Pt 7, paras 99, 104. Date in force: to be appointed: see the Policing and Crime Act 2009, s 116(1)."

158 Defendant's benefit

(1) If the court is proceeding under section 156 this section applies for the purpose of—
  (a) deciding whether the defendant has benefited from conduct, and
  (b) deciding his benefit from the conduct.

(2) The court must—
  (a) take account of conduct occurring up to the time it makes its decision;
  (b) take account of property obtained up to that time.

(3) Subsection (4) applies if—
  (a) the conduct concerned is general criminal conduct,
  (b) a confiscation order mentioned in subsection (5) has at an earlier time been made against the defendant, and
  (c) his benefit for the purposes of that order was benefit from his general criminal conduct.

(4) His benefit found at the time the last confiscation order mentioned in subsection (3)(c) was made against him must be taken for the purposes of this section to be his benefit from his general criminal conduct at that time.

(5) If the conduct concerned is general criminal conduct the court must deduct the aggregate of the following amounts—
  (a) the amount ordered to be paid under each confiscation order previously made against the defendant;
  (b) the amount ordered to be paid under each confiscation order previously made against him under any of the provisions listed in subsection (7).

(6) But subsection (5) does not apply to an amount which has been taken into account for the purposes of a deduction under that subsection on any earlier occasion.

(7) These are the provisions—
  (a) the Drug Trafficking Offences Act 1986 (c 32);
  (b) Part 1 of the Criminal Justice (Scotland) Act 1987 (c 41);
  (c) Part 6 of the Criminal Justice Act 1988 (c 33);
  (d) the Criminal Justice (Confiscation) (Northern Ireland) Order 1990 (SI 1990/2588 (NI 17));
  (e) Part 1 of the Drug Trafficking Act 1994 (c 37);
  (f) Part 1 of the Proceeds of Crime (Scotland) Act 1995 (c 43);
  (g) the Proceeds of Crime (Northern Ireland) Order 1996 (SI 1996/1299 (NI 9));
  (h) Part 2 or 3 of this Act.

(8) The reference to general criminal conduct in the case of a confiscation order made under any of the provisions listed in subsection (7) is a reference to conduct in respect of which a court is required or entitled to make one or more assumptions for the purpose of assessing a person's benefit from the conduct.

159 Available amount

(1) For the purposes of deciding the recoverable amount, the available amount is the aggregate of—
  (a) the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and
  (b) the total of the values (at that time) of all tainted gifts.

(2) An obligation has priority if it is an obligation of the defendant—
  (a) to pay an amount due in respect of a fine or other order of a court which was imposed or made on conviction of an offence and at any time before the time the confiscation order is made, or
  (b) to pay a sum which would be included among the preferential debts if the defendant's bankruptcy had commenced on the date of the confiscation order or his winding up had been ordered on that date.

(3) "Preferential debts" has the meaning given by Article 346 of the Insolvency (Northern Ireland) Order 1989 (SI 1989/2405 (NI 19)).

160 Assumptions to be made in case of criminal lifestyle

(1) If the court decides under section 156 that the defendant has a criminal lifestyle it must make the following four assumptions for the purpose of—
  (a) deciding whether he has benefited from his general criminal conduct, and
  (b) deciding his benefit from the conduct.

(2) The first assumption is that any property transferred to the defendant at any time after the relevant day was obtained by him—
  (a) as a result of his general criminal conduct, and
  (b) at the earliest time he appears to have held it.
(3) The second assumption is that any property held by the defendant at any time after the date of conviction was obtained by him—
  (a) as a result of his general criminal conduct, and
  (b) at the earliest time he appears to have held it.
(4) The third assumption is that any expenditure incurred by the defendant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct.
(5) 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.
(6) But the court must not make a required assumption in relation to particular property or expenditure if—
  (a) the assumption is shown to be incorrect, or
  (b) there would be a serious risk of injustice if the assumption were made.
(7) If the court does not make one or more of the required assumptions it must state its reasons.
(8) The relevant day is the first day of the period of six years ending with—
  (a) the day when proceedings for the offence concerned were started against the defendant, or
  (b) if there are two or more offences and proceedings for them were started on different days, the earliest of those days.
(9) But if a confiscation order mentioned in section 158(3)(c) has been made against the defendant at any time during the period mentioned in subsection (8)—
  (a) the relevant day is the day when the defendant's benefit was calculated for the purposes of the last such confiscation order;
  (b) the second assumption does not apply to any property which was held by him on or before the relevant day.
(10) The date of conviction is—
  (a) the date on which the defendant was convicted of the offence concerned, or
  (b) if there are two or more offences and the convictions were on different dates, the date of the latest.

