SWEET & MAXWELL

Issue 5 June 3, 2011

Archbold Review

Cases in brief

Appeal—fresh evidence—approach to be adopted by Court of Appeal

NOYE [2011] EWCA Crim 650; March 22, 2011

The approach of the Court of Appeal to the admission of fresh evidence under Criminal Appeal Act 1968 s.23 was now to be regarded as settled. The responsibility of assessing the evidence rested with the Court of Appeal and in reaching its decision, the Court reflected on how best to examine the fresh evidence and its possible impact on the safety of the conviction, and tested its analysis to ensure that it had reached the right conclusion. The primary question was for the Court itself, not what effect the fresh evidence would have had on the mind of the jury. To the extent that it had been thought that *Pendleton* [2002] 1 W.L.R. 72 warranted a different approach, on the basis a passage in Lord Bingham's speech (at [19]), the question had been resolved by the Privy Council in *Dial and another v State of Trinidad and Tobago* [2005] 1 W.L.R. 1660. Counsel for N had referred the Court to *Weiss v R* [2005] HCA 81 in the High Court of Australia and *Mantenga* [2009] NZSC 18 in the Supreme Court of New Zealand. While those authorities may have underlined some of the difficulties which could arise, they came from jurisdictions which still had an equivalent to the proviso (see Criminal Appeal Act 1968 s.2 prior to its amendment by Criminal Appeal Act 1995), and they did not impinge on or alter the well established principles which applied in this jurisdiction nor lead to any modification of the essential question of whether, in the light of the fresh evidence, the conviction was unsafe.

Dangerous drugs—possession of immature cannabis plants—whether capable of founding charge of possession with intent to supply

WRIGHT [2011] EWCA Crim 1180; May 5, 2011

W was wrongly convicted of possessing cannabis with intent to supply contrary to Dangerous Drugs Act 1971 s.5(3) on the basis of 35 immature cannabis plants found in his possession. There was no doubt that the appellant was in possession of cannabis as defined in s.37 of the 1971 Act. But to come within s.5(3), the intention to supply must be an intention to supply the thing of which the defendant was in possession. There was no suggestion that W intended to supply the immature plants of which he was in possession. The useable part of each plant would have been the flowering heads, but since W's plants were in their infancy there were as yet none. The case against W was that he intended to grow the plants to maturity, harvest a crop, then supply the crop, or some of it, to others. Thus the intended supply was a supply of the harvested product of the process of cultivation, not a supply of the plants as they existed and were in his possession at the time to which the charge related. Such a conclusion should not give cause for concern. The core offence (with which W was charged and pleaded guilty), was the production of cannabis. The seriousness of that offence depended, *inter alia*, on whether the cannabis was being grown for the appellant's own use or for supply to others. That question was capable of being resolved within the sentencing process for the offence of production, if necessary by a *Newton* hearing. It was unnecessary to add a count of possession with intent to supply in order to determine the purpose for which the cannabis was being produced and therefore the seriousness of the offence of production (see *Auton* [2011] EWCA Crim 76, which included obiter observations on possession with intent to the same effect as the instant case).

Perverting the course of justice—inferring intention—act intended to pervert course of justice to assist potential defendant but failing to do so

T [2011] EWCA Crim 729; March 25, 2011

T's daughter found video files with names, she said, apparently indicative of child pornographic material on a memory stick belonging to T's husband, who had been

CONTENTS

© Thomson Reuters (Professional) UK Limited 2011

convicted of child pornography offences in 2004. When informed, T deleted the files, her daughter said. T said that she deleted one file, which had a name suggesting adult pornography, and she would have remembered if she had seen the file name her daughter recalled ("Virgin teenager who gets raped in her own home"). She deleted the file, she said, because she did not want her daughters exposed to (adult) pornography. Subsequent investigation showed that the memory stick did have files with such names, but that the content of the files was not, in fact, child pornography. T's appeal was dismissed. For the offence to be proved, it had to be established both that T intended to pervert the course of justice and that her act tended to do so. There was clearly evidence that, by deleting the files and, as she must be taken to have thought, rendering them unavailable to the police, she intended to pervert the course of justice. It could be assumed that the jury found that she had lied about the names of the files, and those lies and the fact of the files' deletion, were sufficient to justify the jury's finding of intent. As to tendency to pervert the course of justice, although the offence could not be committed by an act that could have no effect on the course of justice, it may be committed if in the result the act did not affect the course of justice. The offence was complete when the act was done with the requisite intent, and did not cease to be criminal because it did not have the intended effect. It was sufficient that it created a significant risk that the course of justice would be affected. Furthermore, it was irrelevant whether the act might be prejudicial to a potential defendant rather than the police or prosecution. It was for this reason that it was irrelevant that the files did not contain child pornography. For similar reasons, the fact that the files were in the event recovered by an expert did not mean that their deletion was necessarily inconsequential. There was no evidence that the deletion of the files could not be effective. In fact files on the memory stick would have been over-written and been irrecoverable if there had been sufficient use of the memory stick before it was examined by a computer expert. The case was materially indistinguishable from *Rafique* [1993] 4 All E.R. 1.

Private prosecution—decision by CPS to take over and discontinue—whether current policy lawful

