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Archbold Review

Cases in brief

Aggravated trespass—"lawful activity" —nature of unlawfulness required to negative

RICHARDSON v DPP [2014] UKSC 8; February 5, 2014

The words "lawful activity" in Criminal Justice and Public Order Act 1994 s.68 (the deterring, obstructing or disrupting of which with the requisite intent constituted the offence of aggravated trespass), was limited to acts or events that were integral to the activities of the premises in question. R and another had entered a shop and locked themselves together in such a way as to require the shop to close, to protest against the shop selling products manufactured by an Israeli company at a site in the occupied Palestinian territories. They argued that the activities of the shop were not "lawful", because the production of the materials involved breaches of an international convention and International Criminal Court Act 2001 ss.51 and 52, aided and abetted by the shop owner, or the shop owner was thereby using or possessing criminal property (Proceeds of Crime Act 2002 s.329); that the import of the materials was not covered by the relevant international trade agreement and so constituted cheating the revenue; or (the main issue) that the products were mislabelled to suggest they were manufactured in Israel and thus offences under Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) and/or the Cosmetic Products (Safety) Regulations 2008 (SI 2008/1284) were made out. The intention of the section was to add the sanction of the criminal law to a trespass where, in addition to trespassing, a defendant disrupted an activity which the occupant was entitled to pursue. Section 68(2) therefore must mean that the additional criminal sanction was removed when the activity which was disrupted was, in itself, unlawful. But not every incidental or collateral criminal offence can properly be said to affect the lawfulness of the activity, nor render it criminal. It would do so only when the criminal offence was integral to the core activity carried on. It would not do so when there was some incidental or collateral offence, remote from the activity (but noting that the Administrative Court [2012] EWHC 1238 Admin had gone too far in characterising the defence as limited to the "patently unlawful"). It was up to the defence to raise an issue under s.68(2) in the case of apparently lawful activity (including that a possible offence identified was integral to the core activity in question); but once raised, it may indeed involve the investigation of extraneous events. Guilt of a war crime might in theory qualify. Other, less grave, alleged offending may also involve investigation. It did sometimes fall to magistrates to examine matters of complexity and, occasionally, of international import; so long as the issue was not a non-justiciable one such as foreign policy, there was no inhibition on their doing so and they would no doubt constitute themselves appropriately if necessary. Nor should the court of trial be inhibited from doing so by consideration of the fact that a finding may be made against the occupant of the land, such as the shopkeeper here, who was not a party to the trial. The finding might be that an activity on the land had not been proved to have been lawful. That was not a conviction of the absent shopkeeper. Applying these principles, the arguments based on an allegation of a war crime were incapable of being made out; and in any event were remote from the core activity of selling products in the shop. The argument relating to cheating the revenue did not render the selling unlawful: at most it would make the retailer liable to pay wrongly withheld duty. The labelling offences made the application of false descriptions an offence, not the selling of the product. While this allegation did come the closest to the core activity of the shop, it was not nec-

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essary to determine whether the offence was integral to the selling or not, because another element of the consumer protection offence was not made out. The offence required that the average consumer would be misled into making a "transactional decision" (buying the product) when otherwise he or she would not have done. The district judge had been right to find that the average consumer would not have changed their decision because of the mis-description of the source as Israel when actually it was the occupied Palestinian territories; and the cosmetic products offence required the correct identification of the manufacturer and was not directed at the constitutional status of territories.

Environmental regulation—Environmental Permitting (England and Wales) Regulations 2007 reg.38(1)(a) — "knowingly permits" —whether requires knowledge of lack of permit

WALKER AND SONS v ENVIRONMENT AGENCY [2014] EWCA Crim 100; February 6, 2014

The offence in Environmental Permitting (England and Wales) Regulations 2007 reg.38(1)(a) of knowingly permitting the operation of a regulated facility except under and to the extent authorised by an environmental permit was made out if the defendant knowingly permitted the relevant operation to take place, and that, as a matter of fact, the operation concerned was not in accordance with an environmental permit. The prosecution did not need to prove that the defendant knew that the operation was not in accordance with a permit (following *Ashcroft v Cambro Waste Products Ltd* [1981] 1 W.L.R. 1349 in relation to Control of Pollution Act 1974 s.3(1)(a) and *Shanks and McEwan (Teesside) Ltd v Environment Agency* [1999] Q.B. 333 on its successor, Environmental Protection Act 1990 s.33(1)(a), both of which concerned environmental provisions adopting a similar structure to the regulation in the instant case, and distinguishing *Westminster City Council v Croyalgrange Ltd* [1986] 1 W.L.R. 674, a case on sex establishment licensing under Local Government (Miscellaneous Provisions) Act 1982 Sch.3).