Defendant absconds

177 Defendant convicted or committed

(1) This section applies if the following two conditions are satisfied.
(2) The first condition is that a defendant absconds after—
  (a) he is convicted of an offence or offences in proceedings before the Crown Court, or
  (b) he is committed to the Crown Court in respect of an offence or offences under section 218 below (committal with a view to a confiscation order being considered).
(3) The second condition is that—
  (a) the prosecutor . . . applies to the Crown Court to proceed under this section, and
  (b) the court believes it is appropriate for it to do so.
(4) If this section applies the court must proceed under section 156 in the same way as it must proceed if the two conditions there mentioned are satisfied; but this is subject to subsection (5).
(5) If the court proceeds under section 156 as applied by this section, this Part has effect with these modifications—
  (a) any person the court believes is likely to be affected by an order under section 156 is entitled to appear before the court and make representations;
  (b) the court must not make an order under section 156 unless the prosecutor . . . has taken reasonable steps to contact the defendant;
  (c) section 156(9) applies as if the reference to subsection (2) were to subsection (2) of this section;
  (d) sections 160, 166(4), 167 and 168 must be ignored;
  (e) sections 169, 170 and 171 must be ignored while the defendant is still an absconder.
(6) Once the defendant has ceased to be an absconder section 169 has effect as if subsection (1)(a) read—
  "(a) at a time when the first condition in section 177 was satisfied the court did not proceed under section 156,".

(7) If the court does not believe it is appropriate for it to proceed under this section, once the defendant ceases to be an absconder section 169 has effect as if subsection (1)(b) read—
"(b) there is evidence which was not available to the prosecutor . . . on the relevant date,".

178 Defendant neither convicted nor acquitted

(1) This section applies if the following two conditions are satisfied.
(2) The first condition is that—
(a) proceedings for an offence or offences are started against a defendant but are not concluded,
(b) he absconds, and
(c) the period of two years (starting with the day the court believes he absconded) has ended.
(3) The second condition is that—
(a) the prosecutor . . . applies to the Crown Court to proceed under this section, and
(b) the court believes it is appropriate for it to do so.
(4) If this section applies the court must proceed under section 156 in the same way as it must proceed if the two conditions there mentioned are satisfied; but this is subject to subsection (5).
(5) If the court proceeds under section 156 as applied by this section, this Part has effect with these modifications—
(a) any person the court believes is likely to be affected by an order under section 156 is entitled to appear before the court and make representations;
(b) the court must not make an order under section 156 unless the prosecutor . . . has taken reasonable steps to contact the defendant;
(c) section 156(9) applies as if the reference to subsection (2) were to subsection (2) of this section;
(d) sections 160, 166(4) and 167 to 170 must be ignored;
(e) section 171 must be ignored while the defendant is still an absconder.
(6) Once the defendant has ceased to be an absconder section 171 has effect as if references to the date of conviction were to—
(a) the day when proceedings for the offence concerned were started against the defendant, or
(b) if there are two or more offences and proceedings for them were started on different days, the earliest of those days.
(7) If—
(a) the court makes an order under section 156 as applied by this section, and
(b) the defendant is later convicted in proceedings before the Crown Court of the offence (or any of the offences) concerned, section 156 does not apply so far as that conviction is concerned.