R (GUJRA) v CPS [2011] EWHC 472 (Admin); March 9, 2011

It was lawful for the CPS to adopt a policy that in deciding whether or not to take over and discontinue a private prosecution, it would apply the full evidential test from the Code for Crown Prosecutors. Such an approach, adopted in June 2009, was the same as that which Laws L.J. postulated as a possible approach in *R. v Director of Public Prosecutions, Ex p. Duckenfield* [2000] 1 W.L.R. 55 at 63 and said "could not be right" (going on to find that the previous policy of taking over and discontinuing when there was plainly no case to answer was lawful). The statement by Laws L.J. was *obiter* and apparently not the subject of argument. It would not be followed. Since the CPS was required to apply the long-standing evidential test if it did take over proceedings, it could not be unlawful to apply the test in determining whether to take over the conduct of proceedings in the first place. The policy arguments in favour of a uniform approach set out in a witness statement as being the considerations which justified the decision to change the policy were compelling and provided a sound basis for the adoption of the Code test when deciding, in the exercise of the broad discretion vested in the DPP to take over a case under Prosecution of Offences Act 1985 s.6(2), where there is no duty to do so. The application of the test in the Code to decisions under s.6(2) did not nullifies or renders nugatory the right in s.6(1) for a private person to institute criminal proceedings. It was true that the "realistic prospect of conviction" test left less scope for the continuation of private prosecutions than did the "clearly no case to answer" test under the former policy. Private prosecutions could continue, however, where the CPS assessed there to be a realistic prospect of conviction (and provided that the other elements of the policy, notably the public interest test, did not tell in favour of intervention, whether with a view to discontinuing the proceedings or with a view to their being carried on by the CPS). *Scopelight and Others v Chief Constable of Northumbria* [2009] EWCA Civ 1156 did not support G's case. It concerned the different issue of the lawfulness of the retention of material in the hands of a private prosecutor.

[Comment: the effect of this case is that private prosecutions will henceforth be confined to situations in which the CPS is happy to, in effect, outsource its prosecution responsibilities to other bodies which also apply the full Code test, such as the RSPCA. This result could be readily achieved by the legislature by means other than a supposed right to private prosecution, such as allowing the CPS to delegate its responsibilities in certain circumstances. But it seems to be recognised that there were *constitutional* arguments for private prosecution behind the retention of the right in 1985. Such arguments cannot operate to justify merely the sensible and efficient division of responsibilities between potential prosecuting entities. They must apply to the situation where there are genuine differences of judgement about the desirability of the prosecution. The Court approves of the policy considerations advanced in the CPS's internal discussions about the change in policy (it is wrong to subject a defendant to prosecution when the state prosecutor would not prosecute; it is "iniquitious" to treat defendants differently on the basis of the identity of the prosecutor; private prosecution allows weak cases to consume court resources). These are, in reality, arguments against this sort of substantive right to private prosecution at all. They may be perfectly good arguments. But it must be assumed that, when it preserved the right to privately prosecute in 1985, Parliament was not convinced by them.]

Procedure—magistrates' court—dismissal for non-appearance of prosecutor—whether fair in the circumstances

R (LONDON BOROUGH OF BROMLEY) v BROMLEY MAGISTRATES' COURT [2011] EWHC 432 (Admin); February 11, 2011

A defendant who had previously not attended court was arrested and, that morning, the claimant prosecutor was notified that he was in custody at the Magistrates' Court. Before then, the claimant and its solicitors could not have known that the matter was to come before the court. Counsel was instructed and solicitors informed the court that counsel would arrive at "about 2.00". The case was called on at 2.10 and dismissed for want of prosecution under Magistrates' Courts Act 1980 s.15, there having been no attempt by the Court to contact the claimant further. Counsel arrived a few minutes after 2.20. There was no proper justification for the court acting on a peremptory basis by virtue

© Thomson Reuters (Professional) UK Limited 2011

of the failure of the prosecution to attend. A concern in the Magistrates' Court for discipline was understandable, but the overall consideration was one of fairness. It was not fair for the court to act as it did, even if there was an element of muddle involved. It was appropriate to make a mandatory order requiring the justices to proceed to hear the information which was purportedly dismissed.

Trial—unrepresented defendant—unwise decision by—safety of conviction—related contempt of court proceedings taking place in absence of defendant

DEENEY [2011] EWCA Crim 893; April 14, 2011

(1) D was convicted of (*inter alia*) wounding S with intent. S refused to give evidence for either prosecution or defence. D, conducting his own defence, insisted that he could not call evidence, or give evidence himself, if S was not available for cross examination. In connection with this insistence, he refused on a number of occasions to allow S's statements to be read. S's first statement included material that did not support the Crown case on important matters and which would have provided D with additional material with which to cross-examine other witnesses (although S's second statement did include, inconsistently, material adverse to D). There came a point where the Crown conceded that they could not have called S as a witness of truth, if he had been willing to give evidence, but at most would have tendered him. The Court of Appeal considered that allowing the statements to be read would very likely have been much to the advantage of the defence, compared with having him available for cross examination. The fact that an experienced Crown Court judge (not the trial judge) had, at an earlier point in proceedings, expressed concern that a trial on the count relating to S in S's absence might not be fair did not amount to a ruling, and there had been no assurance by the Crown that they would not continue in such circumstances (as D contended). The failure to read S's statement was entirely the result of D's insistence that it not be read. The fact that he was thereby disadvantaged was his own fault, there was no unfairness in the trial and his conviction was safe. Counsel on appeal argued that, unrepresented, he had become a victim of his own obsessive irrationality or ignorance, so as simply to be unable rationally to consider his own best interests. For such an argument to be made out would have required evidence from D himself, tested in cross-examination. It could not merely rely on submission and inference. No such evidence had been given. The inevitable inference drawn by the Court from events at the trial, an assertion in D's self-composed grounds of appeal that the statements had, in fact, been read, and the absence of evidence from him on appeal was that the appellant well understood the trial process but considered that he could manipulate it to his advantage when he understood that S would be unwilling to attend trial.

(2) The judge had sent D out of court when advised that S and D could not safely be held together in the dock when taking summary proceedings against S for contempt of court. The judge had been entitled to conduct the proceedings in D's absence even if he would not have done so had the security of the court been organised in another way. In any event, there was no basis on which this issue could have rendered the trial unfair or the conviction unsafe.