Investigation—duty of police to approach identified potential witnesses—whether failure amounted to abuse of the process of the court

MORRIS v DPP [2014] EWHC 105 (Admin); January 17, 2014

Where a person suspected of assault identified eyewitnesses in interview and subsequently provided the police with contact details, the police were under a duty to contact the witnesses and obtain such information as they were able to provide. While it was an issue of judgement for police officers, and that in making that judgement they were entitled to take into account factors such as resources, time and what other evidence may or may not be available, in a case involving potential eyewitnesses to a single incident where there were sharply conflicting versions of events, it was clear that attempts should have been made to contact the potential witnesses and to take witness statements. The failure of the police to do so was not a result of bad faith and did not seriously prejudice M, however, and the resulting trial did not abuse the process of the court.

Offences against the person—count of attempted murder and counts of causing grievous bodily harm with intent involving transferred malice—whether inconsistent

GRANT, KOLAWOLE AND MCCALLA [2014] EWCA Crim 143; February 13, 2014

The appellants were convicted of firing shots into a shop in an attempt to kill B (count 1), and of two counts (2 and 3) of causing grievous bodily harm with intent to two bystanders who were seriously injured. G was said to be the shooter and K and M secondary parties. The appellants submitted that counts 2 and 3 were inconsistent in fact and in law with count 1 as all three counts alleged a crime of specific intent arising out of the same act and intent, the firing of the gun at B intending to kill him. There was no basis upon which the Crown could prove that the gunman who intended to kill B also intended to do grievous bodily harm to B, identified in counts 2 and 3 as "another". Seriously injuring the victims as opposed to killing B was, on the Crown's case, a mistake and thus not intended. The Crown should have been required to elect between 1 and 2/3. The Court rejected the argument. There had been identified no rule of law nor any legal principle nor any policy ground which supported the argument. Within the appellants' intention to kill B lay an intention to cause really serious physical harm to B. Proof of the *mens rea* for attempted murder by definition involved proof of the *mens rea* for causing grievous bodily harm with intent. The assertion that as a matter of law the two specific intents were mutually exclusive or inconsistent did not withstand scrutiny. The Court postulated the case in which B had died as a result of being shot and that the bullet went on to injure the other two victims, and that all three appellants were charged with the murder of B and with causing grievous bodily harm to the other two victims. The jury, when considering murder, would be directed that it must be sure of either an intention to kill or of an intention to cause really serious harm. It would not be necessary that the jury should agree upon which intention, provided it agreed it was one or the other. Were the two specific intents mutually inconsistent as a matter of law that course would not be possible. The jury would have to be directed to deal with the counts sequentially and tell the court how it found. The point fell into yet sharper focus when considering the necessary direction on the grievous bodily harm counts. Were the appellants' submissions well founded the judge would have to direct the jury that it should go on to consider the s.18 counts only if it were *not* satisfied of an intention to kill, because an intent to kill on the argument advanced was inconsistent with an intention to do really serious harm. That was plainly untenable. There would be no reason not to leave the grievous bodily harm counts to the jury if it had convicted of murder. On these facts a finding of intention to kill (count 1) led inevitably to a finding of intention to cause grievous bodily harm (counts 2 and 3). It was impossible to kill without causing really serious harm. When dealing with counts of attempted murder and counts of grievous bodily harm the jury was in general directed to approach the intents sequentially. That was not because they are mutually inconsistent but so as to permit the judge to identify what the intent was so as to determine the level of criminality for the purposes of sentence. Counts 2 and 3 were freestanding offences known to law. If, on particular facts, a jury were almost certain to convict of a count or counts as a consequence of its decision to convict on one it

considered earlier, that could not render the subsequently reached convictions wrong in law. Often a trial judge would tell a jury that if a particular course were followed a verdict on another count was unnecessary. It did not elevate to a matter of law the near inevitability of the overall verdict nor could it without more mean that the direction requiring separate verdicts became a misdirection. It was no more than a day-to-day exercise in pragmatism. Neither were the counts alternatives such that the Crown should have been required to elect. There were different *de facto* victims. The near inevitability that a conviction on count 1 would mean conviction on counts 2 and 3 was not the same as an alternative basis.

Police powers—arrest and detention to prevent a breach of the peace—European Convention on Human Rights Art.5(1)(c)—analysis—case law of European Court of Human Rights—when binding

R. (HICKS) v COMMISSIONER OF POLICE FOR THE METROPOLIS [2014] EWCA Civ 3; January 22, 2014

H and three others (representative of a number of other potential appellants) had been arrested and detained, it was said, to prevent breaches of the peace during the celebrations of a royal wedding on April 29, 2011. In each case, the appellants were released without charge after the celebrations were over. The instant appeal was concerned only with the compatibility of the detention of the appellants with European Convention on Human Rights, Art.5 (for the Administrative Court judgment see [2012] 8 *Archbold Review* 4).

