

Confiscation during Covid

Polly Dyer and HHJ. Michael Hopmeier¹

Introduction

1. Whilst this period of lockdown may have paused or delayed a large number of criminal trials (along with many other aspects of normal life), there have still been a number of developments in financial crime, including new confiscation cases. It is perhaps unsurprising that criminals have been very active, seeking to financially benefit from new opportunities. Corruption and fraud in respect of public procurement contracts and the supply of masks; the public being cheated by scam emails falsely promising the delivery of protective equipment or even cures and vaccines are common and widely reported². There will be more confiscation hearings in the future once these crimes are brought to trial and those guilty convicted.
2. In this article, the authors review a number of confiscation judgments from the first six months of 2020, covering the following topics:
 - a. Benefit;
 - b. Available amount- tainted gifts;
 - c. Enforcement;
 - d. Mutual recognition;
 - e. Restraint.

Benefit

3. *Newhall*³, was a case that concerned conspiracies to import and, subsequently, supply class A drugs. The Court of Appeal held that the benefit should be based on the wholesale value of the drugs concerned, as opposed to the street value as otherwise there was an inconsistency in approach between defendants. In the cases of other defendants the wholesale value had been taken, presumably because it was recognised that the conspiracies were, by and large, to import and supply drugs wholesale. However, the matter did not end there. The Court noted that this was a criminal lifestyle case but there was no hint in the papers that the lower court had considered the lifestyle provisions. Given that the Court of Appeal did not know what the result of applying the statutory assumptions to the appellant's case would be, it was determined that the appropriate course was to quash the confiscation order and remit the matter to the Crown Court for it to consider afresh⁴. The Court of Appeal emphasised the importance of the parties and Crown Court applying the provisions of the statute in sequence: in a general criminal conduct case, if the court decides that one or other of the assumptions should not be applied, the court must explain why.

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² See, for example, the Financial Action Task Force Report from May 2020 entitled "Covid-19-related Money Laundering and Terrorist Financing. Risks and Policy Responses" and news articles such as from Sky News on 1 June 2020 entitled "Coronavirus" Millions of sub-standard face masks seized at Heathrow since outbreak".

³ [2020] EWCA Crim 224

⁴ A proviso was included that the appellant should not be dealt with more harshly by the Crown Court than he had been dealt with by the current order.

4. The Court of Appeal in Northern Ireland also made a number of observations in *Morrow*⁵, both in relation to “Newton” and confiscation hearings. The appellant appealed against a confiscation order imposed following his guilty plea to offences of depositing, treating and keeping controlled waste. A contested basis of plea had been submitted pertaining to the matter of how much of the material on the land could be defined as “waste”. The judge considered the submissions of counsel but did not hear evidence from the appellant or his expert. In allowing the appeal and remitting the matter back to the Crown Court, it was held that the judge erred by proceeding to determine the issue on the basis of submissions alone when significant issues of fact were still disputed or unknown. Case management observations included: the parties should use their best efforts to agree bases of pleas and/or confiscation order applications (subject to judicial endorsement) to avoid costly and time consuming hearings; it would be rare for definitive findings to be reached in a “Newton” hearing regarding contested material issues without affording the defendant a full opportunity to be heard and to call witnesses. The Court reiterated that a defendant's right to a fair trial extended to the sentencing process.
5. In *Court*⁶, and following *Parveaz*⁷, the Court disagreed with the applicant’s submission that it was disproportionate for a confiscation order to be made where a jury’s acquittal on the charge of possession with intent to supply meant that the applicant was be sentenced for production of the cannabis on the basis that it was for his own personal use and that the effect, therefore, of the confiscation order was essentially penal, rather than depriving the applicant of ill-gotten gains. Another aspect of the appeal was allowed, reducing the benefit figure, in relation to the Judge’s findings about a mortgage application: a defendant was permitted to answer “no” to a question about criminal convictions if they were spent, and it had been inconsistent for the judge to find that the application was fraudulent for failure to declare a beneficial interest which, in the event, the judge was not persuaded existed.

Available amount- tainted gifts

6. *Thakor*⁸ was an appeal relating to monies held in a sole account of the defendant’s wife (and co-defendant), which had been determined to be a tainted gift. There was no dispute that this money had originally come from a joint account in the names of both defendants. It was argued that it was not a gift at all; it was simply being transferred by a person who had an entire right to it and after the transfer, the appellant had no right to the balance in his wife's account. In the Court’s judgment, it could firmly be concluded that it did amount to a tainted gift: any movement by the appellant's wife of their jointly held money into her sole name was properly interpreted as being with his assent; the result of the transfer into her sole name was removal of his ability to access the balance and use it himself without recourse to her; and he received no consideration for the transfer. The court also observed that the total value of the transfer could properly be considered the value of the gift as the appellant lost control of the entirety of the balance transferred (as opposed to simply half of it which the Crown Court judge had included, making an adjustment for proportionality). It observed that there is a

⁵ [2019] NICA 71

⁶ [2020] EWCA Crim 18

⁷ [2017] EWCA Crim 873

⁸ [2020] EWCA Crim 541

distinction in the cases between the concept of proportionality⁹ and wider questions of potential hardship.