Jury—incident involving juror outside retiring room during retirement—proper approach

B [2011] EWCA Crim 1183; May 5, 2011

Where a juror "burst" out of the retiring room and told the usher that she could not go back in, that the foreman was putting pressure on her and it was not fair, or, according to the court clerk who heard the end of the exchange, that the foreman was bullying her, the Recorder had been wrong to merely mention that a juror was a little distressed when referring to a note indicating no majority before giving a "soft" *Watson* direction and sending the jury home. It was unfortunate that what the Recorder said to counsel about what had transpired did not present the full picture. He should have asked both the court clerk and the usher to articulate in open court in front of the defendant and counsel precisely what had transpired in order that he might receive informed submissions as to the approach to be adopted with the jury. [At the earlier hearing at which the Court directed that statements be taken from the usher and court clerk, the Court rejected counsel's submission that other allegations made by jurors to B's family immediately after the trial should be investigated, on the basis that they amounted to a complete repudiation of their oath by jurors (*Thompson* [2010] 2 Cr.App.R. 27 at [4]). The situation described was similar to that in *Mirza* [2004] 2 Cr.App.R. 8, and did not reach the level of the "complete repudiation" exception to the rule that jury proceedings must remain secret: B [2010] EWCA Crim 3097; December 13, 2010.]

SENTENCING CASES

Prescribed custodial sentence—burglary

SPARKES [2011] EWCA Crim 880; March 15, 2011

Where an offender committed two dwelling house burglaries while on bail in respect of earlier burglaries for which he was sentenced to five years' imprisonment, and was subject to a mandatory minimum sentence of at least three years by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 s.111 in respect of the later burglaries, the sentences had to be consecutive, but the principle of totality required the appellant to be sentenced to a total of six and a half years' imprisonment for his overall offending. It was therefore unjust to pass the minimum sentence for the later offences (considering *Raza* [2010] 1 Cr.App.R.(S.) 56 (p.354).

Fraud by Member of Parliament

CHAYTOR [2011] EWCA Crim 929; March 23, 2011

Eighteen months' imprisonment upheld in the case of a Member of Parliament for three offences of false accounting in relation to expenses. The calculation of the losses to the public purse consequent on the dishonesty actually perpetrated by the appellant did not fall be reduced because he might, operating honestly, and within the rules, have been able to make legitimate claims for expenses.

© Thomson Reuters (Professional) UK Limited 2011

Variation of sentence

HUDSON [2011] EWCA Crim 906; March 24, 2011

Where a judge passed sentence on an offender convicted after a retrial following the quashing of a conviction, in the mistaken belief that the time spent in custody after the original conviction would not count against the sentence passed following the conviction on the retrial, and accordingly reduced the sentence to allow for that time, it was not open to the judge, after the expiration of 56 days, to vary the sentence to the term which would have been passed if the judge had been aware that the time spent in custody under the earlier conviction would count against the sentence imposed following the reconviction.

Dangerousness—admissibility of evidence or information on appeal.

BEESLEY AND COYLE; REHMAN [2011] EWCA Crim 1021; April 18, 2011

As the provisions of the Criminal Justice Act 2003 relating to dangerousness required the court to take into account all relevant "information", as opposed to "evidence", the Criminal Appeal Act 1968 s.23, did not constrain the Court of Appeal from receiving further information about the offender where it was right to do so. However it would be very rare for the court to receive new psychological assessments that were not before the trial judge on an issue under the dangerous provisions. If such material was to be adduced, and was disputed and witnesses needed to be called, directions would have to be given and the provisions s.23 might be applied. The question was whether the new material would have affected the decision of the judge at the time he made it. Where an appellate court was considering the assessment of dangerousness for the purposes of the Criminal Justice Act 2003, its task was to assess dangerousness as at the time the trial judge made his decision. Subsequent progress was unlikely to be of assistance in that determination.

Case in detail

R (ADAMS) V SECRETARY OF STATE FOR JUSTICE; RE MACDERMOTT AND MCCARTNEY [2011] UKSC 18; MAY 11, 2011

The three appellants (in two separate appeals) had each been convicted of murder. Following a reference to the Court of Appeal by the Criminal Cases Review Commission, each had had his conviction quashed. Each then claimed compensation under s.133 of the Criminal Justice Act 1988, which provides

> (1)...when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction.

Adams was convicted of murder in 1993, and his conviction was referred back to the Court of Appeal in 2007 on the ground that incompetent defence representation had deprived him of a fair trial. His representatives had failed to consider unused material provided by the police which would have assisted in undermining the evidence given by the single prosecution witness. The Court of Appeal found that if this had been done the jury might not have been satisfied of his guilt, although they expressly stated that the jury would not inevitably have acquitted him.

McCartney was convicted of two murders, and MacDermott of one of them, in 1979. The sole evidence was their admissions during interviews with the police. They alleged that these had been made after ill-treatment and called other witnesses who claimed to have suffered similar treatment from the same group of police officers. The trial judge (sitting without a jury) rejected their evidence. The Court of Appeal in Northern Ireland quashed the convictions in 2007 on the ground that this new evidence left it with 'a distinct feeling of unease' about the safety of their convictions.

In each case the claim for compensation was refused by the Secretary of State, whose decisions were upheld on judicial review both at first instance and on appeal.

The Supreme Court unanimously dismissed Adam's appeal and, by a majority of 5–4, allowed the other two appeals.

Lord Phillips traced the origins of s.133(1), which was enacted to give effect to art.14(6) of the International Covenant on Civil and Political Rights 1966, which this country ratified in 1976. Indeed it reproduces it, in almost identical wording. He summarised the circumstances in which convictions may be quashed into four categories (adopted from Dyson L.J.'s judgment in the Court of Appeal in *Adams*):

> (1) Where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted.
>
> (2) Where the fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could properly have convicted the defendant.
>
> (3) Where the fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant.
>
> (4) Where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.

Interestingly, he examined French law, acknowledging that "practice on the part of only one of the many signatories to the ICCPR does not provide a guide to the meaning of art.14(6) but it does demonstrate that proof of innocence has not been universally adopted as the test of entitlement to compensation" (para.17). He also reviewed the *travaux préparatoires* to the passing of the ICCPR, and the decision of the House of Lords in *Mullen* [2004] UKHL 18; [2005] 1 A.C. 1. He agreed with Lord Hope that

> Lord Bingham's speech in Mullen does not provide significant positive assistance in interpreting "miscarriage of justice" in s.133. It is of assistance in respect of his comments on Lord Steyn's answer to that question. Lord Steyn's conclusion in *Mullen* that "miscarriage of justice" was restricted to the conviction of an innocent person was largely founded on his misreading of the French text of art.14(6) and of the position in France. Shorn of that support, his speech does not provide compelling justification for his conclusion.