(1) The case turned on the proper analysis of the relevant elements of Art.5(1)(c), which allowed detention in respect of "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so". H relied heavily on the recent case of *Ostendorf v Germany* Application No.15598/08, March 7, 2013. It was clear from an analysis of the words of Art.5(1)(c) that there were three categories of situation contemplated—reasonable suspicion of having committed an offence, reasonably necessary to prevent an offence, and fleeing after an offence—and in respect of each of the categories, the arrest/detention must be "effected for the purpose of bringing him before the competent legal authority", the "purpose" (in effect, intention) being that at the time of the arrest/detention. The Strasbourg jurisprudence before *Ostendorf* showed that, while the *purpose of bringing him before a competent legal authority* had to be present in each case, the circumstances were not confined to those where the person had been detained *on suspicion of his having committed an offence* (in its analysis of the earlier case law, the Court considered *Lawless v Ireland (No.3)* (1961) 1 E.H.R.R. 15; *Brogan v United Kingdom* (1989) 11 E.H.R.R. 117; *Steel v UK* (1998) 28 E.H.R.R. 603; *Nicol and Selvanayagam v United Kingdom* Application No.32213/96 January 11, 2001; *Jecius v Lithuania* (2002) 35 E.H.R.R. 16; *A v United Kingdom*, *Al-Jedda v United Kingdom* Application Nos 55721/07 and 27021/08, July 7, 2011; and *Ciulla v Italy* February 22, 1989, series A No.148). The statement in *Ostendorf* that the second situation in Art.5(1)(c) only related to pre-trial detention, not custody for preventive purposes without there already being a suspected criminal offence, was inconsistent with the case law (particularly *Lawless*, *Steel* and *Brogan*); and the postulated situation in which it might apply was nonsensical when applied to English law.

(2) The Court therefore considered whether it was bound to follow *Ostendorf*, and concluded that it was not. Having reviewed the domestic case law on the nature of the obligation to have regard to the Strasbourg jurisprudence in Human Rights Act 1998 s.2(1), the Court set out the following principles: (a) It was the duty of the national courts to enforce domestically enacted Convention rights; (b) the European Court of Human Rights must ultimately interpret the meaning of the Convention; (c) the UK courts would be bound to follow an interpretation of a provision of the Convention if given by the Grand Chamber as authoritative, unless it was apparent that it had misunderstood or overlooked some significant feature of English law or practice which, properly explained, would lead to that interpretation being reviewed by the Court when its interpretation was being applied to English circumstances; (d) the same principle and qualification applied to a "clear and constant" line of decisions of the Court other than one of the Grand Chamber; (e) Convention rights had to be given effect in the light of the domestic law which implemented in detail the high level rights set out in the Convention; (f) where there were mixed messages in the existing Strasbourg case law, a real judicial choice would have to be made about the scope and application of the relevant provision of the Convention. The Court considered *R. (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295*; R. (Ullah) v Special Adjudicator* [2004] 2 A.C. 323; *Horncastle* [2010] 2 A.C. 273; *Manchester City Council v Pinnock* [2011] 2 A.C. 104; *R. (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 A.C. 1; *Ambrose v Harris (Procurator Fiscal)* [2011] 1 W.L.R. 2435; *R. (Osborne) v Parole Board* [2013] 3 W.L.R. 1020; and *R. (Chester) v Secretary of State for Justice* [2013] 3 W.L.R. 1076.

(3) *Ostendorf* was neither a decision of the Grand Chamber, nor was it indicative of "clear and constant" Strasbourg jurisprudence, save that the arrest or detention must, in all three categories set out in Art.5(1)(c) be "effected for the purpose of bringing him before the competent legal authority". The Court was not bound by it, and adopted the interpretation compatible with *Lawless, Brogan* and *Steel* and (save for the "purpose" requirement) *Nicol*.

(4) *Obiter*, the treatment of Art.5(1)(d) in *Ostendorf* might make it another possible route for demonstrating the lawfulness of preventative arrest and detention in some circumstances.

SENTENCING CASES

Confiscation Orders; Private Prosecutions

R. (ON THE APPLICATION OF VIRGIN MEDIA LTD) v ZINGA (MUNAF AHMED) [2014] EWCA Crim 52

The appellant had been convicted following a private prosecution by Virgin Media Ltd ("Virgin"). He and others had sold devices enabling individuals to obtain premium services without payment to Virgin. Virgin initially pursued