7. *Cracknell*¹⁰ concerned a finding that equity in a property was a tainted gift by way of deed in an application for reconsideration of the available amount¹¹. A number of points were taken; the Court did not agree that in a criminal lifestyle case the relevant statutory provisions had no application where the alleged gift was made after the date when the proceedings for the offence were started against the defendant. The Court reiterated the Crown Court's observations that the relevant governing provision is section 77(2) of POCA. In addition, it was argued that the Judge had failed to give adequate weight to "family services" constituting consideration. The Court of Appeal referred to decision in *Hayes*¹², and the rigour needed when examining such a claim.

Enforcement

8. In the case of *Olabinjo*¹³, the claimant applied for judicial review of the decision to activate his default sentence and commit him to prison¹⁴. The application was dismissed. The court held that it was not for them to determine if they would have made the same decision but to consider whether the Claimant had shown that, on the balance of probabilities, he did not receive a fair hearing and/or that the District Judge misapplied the statutory provision. Various factual contentions made by the Claimant were not upheld. The Court noted that a defendant is entitled to legal representation if he seeks it, but no authority was cited to suggest that a court is required to provide a person facing enforcement proceedings with representation if he does not do so. Further, when considering the statutory test to be applied pursuant to section 82(4) of the Magistrates' Court Act 1980¹⁵, the fact that the words "wilful refusal or culpable neglect" were not recorded or explicitly used in the remarks prior to imposing the default sentence, was not determinative and they could be inferred. The District Judge did not refer to the possibility of a receiver being appointed. However, the High Court held that it did not follow that the court could not have been satisfied that all other methods of enforcement had been considered or tried. The fact that the prosecution sought the appointment of a receiver after the sentence had been served did not change the position.

Mutual recognition

9. *Dines v DPP*¹⁶, concerned the enforcement of an Italian confiscation order in the UK pursuant to the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, Article 21. The appellants had entered into a "patteggiamento" when facing Italian criminal proceedings for tax fraud, whereby a defendant proposes, in exchange

⁹ in s.6(5)(b) the Proceeds of Crime Act 2002 ("POCA")

¹⁰ [2020] EWCA Crim 132

¹¹ pursuant to section 22 of POCA

¹² [2018] EWCA Crim 682

¹³ [2020] EWHC 1093 (Admin)

¹⁴ It was conceded that it would have been preferable had the Claimant applied to state a case.

¹⁵ a judge pursuant to section 82(4) in order to issue a warrant of commitment for a default in payment must be satisfied that the default is due to the offender's wilful refusal or culpable neglect, and must have considered or tried all other methods of enforcing payment of the sum and it appears to the court that they are inappropriate or unsuccessful. The judgment refers to section 84(2), we assume in error.

¹⁶ [2020] ECWA Crim 552

for an agreed penalty, to renounce any defence or challenge to the charges faced. The Court of Appeal held that a patteggiamento could be regarded as a conviction, and one for the purposes of Article 21(2).

10. *Godley*¹⁷ concerned a similar issue to *Price*¹⁸. In both cases the prosecution had been granted a Certificate under Regulation 11 of the Criminal Justice and Data Protection (Protocol No.36) Regulations 2014, enjoining the relevant foreign authority to enforce confiscation orders against property that had been included in the realisable amount, which was held in the foreign jurisdiction. Following *Moss*¹⁹ it was held in *Price* that there was no requirement that the Crown must show that the asset derives from criminal conduct at this stage. It was also confirmed in *Price* that the appropriate course is an appeal to the criminal division, as opposed to stating a case or judicial review. In *Godley* the applicant's realisable assets included gifts made to his wife, including the purchase price of real property in Portugal. The Court reminded the applicant of Regulation 3²⁰; enforcement can be made against assets that are the equivalent to the value of property which directly or indirectly represented the proceeds of an offence. Even if the property in Portugal had not been accepted to be a realisable asset (which it had been), it was the equivalent to the value of property which directly or indirectly represented the proceeds of the fraud, namely the gifts used to acquire a shareholding in the company which held the property.

Certificates of inadequacy

11. In *Nixon*²¹ the CPS returned to court to seek to increase a previous order on the basis of the defendant's newly acquired assets where there had been a large benefit figure²² and at the time of the order²³ a limited available amount/realisable assets²⁴. The CPS applied to the High Court for a 16(2) of the Drug Trafficking Act 1994 ("DTA") certificate to increase the amount the defendant had to pay under the original order. Following *Re Peacock*²⁵, the High Court acceded to the CPS application in relation to a property in which the defendant had acquired an interest a property in 2013 in his sole name, despite the fact that Mr Nixon had not offended in the 10 years since his prison release and now lived in the property, with his family.
12. In *Ojebode*²⁶, the applicant applied for a certificate of inadequacy under section 83 of the Criminal Justice Act 1988 ("CJA") on the basis that her realisable property was now inadequate to pay the amount remaining due under the confiscation order²⁷. The Crown