© Thomson Reuters (Professional) UK Limited 2011

…. I do not believe that *Mullen* helps very much in determining the meaning of "miscarriage of justice" in section 133. The cases that have followed *Mullen,* including those before this Court, have proceeded on the basis that Lord Bingham had laid down an alternative test to that of Lord Steyn, and concluded, in each case, that neither test was satisfied. In the circumstances there is nothing to be gained by considering those decisions. I agree with Lord Hope that a fresh approach is required (paras 33–35).

Whilst Category 1 clearly fell within s.133, Category 3 and 4 did not. In interpreting Category 2, he preferred "a more robust test of miscarriage of justice. **A new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it**" (para.55).

Lord Hope set out the background to the statutory right to compensation provided by s.133. He provided a table which showed the recent drop in the number of applications approved under s.133:

Year	Total Applications Received	Applications approved under s 133
2004–5	88	39
2005–6	74	21
2006–7	39	23
2007–8	40	7
2008–9	38	7
2009–10	37	1

He too would dismiss the appeal by Adams on the ground that the phrase "new or newly discovered fact" did not encompass the material that was available to but not used at the trial by the convicted person's legal representatives. Even if the material in question could be said to have been newly discovered, his case would not have entitled him to compensation under the statute. He would allow the appeals by McCartney and MacDermott, for the reasons given by Lord Kerr.

Lady Hale agreed that a "miscarriage of justice" in s.133 of the Criminal Justice Act 1988 should be interpreted as proposed by Lord Phillips (at para.55, cited above). The phrase was clearly capable of bearing a wider meaning than conclusive proof of innocence. Whilst she sympathised with Lord Brown's "palpable sense of outrage" that Lord Phillips' test may result in a few people who are in fact guilty receiving compensation, she pointed out that his approach would of course result in a few people who are in fact innocent receiving no compensation.

Lord Kerr focused on a detailed analysis of the cases of McCartney and Macdermott, concluding that

on the facts as they are now known, they should not have been convicted. As it happens, I am also satisfied that they ought not to have been prosecuted and their cases therefore fulfil the requirement that Lord Hope has formulated. Clearly they also satisfy the test preferred by Lord Clarke of being cases in which no reasonable jury, properly directed, could convict. Like Lord Phillips and Lord Hope I consider that both are entitled to be compensated under section 133 (at para.182).

He did not consider that Adams had demonstrated that, on the facts as they now stand revealed, it could be concluded beyond reasonable doubt that he should not have been convicted, and would therefore dismiss his appeal.

Lord Clarke agreed, stating that that "if Parliament had intended to limit miscarriages of justice to cases where the claimant could prove innocence, it would have been easy to say so" (at para.195).

The first dissenting judgment is that of Lord Judge. He considered that the words 'beyond reasonable doubt' in s.133 meant that the miscarriage of justice was the conviction and incarceration of the truly innocent (at para.248): on the appeals of MacDermott and McCartney, he agreed with Lord Brown's proposal that they should be remitted to the Secretary of State for further consideration. Lord Brown considered that there was no logical or principled dividing line between categories 2 and 3 (at para.274) and he argued that the arguments in favour of an interpretation limited to category 1 were compelling (at para.277). He asked,

Why should the state not have a scheme which compensates only the comparatively few who plainly can demonstrate their innocence—and, as I have shown, compensate them generously—rather than a larger number who may or may not be innocent? That, at all events, is the scheme which in my opinion Parliament enacted here (para.281).

Lord Rodger agreed with Lord Brown, and Lord Walker agreed with Lord Brown and Lord Judge.

In the news

The Centre for Public Law of the University of Cambridge is hosting a one day conference on June 30, 2011 to mark five years since the publication of Lord Keith's Report of the "Zahid Mubarek Inquiry" (see www.official-documents.gov.uk/document/hc0506/hc10/1082/1082_i.pdf). Zahid was an Asian young man, serving a short prison sentence. He was murdered by another prisoner in Feltham Young Offender Institution in 2000. The Report of the public inquiry into his death identified the key stages when, had appropriate action been taken, the tragedy which befell Zahid could have been prevented. It also considered what steps should be taken to reduce the risk of something like this ever happening again. The conference will be assessing the impact of the Report, asking, for example, whether there have been significant reforms to the prison system to make it safer, more racially and religiously tolerant and humane. For registration details, see www.law.cam.ac.uk/press/events/2011/06/cpl-conference-assessing-the-impact-the-zahid-mubarek-inquiry—five-years-on/1473. (Only £45; lawyers: 4 CPD points available).

© Thomson Reuters (Professional) UK Limited 2011

Feature

Confiscation orders: Update, Part II

By D.A. Thomas QC

(The first part of this Update was published in the previous issue of *Archbold Review*: Issue 6, at p.6).

Criminal lifestyle

Surprisingly, the complex criminal lifestyle provisions of the Proceeds of Crime Act 2002 seem to have generated very few problems, possibly because the majority of the cases in which they apply involve offences listed in Sch.2 rather than the tests set out in ss.75(2)(b) and (c). One useful decision is *Whittington* [2010] 1 Cr.App.R.(S.) 83, where the sentencing judge found that the appellant's benefit from drug trafficking offences included a sum of £8, 814,840, on the basis of figures in a notebook which it was said indicated that the appellant had obtained and distributed cocaine worth £8,814,840. The Court of Appeal held that, given that the defendant had a criminal lifestyle by virtue of committing a Sch.2 offence, it fell to the prosecution to prove on the balance of probabilities that the defendant had obtained property. The prosecution might do so by proving that property had been transferred to the defendant, that he had obtained property or that he had incurred expenditure after the relevant day. Only when the prosecution had established that the defendant had held property in one of those three ways did any question as to the source of the property arise. The prosecution might establish the possession of property or expenditure by any manner of means according to the civil standard of proof. If the prosecution could only establish that the defendant had obtained property in the past by proof of criminal offences other than those charged on the indictment, they must prove those criminal offences to the criminal standard. The purpose of the first three assumptions within s.10 was to assist in the proof of the source of property obtained by the defendant. The assumptions had nothing to do with the logically prior question as to whether the defendant had or had had the property in issue. The assumptions were not triggered until the prosecution had proved that the defendant had obtained the property which the prosecution contended went towards the valuation of the defendant's benefit.