confiscation proceedings under the Proceeds of Crime Act 2002 (POCA) and sought a compensation order under s.130 of the Powers of Criminal Courts (Sentencing) Act 2000. Virgin had entered into an agreement with the Metropolitan Police Authority under which Virgin agreed to make a cash donation to the Metropolitan Police Authority of 25 per cent of any sums recovered under a compensation order. Virgin later abandoned its claim for compensation and pursued confiscation proceedings which would result in benefit to the Crown. The appellant argued that a private prosecutor could not pursue confiscation proceedings, and that the proceedings were an abuse of process. The Court reviewed the statutory provisions concerning private prosecutions and POCA, stating first that confiscation proceedings are part of criminal proceedings and within the scope of s.6 of the Prosecution of Offences Act 1985. Although s.6 of POCA contains no definition of the term "prosecutor", the term appears in Pt 2 of the Act. Section 41 of POCA confers power on the court to make an order restraining a person from dealing with assets if the conditions set out in s.40 are satisfied. Section 40(9) (b) states that "references in this Part to the prosecutor are to the person the court believes is to have conduct of any proceedings for the offence". The term prosecutor is therefore to be read in a wide sense as the prosecutor who conducts the proceedings for the offence; that includes a private prosecutor. This is so despite private prosecutors being omitted from the list of those liable to pay compensation in the event of default set out in s.79 of POCA and despite the fact that a private prosecutor cannot conduct the financial investigation of the defendant. The Court also considered the propriety of Virgin's agreement with the Metropolitan Police Authority. As the only benefit of the confiscation proceedings was to the state, the agreement did not give rise to any abuse of process. However, the agreement did run some of the risks identified by Gage L.J. in *Hounsham* [2005] EWCA Crim 1366. It provided an incentive for the police to devote resources to assisting Virgin in their claim for compensation and gave rise to a perception that their independence was being compromised. The Court declined to comment further on the circumstances in which the police should assist in confiscation or compensation proceedings brought by private prosecutors save to urge that very urgent consideration be given by the Association of Chief Police Officers (or its successor national body), the Association of Police and Crime Commissioners and the Home Office to the issuing of clear guidance on what the police may or may not do when approached by commercial enterprises to lend assistance in proceedings for confiscation and claims for compensation. The Court also considered the safeguards required by the court in confiscation proceedings given concerns regarding the interrelationship between prosecution in the public interest and claims for recompense by private prosecutors. The court can in part rely on the professional duties of the advocates and solicitors. Furthermore, it is for the court to ensure that an order is not disproportionate and the proceedings are not abused. The Court trusts that, if necessary, the DPP will intervene, either by taking over the proceedings or assisting the court. Difficulties can also be addressed on appeal.

Sentencing Guideline—Fraud, bribery and money laundering—corporate offenders

The Sentencing Council has issued a new definitive guideline on fraud, bribery and money laundering offences committed by corporate offenders. The Guideline comes into force on October 1, 2014 and applies to all corporate offenders who are sentenced on or after October 1, 2014.

The Guideline covers the following offences: conspiracy to defraud; cheating the public revenue; fraud (offences contrary to ss.1, 6 and 7 of the Fraud Act 2006); false accounting (Theft Act 1968, s.17); fraudulent evasion of value added tax (Value Added Tax Act 1994, s.72); fraudulent evasion of duty (Customs and Excise Management Act 1979, s.170); bribery (offences contrary to ss.1, 2, 6 and 7 of the Bribery Act 2010); money laundering (Proceeds of Crime Act 2002, ss.327, 328 and 329).

The Guideline can be found at http://sentencingcouncil.judiciary.gov.uk/guidelines/forthcoming-guidelines.htm. A useful summary of the contents of the guideline was published in *Criminal Law Week* 2014/05/17.

Comment

Contempt of Court and Internet Publications—the Law Commission's Recommendations and the Criminal Justice and Courts Bill

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On December 9, 2013, the Law Commission published the first of three reports making recommendations for reform of the law of contempt of court.[1] That first report dealt with two sides of what the Commission described as the most pressing issue facing the law of contempt, namely, how to maintain public confidence that jury trials are, and continue to be, conducted on the evidence in the case and not by consideration of extraneous material, particularly material available on the internet.

The "two sides" of that issue identified were:

1 "Contempt of Court (1): Juror Misconduct and Internet Publications", Law Com. No.340.

(1) Focussing on the conduct of jurors themselves, the direction and guidance they receive on the limits of acceptable conduct and the way in which instances of juror misconduct are dealt with. In this connection the Commission notably recommended the creation of a new criminal offence for jurors conducting prohibited research.

(2) Focussing on the law of contempt by publication, and the way in which the regime established by the Contempt of Court Act 1981 can be adapted to cope with the modern media and the internet.

Some of the Commission's recommendations in both areas have already found their way into draft legislation in the form of the Criminal Justice and Courts Bill[2] ("the Bill"), currently awaiting its second reading in the House of Commons. The first side of the issue was the subject of an article in the December issue of *Archbold Review*, which foreshadowed the publication of the Commission's report. This article relates to the Commission's recommendations on the second side of the issue.