223 Criminal lifestyle

(1) A defendant has a criminal lifestyle if (and only if) the following condition is satisfied.
(2) The condition is that the offence (or any of the offences) concerned satisfies any of these tests—
(a) it is specified in Schedule 5;
(b) it constitutes conduct forming part of a course of criminal activity;
(c) it is an offence committed over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence.
(3) Conduct forms part of a course of criminal activity if the defendant has benefited from the conduct and—
(a) in the proceedings in which he was convicted he was convicted of three or more other offences, each of three or more of them constituting conduct from which he has benefited, or
(b) in the period of six years ending with the day when those proceedings were started (or, if there is more than one such day, the earliest day) he was convicted on at least two separate occasions of an offence constituting conduct from which he has benefited.
(4) But an offence does not satisfy the test in subsection (2)(b) or (c) unless the defendant obtains relevant benefit of not less than £5000.
(5) Relevant benefit for the purposes of subsection (2)(b) is—
(a) benefit from conduct which constitutes the offence;
(b) benefit from any other conduct which forms part of the course of criminal activity and which constitutes an offence of which the defendant has been convicted;
(c) benefit from conduct which constitutes an offence which has been or will be taken into consideration by the court in sentencing the defendant for an offence mentioned in paragraph (a) or (b).

(6) Relevant benefit for the purposes of subsection (2)(c) is—
  (a) benefit from conduct which constitutes the offence;
  (b) benefit from conduct which constitutes an offence which has been or will be taken into consideration by the court in sentencing the defendant for the offence mentioned in paragraph (a).
(7) The Department of Justice in Northern Ireland may by order amend Schedule 5.
(8) The Department of Justice in Northern Ireland may by order vary the amount for the time being specified in subsection (4).

224 Conduct and benefit

(1) Criminal conduct is conduct which—
  (a) constitutes an offence in Northern Ireland, or
  (b) would constitute such an offence if it occurred in Northern Ireland.
(2) General criminal conduct of the defendant is all his criminal conduct, and it is immaterial—
  (a) whether conduct occurred before or after the passing of this Act;
  (b) whether property constituting a benefit from conduct was obtained before or after the passing of this Act.
(3) Particular criminal conduct of the defendant is all his criminal conduct which falls within the following paragraphs—
  (a) conduct which constitutes the offence or offences concerned;
  (b) conduct which constitutes offences of which he was convicted in the same proceedings as those in which he was convicted of the offence or offences concerned;
  (c) conduct which constitutes offences which the court will be taking into consideration in deciding his sentence for the offence or offences concerned.
(4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.
(5) If a person obtains a pecuniary advantage as a result of or in connection with conduct, 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.
(6) 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.
(7) If a person benefits from conduct his benefit is the value of the property obtained.

APPENDIX B: The misnomer of "apportionment" in confiscation cases: *R v Fields* [2013]

Where more than one defendant has been convicted on the basis of having acted jointly in the commission of a crime, from which proceeds have been obtained, the question arises whether the full value of those proceeds is recoverable from each defendant, or whether the amount should be apportioned between them.

In *R v Fields* [2013] EWCA Crim 2042 - a decision of considerable importance - the Court of Appeal (Criminal Division) held that in a case of co-principal conspirators, who have been found by the judge in confiscation proceedings to have obtained the benefit jointly, "*there can be no apportionment as between them of that benefit: and that the value of the benefit is to be assessed as the whole amount with regard to each*" (per Davis LJ, para. 98). Although the case was decided in the context of Part 2 of POCA 2002, the reasoning appears to be equally applicable to other statutory confiscation regimes that follow conviction.

In *Fields*, F, S1 and S2, were found by the trial judge to be principal conspirators in a conspiracy to defraud from which a total benefit was assessed in the sum of £1,410,762. The CACD held that the judge was correct to include this 'base figure' in the assessment of "benefit" obtained by each of those defendants. The Court regarded *R v May* [2008] 1 AC 1028 (HL) as decisive authority for the proposition – not displaced by *Waya* [2013] 1 AC 294 (SC) – that where each defendant had obtained the control of property jointly, then each had obtained the whole of it. In *Fields*, and in *Lambert and Walding* [2012] EWCA Crim 421, the CACD drew support from the opinion of the Committee in *R v May* (para.46) that *R v Porter* [1990] 1WLR 1260 did not hold that the Court has power to apportion, between the parties who are jointly culpable for the underlying criminal conduct, the value of the benefit obtained because such a power would constitute "a procedure which would be contrary to principle and unauthorised by statute" (per Lord Bingham, para.46).