¹⁷ [2020] EWCA Crim 413

¹⁸ [2020] EWHC 496 (Admin)

¹⁹ [2019] EWCA Crim 501

²⁰ of the Criminal Justice and Data Protection (Protocol No.36) Regulations 2014

²¹ [2020] EWHC 410 (Admin)

²² £2 million

²³ in 2004

²⁴ c.£7600

²⁵ [2012] UKSC 5

²⁶ [2020] EWHC 923 (Admin)

²⁷ On an application made by a defendant subject to a confiscation order under section 83 of the 1988 Act, the High Court must be satisfied that a defendant's realisable property, at the time of the application, is inadequate for the payment of any amount remaining to be recovered under the confiscation order. If it is so satisfied, the High Court must issue a certificate to that effect, giving its reasons for doing so. Once a certificate of inadequacy has been issued by the High Court under section 83(1) of the 1988 Act, the defendant may then apply to the Crown Court under section 83(3) for the confiscation order to be varied. The only issue for the High Court to determine

opposed the application on the basis the applicant had equity in a property that remained available to realise and also that there was evidence that she had other available assets that could be realised. Despite the unsatisfactory state of the evidence provided by Ms Ojebode, the judge reached the view that, on a balance of probabilities, her realisable property was inadequate for the payment of the full amount remaining on the confiscation order. The Judge took into account the limited amount of money that would be realised from the sale of the property, which would be less than a quarter of the outstanding amount, and concluded that she was using loan monies to pay personal creditors. The judge also bore in mind the defendant's age and health²⁸, and the fact her only recognised income was her limited pension. The Judge noted the judgment of Eilias LJ in *Najafpour*²⁹: "the intention of this provision is clear: it is to ensure that a defendant does not serve a period [of imprisonment] in default where it turns out that he is in fact unable to raise the money which the court anticipated he would be able to do when it imposed the confiscation order".

13. However, the granting of the certificate of inadequacy is only the first hurdle. Ms Ojebode can now go to the Crown Court to seek a variation of the confiscation order under section 83(3) of the 1988 Act, but as noted by Mr Justice Murray, "Ms Ojebode will need to persuade the Crown Court of the extent to which the amount outstanding should be reduced, which may be very little indeed if she is not able to provide much better and more credible evidence....".

Restraint

14. In *S*³⁰, the Crown appealed the judge's decision to discharge a restraint order pursuant to section 42(7) of POCA, claiming that the proceedings for the alleged offence³¹ had not been started within a reasonable time. It was held by the Court of Appeal:
 - a. discharge was mandatory if the circumstances were met;
 - b. there was no reason to qualify the words "reasonable time" and they were not to be read restrictively;
 - c. where delay was asserted, it was necessary to have regard to the practical realities of litigious life³². It was for the court to decide, having regard to all the circumstances of the particular case, whether or not the proceedings had been started within a reasonable time, bearing in mind (in no particular order) as likely to be relevant: (1) the length of time that had elapsed since the restraint order was made; (2) the reasons and explanations advanced for such lapse of time; (3) the length (and depth) of the investigation before the restraint order was made; (4) the nature and extent of the restraint order made; (5) the nature and complexity of the investigation and of the potential proceedings, and (6) the degree of assistance or of obstruction to the investigation;

is whether it is satisfied that the realisable property is inadequate for the payment of any amount remaining to be recovered under the confiscation order. The burden of establishing this is on the applicant to the civil standard.

²⁸ relevant to a potential default sentence

²⁹ [2009] EWCA Crim 2723, in relation to section 23 of POCA

³⁰ [2020] 1 Cr App R 13

³¹ money laundering

³² It was noted that was not the same situation as where a prosecutor was seeking to extend a custody time-limit under s.22(3)(b) of the POA 1985

15. The appeal was allowed on the basis that the Judge had directed herself that there was a requirement to “act as rapidly as possible” where an all assets restraint order was in place. These words were not in the statute. Further, there was a requirement to consider the investigation and potential proceedings as a whole, in what clearly would give rise, if a decision to bring charges were made, to potential charges of conspiracy or joint substantive charges, and it would be wrong to consider the position solely by reference to *S* himself. The judge’s reasoning could not be upheld; she had misapplied the statutory provisions, had not taken into account a material consideration, and had taken into account an immaterial consideration.

Conclusions

16. Restraint and confiscation applications will doubtless continue apace over the following months and years. Confiscation remains a vital weapon in the fight against crime. Whilst confiscation hearings may not be a priority for Judges in the criminal courts, a cash-strapped HM Government may well welcome the substantial sums which confiscation orders return each year to the Treasury. As seen above, the complexity of the current legislation still leads to errors in lower courts. Most recently in *Jackson*³³, the Court of Appeal had to remind the parties that under Section 15(2)(ca) of POCA, a Judge should not impose the statutory charge on sentence, if confiscation proceedings are postponed. The Report on reform in this area of law from the Law Commission, to be published later this year, will be eagerly awaited by many, not least Circuit Judges.

10.06.20

³³ [2020] EWCA Crim 676