Contempt by internet publication—the current law and its problems

Under s.2 of the Contempt of Court Act 1981 ("the 1981 Act") a person will be in contempt of court if they publish material which creates a substantial risk of serious prejudice to court proceedings which are active at the time of publication. The types of publication caught by the 1981 Act are extremely broad, and include "any speech, writing, programme included in a cable programme service or other communication in whatever form." "Active," in the case of criminal proceedings, means any time between arrest (or the issue of a warrant for arrest) and acquittal or sentence. Liability for contempt under these circumstances is strict, in that foresight of the risk of prejudice is not required, although there is a defence of "innocent publication" for publishers who are unaware, and have no reason to suspect, that proceedings are active at the time of publication.

A key problem for the current law arises in its application to internet publications (including the increasingly common phenomenon of the "citizen journalist" commenting on current affairs on a blog, or on Twitter, etc.). It is unclear whether "the time of publication" for these purposes refers only to the first time a publication appears on the internet, or whether internet publication should be considered as a continuing act for as long as the material remains available. Both interpretations have substantial drawbacks. If the first interpretation is preferred, then the law of contempt is narrow. It is incapable of reacting to a situation where prejudicial material first published on the internet before proceedings became active remains available to the public, and therefore to jurors and potential jurors, once the proceedings have become active. On the other hand, if the second, broader, interpretation is preferred, material first published before proceedings were active would be caught by s.2. This would, however, place an onerous burden on internet publishers to continuously monitor all of their online material with a view to checking that none of that material relates to proceedings which have become active since the initial act of publication.

2 References to the Bill in this article are to Bill 169 2013-2014 (as introduced).

The broader interpretation was favoured in the Scottish decision of *HM Advocate v Beggs (No.2)*[3] which held that the phrase "time of publication" was "capable of referring to a period of time during which the material was accessible on the web site, commencing with the moment when it first appeared and ending when it was withdrawn." The same approach has been taken by the English courts, albeit only at first instance. The case of *Harwood*[4] involved the trial of a police officer accused of manslaughter arising from an allegation that he lethally assaulted protestor Ian Tomlinson during the G20 riots of 2009. The trial judge, Fulford J. (as he then was), adopted the broad interpretation of "time of publication". The publication, which related to the defendant's disciplinary record and had first appeared online before criminal proceedings against him had begun, was therefore caught by s.2. The judge therefore exercised his power to grant an injunction (under s.45 of the Senior Courts Act 1981) ordering the removal of the material in question.

The Commission's Recommendation—a new general exemption from liability

In its report, the Commission recognised the force behind these modern authorities giving a broad interpretation to the notion of the "time of publication". This interpretation allows the courts, in the exceptional circumstances in which it arises, to protect proceedings from the damaging effect of internet publications which first appeared before proceedings became active, but which threaten serious prejudice to those proceedings as they remain available after the case gets under way. However, in common with many of those responding to its consultation paper, the Commission also expressed concern about the burden which this broad interpretation places on publishers, and the difficulty this may create for compliance with Art.10 of the ECHR, and the UK's EU law obligations.[5]

In order to strike a balance between these competing principles, the Commission therefore recommend putting the broad interpretation in *Beggs* and *Harwood* on a statutory footing, but also recommend providing an exemption from liability for material which is first published before proceedings became active. Under the Commission's recommendation, this exemption would only be lifted if the Attorney General were to serve written notice on a publisher that an internet publication for which they were responsible was now creating a substantial risk of serious prejudice to active court proceedings. In the absence of such a formal notice, a publisher of online material first made available before proceedings became active would be immune from contempt liability and hence immune also from any injunctive powers of the courts to order the removal of such material. In the rare cases in which the Attorney General believed the high threshold under s.2 of the 1981 Act was satisfied by a particular publication and issued a formal notice, a publisher would potentially become liable for contempt of court if they did not remove the material (and would also become subject to the courts' injunctive powers to order its

3 2002 SLT 139.

4 [2012] EW Misc 27 (CC), available at http://www.bailii.org/cgibin/markup.cgi?doc=/ew/cases/Misc/2012/27.html&query=harwood&method=boolean.

5 The Directive on Electronic Commerce, Directive 2000/31/EC (implemented by the Electronic Commerce (EC Directive) Regulations 2002) prohibits Member States from imposing general obligations on certain internet service providers to monitor the information which they transmit or store.

removal). This would of course continue to depend upon the court, having heard argument, being satisfied that the necessary stringent conditions for strict liability contempt were satisfied.[1]

The Criminal Justice and Courts Bill

Clause 37 of the Bill seeks to enact the Commission's recommendations in this area. The clause inserts a new s.4A into the 1981 Act. This provides that where a person makes a matter available to the public, or a section of the public, continuously over a period, and during that period legal proceedings become active within the meaning of s.2, the person is not guilty of contempt of court under the strict liability rule in connection with those proceedings. This is subject to receiving a written notice from the Attorney General, which has the effect of depriving them of that general defence. Such a notice must specify the internet publication to which it relates ("the matter" in the language of the clause) and the proceedings against which it offends. The clause also gives the Secretary of State power to make regulations by statutory instrument making provision about the giving of such notices, including provision about the information to be included in a notice.