Obtains

Section 76(4) of the 2002 Act provides: "A person benefits from conduct if he obtains property as a result of or in connection with the conduct." Section 76(5) adds: " 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." These provisions have given rise to many judgments. The leading case is *May* [2009] 1 Cr.App.R.(S.) 31, decided in the House of Lords. The issue for decision was relatively narrow—did a participant in a typical "missing trader" VAT fraud "obtain" the whole of the money which passed through his hands, notwithstanding that the same money would pass through the hands of other conspirators with the result that the total amount to be confiscated by virtue of orders made against each of the conspirators would far exceed the amount obtained by fraud as a result of the conspiracy. Not surprisingly, in the light of previous decisions in the Court of Appeal, the House of Lords held that the defendant did receive the proceeds of the fraud jointly with his co-conspirators, and each had therefore "obtained" the whole of the proceeds of the fraud. In a lengthy judgment Lord Bingham reviewed the whole of the law of confiscation. His speech ended with an obiter dictum which has been followed many times:

> D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control.
>
> Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained of that property.

The effect of this dictum is that it is important to examine the capacity in which a defendant receives property which passes through his control. Did he receive it as an owner, or as subordinate on behalf of another person? In *Sivaram* [2009] 1 Cr.App.R.(S.) 80 the appellant was the manager of a service station. The owner of the service station purchased diesel fuel which had been marked with red dye to indicate that its lawful use was restricted to agricultural machinery or off-road vehicles. The red dye was removed from the diesel and diesel was then sold for use in road vehicles. The appellant pleaded guilty on the basis that he was employed at the service station, and had accepted between 8 and 10 deliveries of diesel fuel knowing that the appropriate excise duty had not been paid. He had received payments totalling £15,000 as a share of the sale proceeds. The sentencing judge held that that the appellant and the owner of the service station had jointly benefited in the total amount of the duty evaded, £128,520, and that the value of the appellant's benefit was £128,520. The Court of Appeal said that the critical question in relation to the conduct of the appellant in supervising the bunkering operations carried out under his control was the capacity in which he was acting. Was he a joint purchaser of the fuel for resale or was he just acting as an employee? The sentencing judge believed that the appellant was acting as an employee, and it followed that the judge's finding that the appellant benefited in the sum of £128,520 must be set aside. A confiscation order in the amount of the appellant's fee of £15,000 was substituted.

In *Frost* [2010] 1 Cr.App.R.(S.) 73 the business manager of a school submitted false invoices to the county council who as a result reclaimed VAT in an amount greater than its entitlement. The county council then credited the school's bank account with the overstated amount. The appellant was one of several co-signatories to the school bank account, and any cheque drawn on the account required two signatures. The appellant's purpose was to conceal defalcations on the

© Thomson Reuters (Professional) UK Limited 2011

school's account for which he was responsible. The Court of Appeal held that the VAT had not been "obtained" by the appellant. He did not "obtain" anything unless and until he committed a further dishonest act in deceiving a co-signatory into signing the dishonest cheques which he prepared. The appellant did not acquire an interest in property before he successfully extracted funds from the school bank account. The property he obtained "as a result of or in connection with" his criminal conduct was limited to those sums. By contrast, in *Newman* [2009] 1 Cr.App.R.(S.) 12 a bank employee agreed with a car dealer to steal £15,000 from the bank, in return for which the appellant would receive a car from the dealer. A cheque for £15,000 was drawn in favour of the dealer and paid into the dealer's account. The cheque had been stolen at the bank branch where the appellant was employed and the signatures had been forged. The appellant had sent the cheque to the car dealer who had provided him with a car worth £10,000 in return. Subsequently the appellant agreed with his sister's partner that he would obtain a cheque for £15,000 from the bank, give it to the sister's partner and that they would divide the proceeds between them. The appellant found a customer with a similar name to that of his sister's partner, created a fictional loan facility in the name of the customer and printed off a cheque in the customer's name. The cheque was sent to the sister's partner who paid it into his account. A confiscation order was made on the basis that the appellant's benefit was £30,000. The Court of Appeal held that the cheques were received by the appellant when they passed through his hands before they were sent either to the car dealer or to the appellant's sister's partner. The fact that the appellant did not retain them did not matter. The appellant therefore "obtained" the cheques within the meaning of s.76(4) on the basis of the accepted interpretation of the legislation. The cheques, which were property within the meaning of s.102, were received by the appellant before they were passed on. The appellant had an interest in each when it passed through his hands. The cheques were properly valued at their face value. Although this decision was given a few weeks before the House of Lords decision in *May*, it seems plain that it is not inconsistent with it.

The position of money launderers was considered in detail in *Allpress* [2009] 2 Cr.App.R.(S.) 58. The effect of the decision is that those who act as couriers transporting packages of cash do not benefit to the extent of the value of the cash, and those who hold cash on behalf of another person and return the same cash to the other person do not benefit to the extent of the value of the cash. The launderer who passes the money through his own bank account, or an account which he controls, will benefit to the extent of the full value of the money which has been passed through the account, even though it has effectively been repaid to the person by whom it was entrusted to the defendant.

Blatch, Seager [2010] 1 Cr.App.R.(S.) 60 was concerned with offences of acting as a company director while disqualified. The question was whether the defendant in each case had "obtained" the whole of the turnover of the company concerned, or merely his personal earnings. The Court held that a duly formed and registered company was a separate legal entity from its shareholders. A court could pierce the company entity and look what lay behind it only in certain circumstances; on the facts of both cases there was no basis on which the corporate veil could be pierced. It followed that the decision of both sentencing judges that the benefit of the appellants must be equal to the turnover of the relevant companies was wrong. The question was, what actual benefit had the appellants received? In the case of one appellant, the amount he had received in payment from the companies in return for his services was known and that amount was the value of his benefit for the purposes of the confiscation order.