The courts, at first instance, have frequently apportioned between defendants the value of the "benefit" which they had obtained in respect of their joint conduct. The approach (which was partly a concession to fairness as well as being an attempt to keep the benefit figure within reasonable limits) was often referred to as the "*Porter* principle" or a division made "along *Porter* lines". However, the actual basis of the decision in *Porter* is narrow, namely, that it is not permissible for a court to make a confiscation order *jointly and severally* against two or more defendants. The CACD held that the Drug Trafficking Offences Act 1986 did not contemplate a joint order even though there had been a joint criminal venture. The Court might have stopped there, but it went on to state:

> It appears to us that in assessing benefit in accordance with the provisions of s.1 of the [DTOA 1986] the Court must, as between co-accused, determine their respective shares of any joint benefit that they may have received as a result of drug trafficking. In the absence of any evidence, whether from the co-accused or elsewhere, a Court is entitled to assume that they were sharing equally.

Some decisions, subsequent to *Porter*, accord with the passage cited above: see *Gibbons* [2002] EWCA Crim 1621, and noting *Rooney* [2010] EWCA Crim 2, para.36. But, so-called '*Porter* apportionment' emerged more as a matter of practice than as a principle that had been judicially decided or approved.

The fundamental question was, and remains, what *as a matter of law* is the "benefit" that the defendant in question has "obtained" (POCA / CJA 1988) or "received" (DTOA 1986 / DTA 1994)? Crucially, where there has been a joint obtaining of property, is the value of that property to be assessed as a "benefit" obtained in the hands of each defendant as if he or she had acted alone, or must the court apportion the value between them? In answering this question, regard must be had to fundamental principles. Joint participation in a criminal venture does not necessarily equate to a joint obtaining of property. Thus, a conspiracy is not a legal entity. Accordingly, in confiscation proceedings, the court must determine the benefit obtained by a defendant "whether singularly or jointly by the individual conspirator before the court" (*R v Allpress* [2009] EWCA Crim 8, para.31).

It follows that POCA requires, and the appellate decisions proceed on the basis that the court must, as between co-defendants, determine the value of property which each has obtained. As to the basis on

which this determination is to be made, it is difficult to escape the conclusion that policy has influenced decisions reached by the appellate courts: see *Lambert and Walding* (para.41). It is implicit in the decision in *Porter*, the Court was not inclined to the view that there ought to be multiple recovery of a benefit jointly obtained, because the Court quashed the joint order for £9,600 and imposed several orders for £4,800 substituted in each case. But, many years later, the House of Lords held (in *R v May*) that the CACD had erred in *Porter* on the grounds that the disposal of the appeal would "have been a proper…had there in fact been no evidence of the parties' shares in the proceeds", whereas "….the judge's finding, not challenged on appeal, was that the proceeds had been received jointly. That being so each had received a payment or other reward in the full sum of £9,600 and orders in that sum should have been made against each of them severally" (per Lord Bingham, para.27).

By contrast, the Court in *Fields* would doubtless say that its reasoning *does* honour the aforementioned principles because in a case of a joint benefit, each confederate *has* obtained the joint benefit in its whole value, and therefore, each is not being deprived of what he has never obtained (see paras.77, 78, 82(i)). Although as a matter of law, 'benefit' can be constructed in this way, it is of course impossible for confederates to have actually shared an amount that is greater than the total sum obtained from the crime which they committed jointly. Nevertheless, the Courts have upheld full-value benefit determinations from each defendant on the basis that each has obtained "in law *and in fact*" [emphasis added] the joint benefit obtained from their joint offending (see, for example, *Fields*, para.78; *Green* [2008] UKHL 30, para.16). By so holding, the Court, in *Fields*, was in a position to strongly query "how it can ever be disproportionate, in a joint benefit case…to make against each of several defendants a confiscation order (where there are sufficient available assets) which is for no more than the correctly assessed joint benefit" (per Davis LJ, para.78).