Conclusion

In the internet age, the tension between freedom of expression and the right to a fair trial by jury can be acute. The Commission's recommended reform cannot resolve this basic conflict, but it is submitted that it does strike the balance more appropriately than the present law. It should provide welcome respite for publishers in rejecting beyond doubt the suggestion (entirely plausible under the current law) that internet publishers have a general obligation to continually monitor all of their online material. As the Commission explicitly recognises, it is not possible to cleanse the web of all prejudicial material relating to every trial, nor would this necessarily be desirable. But the provisions of the Bill, if enacted, should provide advocates and trial judges with a helpful tool in those rare high-profile cases where prejudicial internet coverage, including pre-trial coverage, genuinely poses a serious risk of undermining the prospect of a fair trial.

1 The various elements of strict liability contempt under the current law are considered in detail in the Consultation Paper (No.209) at paras 2.29 onwards.

Feature

Keeping "Proportionality" in Proportion: an Update on *Waya* and Confiscation

By Polly Dyer, barrister at QEB Hollis Whiteman, and Michael Hopmeier, Circuit Judge, Kingston Crown Court; Honorary Visiting Professor at City University, London

In an article a year ago the authors discussed the Supreme Court's decision in *Waya*; a case in which it was held that confiscation orders must be "proportionate".[1] Over the past year numerous cases have come before the Court of Appeal in which appellants have sought to rely on the issue of "proportionality". In what follows, the authors review a number of the key decisions made over the last 12 months in the field of confiscation. What arguably becomes apparent is that, whilst the term "proportionality" is now embedded in the legal consciousness, little in fact, it is suggested, has substantially changed in the way that POCA legislation is, and should be, applied.

In the cases that have come before it, the Court of Appeal has reaffirmed a number of general principles, making it clear that a number of established practices are not to be abandoned as "disproportionate" as a result of *Waya*. For example, the mere making of a compensation order alongside a confiscation order is not disproportionate; requiring co-defendants who jointly obtained a benefit from crime to each pay a sum amounting to their total benefit, is not an infringement of "A1P1"[2] (although two appeals to the Supreme Court are pending on this issue). However, what has arguably become more significant as a result of *Waya* is the effect of repayment.

A number of cases have reiterated the principle set out in *Waya* that a confiscation order will be disproportionate where the defendant has repaid any benefit in full as it would amount to an additional penalty.[3] In *Hursthouse*, the appellant sought to rely upon a forged will after the death of her father.[4] The forged will appointed her as sole executor and beneficiary of the estate. As executor, the appellant gave control of all assets to solicitors. No funds were ever transferred to the appellant pursuant to the forged will (the forgery having been discovered before distribution). The Court quashed the confiscation order as it held that the money had been fully "restored" and there was no additional benefit to the appellant; an order to pay back the benefit would amount to a pecuniary penalty and infringe A1P1. At [28] the Court stated: "We note that *Waya* does not

1 P. Dyer and M. Hopmeier, "Confiscation: *Waya* and other recent developments" [2013] 1 *Archbold Review* 7-9 and 2 *Archbold Review* 6-9; [2012] UKSC 51.

2 "A1P1", otherwise known as Art.1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, guarantees the right to peaceful enjoyment of property; *Ahmad and Ahmed* [2012] 2 Cr.App.R. (S) 85 and *Fields* [2013] EWCA Crim 2042 are being heard as this article is being written.

3 See *Axworthy* [2012] EWCA Crim 2889, discussed in the second part of the earlier article.

4 [2013] EWCA Crim 517.

distinguish between mechanisms of restoration; it looks at whether or not there has been a full restoration".

However, the principle that no confiscation order should be imposed where restoration has been effected has its limits. In *Harvey*, the appellant ran a plant hire and contracting business, which made extensive use of stolen plant.[5] When the stolen plant was recovered, it had approximately halved in value from the time that it was taken. The Court of Appeal rejected the argument that since the property had been restored to the loser the value of the restored property should be taken into account in fixing the level of the confiscation order as this was not a case of "full restoration". Depreciation meant that what was restored was worth substantially less than the property when it was originally stolen. Moreover, the appellant had had the use of the vehicles over the years. In the circumstances, a confiscation order based upon the original value of that property without any deduction is not disproportionate.

Further, any benefit has to be restored to the "true owners". In *Louca*, the appellant was involved in a conspiracy to import cigarettes.[6] The cigarettes were recovered by HMRC and destroyed; it was therefore argued that the appellant had made full restoration. It was held that a confiscation order in the value of the cigarettes was proportionate as there was no true "restoration" to the owner since the smuggled cigarettes were not HMRC's property and the seizure was to prevent the appellant from profiting from them.