The obiter dictum of Lord Bingham in *May* causes problems in cases of theft and handling. Before *May* was decided, it was clearly established that a thief "obtained" the value of the goods stolen, even though he did not succeed in retaining them for any length of time (see *Wilkes* [2003] 2 Cr.App.R.(S.) 105, where the defendant was interrupted in the process of burgling a shop; he was held to have "obtained" goods which had been removed to the rear of the shop ready for removal). Similarly, a handler "obtained" the stolen property even though it was recovered and returned to the owner (see *CPS v Rose* [2008] 2 Cr.App.R.(S.) 80 and *Stanley* [2008] 2 Cr.App.R.(S.) 19). The problem with applying Lord Bingham's dictum is that a thief and a handler do not "own" the stolen property, or acquire "a power of disposition or control" of it. This point seems to have been overlooked in *Clark and Severn* [2011] EWCA Crim 15; [2011] Crim.L.R 412, where the Court held that in determining the benefit obtained by conspirators who had arranged for stolen cars to be placed in containers for shipment abroad, the sentencing judge should have considered whether they received the cars as joint owners or as bailees. It does not appear that *CPS v Rose* or *Stanley* were cited. It is submitted that *Clark* and *Severn* was wrongly decided. A thief cannot create a bailment of stolen goods, and any receiver of stolen goods is himself a thief as the act of receiving them with intent permanently to deprive the true owner is plainly an appropriation. Lord Bingham's dictum is plainly helpful in the context in which it was made, but it does not overrule decisions of the Court of Appeal in the different context of theft or receiving stolen goods.

Benefit

Numerous cases have turned on the concept of benefit. The Court of Appeal has stuck resolutely to the rule, endorsed by the House of Lords in *May*, that the benefit is the value of the property or pecuniary advantage that passes through the defendant's control, whatever happens to it afterwards. "Benefit" is not to be confused with profit. The clearest analysis is provided by *Neuberg* [2008] 1 Cr.App.R.(S.) 84, where the appellant pleaded guilty to trading under a prohibited style contrary to the Insolvency Act 1986. The Court held that as the appellant had traded unlawfully, using the prohibited name to generate business, the benefit arising from the offence was the gross income or turnover of the business for the period specified in the indictment irrespective of the profit. A striking example of the same principle is provided by *Del Basso and Goodwin* [2010] EWCA Crim 1119; [2011] 1 Cr.App.R.(S.) 41. The appellants pleaded guilty to failing to comply with an enforcement notice, contrary to the Town and Country Planning Act 1990 s.179. The appellants ran a park and ride scheme without planning consent to provide funds for a football club, despite repeated enforcement notices. The sums concerned were paid into bank accounts over which the defendants had exclusive control, but used for the benefit of the football club.

© Thomson Reuters (Professional) UK Limited 2011

The sentencing judge found that the first appellant had benefited in the amount of £1,881,221.19 and that the available amount was £760,000. A confiscation order in that amount was upheld. The legislation looked to the property coming to an offender which was not his and not what happened to it subsequently. The court was concerned with what he had obtained; whatever disposition of that property was made, whether for socially worthwhile reasons or otherwise, was irrelevant. Profit was not the test.

A number of special situations have received attention. In *Islam* [2010] 1 Cr.App.R.(S.) 42 the House of Lords reversed earlier decisions of the Court of Appeal and held that drugs taken from the possession of a defendant were to be valued as part of his benefit, but not as part of his available assets. The practical effect of the decision seems to be that in valuing the benefit of a drug trafficker, the court should first establish a value for the drugs actually seized from the defendant, and then determine what was paid for the drugs; the amount paid will itself be assumed to be the proceeds of earlier crimes by virtue of s.10(4), unless the defendant then explains that that money had a lawful origin.

Waller [2009] 1 Cr.App.R.(S.) 76, a case of tobacco smuggling, may have wider implications. The appellant pleaded guilty to fraudulently evading duty payable on tobacco. He admitted that he had bought 250 kilograms of hand-rolling tobacco for himself, his family and his friends, using £2,000 of his own money and £12,000 given to him by three other people. The duty evaded was £27,505. The Court held that the appellant's benefit amounted to £41,500, calculated as being the value of the tobacco (£14,000) and the amount of duty evaded (£27,505). The Proceeds of Crime Act 2002 s.76(4) provided that a person benefited from conduct "if he obtains property as a result of or in connection with the conduct". The tobacco was "obtained in connection" with the smuggling enterprise. The decision seems to indicate that property obtained lawfully but for the purpose of committing crime will be part of the defendant's benefit for the purpose of s.76(4). If a defendant buys a motor vehicle for the purpose of delivering drugs or stolen property, it seems that he will be treated as having obtained it "in connection" with the offence, even though he has bought it with funds which were lawfully his.

Mortgage fraud was considered in *Waya* [2011] 1 Cr.App.R.(S.) 4 the appellant bought a house in 2003 for £775,000, using £310,000 from his own resources and a mortgage loan obtained by fraud in respect of the balance of £465,000. The first mortgage was redeemed early and a second loan was obtained from a second lender; the appellant was acquitted of fraud in respect of the second loan. By the time of the confiscation order the property had an open market value of £1,850,000. The Court accepted the submission that the property obtained by the appellant was not the freehold title to the property but the funds transferred by the lender to his solicitor that were in turn transmitted to the vendor. It followed that the appellant no longer held the money because it was invested in the residential property, and that 60 per cent of the value of the property at the time the confiscation order was made indirectly represented the funds obtained in 2003, despite the repayment of the first mortgage and the grant of the second.