It is important to stress that in *Fields* and in *Lambert* the focus of the Court's attention was on cases where a finding of fact had been made by the trial judge in confiscation proceedings that the defendants had obtained the same property *jointly*. Accordingly, where property has not been obtained jointly, or where there is insufficient evidence that the proceeds had been obtained jointly, it is open to the judge to assess the respective shares of each confederate. It would seem that the cases of *Gibbons* [2002] EWCA Crim 16121, and *Rooney* [2010] EWCA Crim 2, *Allpress*, and *McCreesh* [2011] EWCA Crim 641, can be contrasted and considered in that context. Thus, it will be seen that in cases such as *R v May*, *Rooney*, *Lambert*, and now *Fields*, a distinction has been drawn between (a) cases where there is evidence of the joint obtaining of the benefit (full value recoverable from each defendant), (b) cases where there is evidence of the proceeds having been shared, and (c) cases where there is insufficient evidence that the proceeds were obtained jointly or it is unclear what the respective shares were.

Arguably, it follows from the above that the object-lessons for practitioners are (i) that the expression "apportionment" is a misnomer and ought not to be used (see, R. Fortson, '*Misuse of Drugs and Drug Trafficking Offences*', para.13-112, 6th ed., 2012, Sweet & Maxwell); and (ii) that the court should be required to determine whether D has obtained the property jointly, notwithstanding that the offence was committed jointly. For completeness, it should be noted that, in *Fields*, the Court declined to hold that where there has been a joint obtaining of property, that each defendant holds a "beneficial interest" equal to the value of a share in that property. The Court saw no reason to construct, let alone to recognise, a trust "in these criminal circumstances" (para.36).

The apportionment approach was capable of creating practical difficulties in cases where, for example, not all confederates were convicted, or one or more had absconded. Within a year of *Porter* being decided, it was distinguished in *Chrastny No.2* (1991) 12 Cr.App.R.(S.)715, where C was convicted of conspiracy to supply cocaine with a value in excess of £4 million. Her husband had absconded. The appellant argued that the Court should not find that the whole of the property held in joint names (worth some £2 million) was the proceeds of drug trafficking attributable to either defendant, and that the value should be apportioned. In dismissing the appeal, the Court distinguished *Porter*, and *Viner and Long* (The Times, May 25, 1990), on the basis that all the defendants were before the Court whereas in *Chrastny (No.2)* the husband had absconded. Less convincing is the concern expressed in *Fields* that it would be "unsatisfactory….for one defendant (who is able to pay the whole in full) to have avoided paying up to the full amount of the proceeds obtained simply by reason of the other defendants thereafter failing to make any payment. Apportionment of the confiscation order at this stage would carry that risk" [per

Davis LJ, para.82(iii)]. However, if the shares more closely reflect what had in truth been received by each defendant, then it is arguably not unsatisfactory to treat each defendant's case separately on its merits.

Thus far, we have been concerned with the value of D's *benefit* from "criminal conduct". There may be cases where, for the purposes of s.9, POCA (the "available amount") the Court must have regard not only to the property that D has obtained as a "benefit", but also to the value of the property that he has actually received and retained (see *Fields*, para.53). This will be particularly relevant in cases where the extent of D's wealth is likely to be limited to the value of his or her share of the proceeds of crime. However, what the Court, in *Fields*, was not prepared to endorse was the proposition that it would be disproportionate (in ECHR terms) to deprive each defendant of the benefit jointly obtained within the limits of his or her realisable assets: see *Fields* (paras. 72-90), and *Green*, (para.16). In both of those decided cases, the reasoning appears to be (as explained above) that a defendant is required to disgorge the benefit that he or she has obtained "in law and in fact" (*Fields*, para.78; *Green*, para.16).

It remains to be seen whether the Supreme Court and/or the European Court of Human Rights follows the reasoning of the Courts in *Fields* and in *Lambert and Walding*.

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