Jawad addressees the relationship between a confiscation and compensation order.[7] The Court of Appeal clarified that post *Waya* there is no obstacle to making both orders in the same case because the two orders serve different purposes. However, where a compensation order has been made, and there has been full restoration to the loser because that compensation order has been satisfied, it would then be disproportionate to make a confiscation order to repay that same amount. The mere making of a compensation order will not render the confiscation order disproportionate as there is no guarantee that the defendant will ever pay his compensation order. It also made it clear that if repayment is to be relied upon, it should be initiated prior to the start of the confiscation hearing. If it has not been made before the day of the confiscation hearing, proof that payment is guaranteed is necessary. If the assets are in the possession of the Crown, a defendant can request realisation and repayment or variation of a restraint order. A court should not accept expressions of intention which are not backed up by the assurance of repayment; a court is unlikely to be receptive to pleas to adjourn on this basis.

Sale is a case which can be regarded as analogous to the restoration cases detailed above.[8] The appellant was convicted of corruption: he bribed a potential client in order to secure contracts for his company. The payments to the company under the contract were treated as having been obtained by the appellant himself. Accordingly, at first instance it was held that the property obtained by the appellant was the entire value of payments under the contracts that his company received (in that case £1.9 million). Applying the line of cases coming after *Waya*, the Court of Appeal held that the confiscation order was disproportionate; the client had been "repaid" the value of the legitimately incurred expenses (just over £1.7m) through the completion of the contracts as expected. However, the Court did hold the appellant liable for additional benefit (after discounting the "repaid sum"), that being the profit made in this case. The appellant had also obtained a pecuniary advantage by obtaining a market share, excluding competitors, and saving on the costs of preparing proper tenders (although no calculation was carried out as it was not argued). The Court of Appeal reduced the confiscation order from £1.9 million to £197,000.

Joint liability

The Court of Appeal decision in *Ahmad and Ahmed* was discussed in the authors' article of last year.[9] In this case, the Court of Appeal reduced two confiscation orders from about £92 million payable by each defendant to some £16 million payable by each defendant, the total benefit having been assessed at some £16 million (the figure uplifted with inflation). The issue which has arisen for consideration by the Supreme Court is this: where two or more defendants jointly obtain property (in this case £16 million) as a result of or in connection with criminal conduct, is it proportionate within the meaning of Art.1 of the First Protocol of the European Convention on Human Rights for a court to make a confiscation order against each defendant, each order being in an amount equal to the value of the benefit obtained? The Crown has argued that such orders are not in breach of the Convention and are proportionate to the legitimate aim of the legislation. The appellant has argued that such orders are disproportionate and the Court should consider making joint and several orders and/or dividing the total amount between defendants.

Fields is another case on joint liability where the three applicants seek the permission of the Supreme Court to appeal against the decision of the Court of Appeal.[10] It is being heard at the same time as *Ahmad*. Each applicant was convicted of his involvement in fraud. As a result of the fraud each applicant was found as a fact to have jointly obtained property and services, the value of which (adjusted for inflation) was £1,565,945. Each applicant was found to have sufficient assets in excess of that sum and orders were made against each applicant in the sum of £1,565,945. The applicants have submitted that such multiple orders which reflect 100 per cent of the value of property jointly obtained are "disproportionate" and therefore unlawful. They have also submitted that in a case where defendants jointly obtain property, the Court should ascertain each defendant's "beneficial interest" in the property obtained. The Crown argues, as in *Ahmad*, that the confiscation orders were lawful and involved no breach of the applicants' property rights as guaranteed by A1P1. As to "beneficial interests", the Crown has submitted that the Supreme Court is bound by the case of May.[11]

The judgments in the cases of *Ahmad* and *Fields* are unlikely to be delivered for several months. The issues are by no means simple. No doubt all parties will look to the Supreme Court for clear guidance as to how to approach the issue of joint liability when making confiscation orders; whether practical guidance will, or can in fact, be given to cover every case remains to be seen.

5 [2013] EWCA Crim 1104.
6 [2013] EWCA Crim 2090.
7 [2013] EWCA Crim 644.
8 [2013] EWCA Crim 1306.

9 "Confiscation: '*Waya*' and other recent developments"; Ibid.
10 *Fields* [2013] EWCA Crim 2042.
11 [2008] 1 A.C. 1028.

Approach

Over the past year there has been a reassertion by the Court of Appeal of established general principles regarding the calculation of benefit and the available amount. There has been a reiteration that confiscation proceedings take place in distinct stages; namely the calculation of the benefit from crime, and the calculation of the amount recoverable from the defendant. The first is concerned with the proceeds of crime; the second with recovering a sum equivalent to those proceeds, whether from criminal assets or otherwise (*Dhall*[12]; *Re Price*[13]). As stated in *Dhall*, "if a defendant inherits a house from his Aunt a month before the hearing of the confiscation proceedings the value of that house will form part of his available assets, even though it has no relation to criminal conduct" (at [21]).