Available amount

There have been frequent reminders that once the value of the defendant's benefit has been established, the burden of showing that the value of the "available amount" is less than this rests on the defendant. If the defendant fails to persuade the court that the value of the available amount is less than the value of the benefit, the court must make a confiscation order in the amount of the benefit. It is not the responsibility of the prosecution to show that the defendant has hidden assets; it is the defendant's job to show that he has not (see *Telli v Revenue and Customs Prosecutions Office* [2008] 2 Cr.App.R.(S.) 48 (p.278) and *Summers* [2008] 2 Cr.App.R.(S.) 101). A debt owed to the defendant which is unlikely to be paid should be ignored in calculating the value of the available amount: *Najafpour* [2010] 2 Cr.App.R.(S.) 38. The fact that the defendant has been made bankrupt does not affect the power of the court to make a confiscation order (*Shahid* [2009] 2 Cr.App.R.(S.) 105). It is not open to a defendant on an application for a certificate of inadequacy under s. 23 of the 2002 Act to challenge the Crown Court's earlier finding that he has hidden assets (*Younis* [2009] 2 Cr.App.R.(S.) 34).

Valuing pension plans has led to different conclusions. In *Chen* [2010] 2 Cr.App.R.(S.) 34 the appellant had two pension policies which were due to mature in 2018. The appellant had no right to access the pension fund until that date; the policies had no surrender value and could not be assigned or sold. The Court held (disagreeing with *Ford* [2009] 1 Cr.App.R.(S.) 13, which was decided under the 1988 Act) that the market value of the policy was not the current value of the underlying fund. There was no way in which it would have been possible to realise that or any other money or property of any value under the policy. The critical point was the value of the policy to the defendant at the time the confiscation order is made. The decision does not appear to overrule *Ford* in respect of orders made under the 1988 Act.

Evidence

The basic approach to the factual determinations to be made in confiscation proceedings was considered in *Sangha* [2009] 2 Cr.App.R.(S.) 17, where it was said that the questions that had to be determined in the confiscation proceedings were distinct from those falling for determination during the trial process itself. The standard of proof was different and there would normally be evidence additional to that led at the trial. The court responsible for making the relevant determinations was the judge, not the jury. While the judge must act consistently with the jury's verdict and its factual basis, the judge was not limited to the facts on the basis of which the jury reached their verdict. If other misconduct was relevant to the statutory questions that the court had to determine, the principle did not preclude the court from considering evidence of that other misconduct even where it amounted to a criminal offence. The sentencing judge was entitled to take into account all the evidence he had heard and to make his own relevant findings of fact when determining whether the appellants had benefited from their relevant criminal conduct that question.

In *Knaggs* [2010] 1 Cr.App.R.(S.) 75 the appellant made an unqualified plea to the indictment, but in confiscation proceedings sought to challenge some of the evidence which formed part of the prosecution case against him. The Court of Appeal held that the appellant was entitled as a matter of law to challenge the prosecution evidence, but his unqualified plea

© Thomson Reuters (Professional) UK Limited 2011

of guilty without a Newton hearing, and the unchallenged prosecution opening on the basis of which he was content to be sentenced, were all circumstances that the judge was fully entitled to regard as powerful evidence which contradicted his assertions made in the confiscation proceedings.

The admissibility of hearsay evidence in confiscation proceedings was considered in *Clipston* [2011] EWCA Crim 446; 488 [2011] Crim.L.R. 488, where out of court admissions made by a codefendant were used to determine the value of the defendant's benefit. The Court held that hearsay evidence was admissible in confiscation proceedings. The post- conviction stage had been reached. The jury was not involved. The particular context was that of confiscation proceedings. The procedure must be both flexible and fair. In many instances there would or should be no realistic issue as the admissibility of the evidence, given the focus of the Proceeds of Crime Act on "information". If a hearsay statement was important and seriously in dispute, so that admissibility was quite properly a live issue, the regime under the Criminal Justice Act 2003, applied by analogy, would furnish the most appropriate framework for adjudication. The judge should understand the potential for unfairness and "borrow", as appropriate, from the available guidance in s.114(2) of the 2003 Act. It would be of the first importance to keep the post–conviction context in mind. In many more cases, the real issue would be the weight rather than the admissibility of the evidence or information in question. If so, the checklist contained in s.114 (2) and the matters set out in s.116 of the Criminal Justice Act 2003, suitably adapted to address weight rather than, admissibility, would provide a valuable if not exhaustive framework of reference. In any event and in every case, the judge must proceed judicially, having regard to the limitations of the evidence or information under consideration. Care must invariably be taken to ensure that the defendant had a proper opportunity to be heard. The judge would need to exercise judgment. Such judgment must be exercised consistently with both the legislative intent underpinning the Proceeds of Crime Act and the need for fairness to all concerned. While there was undoubtedly the need in confiscation proceedings for very considerable flexibility, conversely there would be areas where strictness was appropriate. A fair outcome to all parties did not require a statutory straitjacket, more suitable for the trial, governing the admissibility of hearsay at this stage of confiscation proceedings.

Default terms

A court which makes a confiscation order must fix a term of imprisonment in default of payment. The term is chosen from the table set out in the Powers of Criminal Courts (Sentencing) Act 2000 s.139. The terms set out in the table are maximum terms for the corresponding amounts, and the court must exercise its discretion in fixing an appropriate term. The process has been considered in three recent cases. In *Piggott* [2010] 2 Cr.App.R.(S.) 16, a VAT fraud, the appellant was sentenced to nine years' imprisonment (later reduced on appeal to eight years), disqualified from directing a company for 15 years, with a confiscation order for £1,490,887.60, with 10 years' imprisonment in default. The Court endorsed comments made in *French* (1995) 16 Cr.App.R.(S.) 841 where it was said that the default term was fixed on the hypothesis that there was a wilful and total refusal to comply with the order. The period of imprisonment in default should be such, within the maximum permitted, as to make it clear to the defendant that he had nothing to gain by failing to comply with the order. The court should consider all the circumstances and was not bound to follow an arithmetical approach. The court must have particular regard to the purpose of the imposition of a term of imprisonment in default, that was to say to secure payment of the amount that the court had ordered to be paid. The default term was reduced to eight years. In *Price* [2010] 2 Cr.App.R.(S.) 44 the argument was that when the default term (10 years) was looked at in conjunction with the sentence (28 years), the principle of totality required a reduction. This argument was rejected. The fundamental objection to allowing the defendant to say that in the light of his sentence he should suffer a lesser period of default was that it remained his own choice and in his own hands as to whether he served the period of imprisonment in default or not. No period by way of default would be ordered unless and until the judge had found as a fact that the defendant had realisable assets sufficient to meet the confiscation order. Once that had been found as a fact, there remained no reason, save of his own choice and unwillingness to divest himself of the proceeds of crime, why the defendant should not pay. There was therefore no reason why, if he refused to pay, he should not serve the period of imprisonment in default, in addition to the sentence by way of punishment. The period in default had a quite distinct and separate justification. The analogy between a series of offences, the totality of the sentences for which might prove excessive, was false. The same reasoning was adopted in *Aspinwell* [2011] 1 Cr.App.R.(S.) 54 where a man aged 78 pleaded guilty to money laundering. He was sentenced to 12 months' imprisonment with a confiscation order for £297,600, with three years' imprisonment in default. His sentence of imprisonment was varied on appeal, before the confiscation order was made, to a suspended sentence, in view of his ill health. His challenge to the default sentence was rejected. The appellant was not compelled to go back to prison. It was his own choice. He could seek to obtain a certificate of inadequacy to demonstrate that he did not have assets to meet the sums due. The sentencing judge made the confiscation order after hearing evidence from the appellant and concluded that he was able to make the relevant payment. There was no reason to exercise of compassion or mercy in the circumstances. The appellant would avoid prison by complying with the confiscation order.

In practice

The Sentencing Council has published a public consultation on its proposed new guideline for the sentencing of burglary offences (a single guideline for both Crown and magistrates' courts). The consultation runs for 12 weeks and will close on August 4, 2011: see sentencingcouncil.judiciary.gov.uk

© Thomson Reuters (Professional) UK Limited 2011

1ST SUPPLEMENT TO THE 3RD EDITION

REUTERS

REFLECTING THE REALITY OF THE LAW ON FRAUD

ARLIDGE AND PARRY ON FRAUD

If you specialise in the law in this area, I'm sure you'll already have your edition of **Arlidge and Parry on Fraud**, looking well-used on your desk. A core work in the Serious Fraud Office, it's the essential reference for anyone specialising in criminal fraud.

ARE YOU UP TO DATE WITH THE LATEST DEVELOPMENTS?

The first supplement brings the third edition fully up to date with the latest developments including:

- The Bribery Act 2010, which will replace and abolish the Prevention of Corruption Acts, and introduce a new regime for the prevention of corruption
- The Serious Crime Act 2007, which introduced Serious Crime Prevention Orders
- The Parliamentary Standards Act 2009, which introduces a new offence of making a false or misleading claim for expenses by Members of Parliament
- *R. (Corner House Research and another) v Director of the Serious Fraud Office* dealing with factors which may be taken into account in the decision to prosecute
- The SGC definitive guideline on statutory offences of fraud, in force from October 2009
- The Criminal Procedure Rules of 2010

PLACE YOUR ORDER TODAY

VISIT **sweetandmaxwell.co.uk**
EMAIL sweetandmaxwell.orders@thomson.com
CALL 0845 600 9355 (UK) +44 (0)1264 388560 (INTERNATIONAL) QUOTING REFERENCE 0650502

SWEET & MAXWELL

THOMSON REUTERS™

© Thomson Reuters (Professional) UK Limited 2011

REUTERS / Dylan Martinez

FOCUS YOUR SEARCHES WITH WESTLAW UK CRIME

Searching through irrelevant information to get what you want is frustrating. What you need is a powerful search engine to find that elusive case or SI, and we've got just the thing.

We've taken the criminal content from Westlaw UK and created a tailored crime-specific research service.

Combining the power and intuitiveness of the Westlaw UK search functionality with the easy-to-use interface means you can now cut out irrelevant search results and get straight to the heart of a matter.

Search efficiently. Search effectively. Use Westlaw UK Crime.

Why not sign up for a **FREE TRIAL** today and see how Westlaw UK Crime can help your practice run more smoothly.

Contact Tim Rudall on:
020 7393 7306, or tim.rudall@thomsonreuters.com

Westlaw UK

THOMSON REUTERS™

© Thomson Reuters (Professional) UK Limited 2011

REUTERS/Hugh Gantry

WE UNDERSTAND THE PRESSURES OF
ALWAYS NEEDING TO BE ONE STEP AHEAD

AND WE CAN HELP...

MITCHELL, TAYLOR AND TALBOT ON CONFISCATION AND THE PROCEEDS OF CRIME

GENERAL EDITORS: ANDREW MITCHELL QC & KENNEDY TALBOT
PRINCIPAL EDITOR: STEPHEN HELLMAN

This two volume looseleaf provides unrivalled explanation of the law as it relates to restraint, receivership, confiscation, civil recovery and money laundering. With full coverage of all aspects of the topic, it covers all the latest relevant legislation that will make a difference to a money laundering case and ensures you have the most comprehensive source of information at your fingertips.

Visit **sweetandmaxwell.co.uk** for more details.

SWEET & MAXWELL

THOMSON REUTERS™

Editor: Nicola Padfield
Cases in Brief: Richard Percival
Sentencing cases: Dr David Thomas Q.C.
Articles for submission for Archbold Review should be emailed to sweetandmaxwell.archboldreview@thomsonreuters.com
The views expressed are those of the authors and not of the editors or publishers.
Editorial inquiries: House Editor, Archbold Review.
Sweet & Maxwell document delivery service: £9.45 plus VAT per article with an extra £1 per page if faxed.
Tel. (01422) 886277
Archbold Review is published by Sweet & Maxwell, 100 Avenue Road, London NW3 3PF
Part of Thomson Reuters (Professional) UK Limited
(Registered in England & Wales, Company No 1679046. Registered Office and address for service: Aldgate House, 33 Aldgate High Street, London EC3N 1DL)
For further information on our products and services, visit
www.sweetandmaxwell.co.uk
ISSN 0961–4249
© 2011 Thomson Reuters (Professional) UK Ltd
Sweet & Maxwell ® is a registered trademark of Thomson Reuters (Professional) UK Ltd.
Typeset by EMS Print Design
Printed by St Austell Printing Co

416070

© Thomson Reuters (Professional) UK Limited 2011