Calculation of benefit

In *Morgan,* the Court emphasised that the assessment of "benefit" cannot depend on what a defendant intended the outcome of his criminal conduct to be.[14] Rather, it must depend on what actually happened. The appellant in this case had pleaded guilty to depositing controlled waste without a licence. He asserted that he intended to use a proportion of his scrap metal site for the "recovery" or "reclamation" rather than the "disposal" of the waste. The Judge found, applying the relevant environmental regulations, that the appellant's site was in fact the latter (a "disposal" site) and that the appellant had therefore gained a benefit through non-payment of the relevant taxes and licences (applying s.10(3) a pecuniary advantage constituted property obtained as a result of criminal conduct). The appeal was dismissed.

The Court of Appeal has also reiterated the need to examine the facts of the case to determine whether the defendant has a criminal lifestyle and whether he did in fact benefit from his crime. For example, the case of *Molloy* reiterated the principle in *Bajwa* that, in calculating whether the offending falls within the definition of "criminal lifestyle", the period of at least six months specified in s.75(2)(c) of POCA relates to the period of the individual defendant's participation rather than the duration of the conspiracy as a whole.[15] *Odamo* similarly stressed the importance of scrutinising the offence with which the defendant was indicted.[16] This reiteration has included a number of cases on identifying who "caused" tobacco products to reach the excise duty point in tobacco importation cases, which will now be discussed.

Taylor and Wood concerned the fraudulent evasion of a duty payable on the importation of cigarettes and the interpretation of reg.13(1) of the Tobacco Products Regulations 2001, which imposes the primary liability to pay the duty on the person "holding the tobacco products at the excise duty point".[17] The appellant ("T") argued that the benefit figure should not include the pecuniary advantage obtained (the duty evaded) because T did not "hold the tobacco products at the excise point". In this matter, T had instructed his co-defendant's freight forwarding company to arrange the collection of "textiles" from Belgium. His co-defendant instructed a legitimate UK haulier to pick up the "textiles", who in turn contracted the job out to a legitimate Dutch haulier. It was held that the defendants , as "bailors", have "constructive possession" (i.e. the right to control the goods) and, as such, they "held" the tobacco at the excise duty point. Additionally, they "caused the tobacco products to reach an excise duty point" and therefore were jointly and severally liable to pay the duty with the person who held the products at the excise duty point under reg.13(3)(e) in any event. The case of *Young* addresses the same matter, although in all four appeals that were heard the confiscation orders were quashed because the defendants had neither held the cigarettes at an excise duty point nor caused the cigarettes to reach an excise duty point[18]: Young had assisted in unloading contraband cigarettes in return for £150; Boot had stored contraband cigarettes in return for £100; Wheelright had been involved in distributing contraband cigarettes after they had reached the excise point; and Whitehead was responsible for lock-up premises used to store the cigarettes after they had reached the excise point.

The Court of Appeal has again reiterated that rental income obtained from criminal property can be judged as "benefit". In *Oyebola* it was held that rental income from property obtained through a mortgage fraud was a "benefit"; to find otherwise would have the "startling result that a criminally obtained property…could be used as a means of generating for the fraudster a significant 'legitimate' income which could not be the subject of confiscation proceedings: he would thus benefit from his crime" ([38]).[19] *Waya* did not undermine *Pattison*.[20] The Court left open the possibility that there could be apportionment by reference to the acquisition cost of the property of "untainted money" because no sustained argument on the issue was heard. *Mahmood (Ziarat)* was similarly decided.[21]

The available amount

In decisions concerning the calculation of the "available amount", the Court of Appeal has again emphasised that the onus is on the defendant to show the whereabouts of his/her assets (*Dhall*; *Saben*; *Druce*).[22] In *Jaffrey*, it was held that a judge, in concluding that there are hidden assets, is entitled to draw on any evidence from any point in the trial when reaching his conclusion as to the amount.[23] He should however indicate his intended approach and reasoning to the parties and give them an opportunity to address him on it. Additionally, as a procedural point, *Tanveer* is authority for the proposition that failure to deal with a particular point about realisable assets in a s.16 statement does not necessarily preclude its argument at a hearing.[24]

In *Smith,* the appellant argued that money given to family members was irrecoverable and therefore should be regarded as having no value for the purposes of determining the recoverable amount under s.9(1)(b) of POCA.[25] It was common ground between the parties in this matter that the gift was a "tainted gift" within the meaning of s.77 of POCA. The Court held, in determining the value

12 [2013] EWCA Crim 892.
13 Unreported, July 18, 2013 QBD (Admin).
14 [2013] EWCA Crim 1307.
15 [2013] EWCA Crim 682; [2011] EWCA Crim 1093; pursuant to s.75(2)(c) of POCA, a defendant has a criminal lifestyle if the offence was committed over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence.
16 [2013] EWCA Crim 1275.
17 [2013] EWCA Crim 1151.
18 [2013] EWCA Crim 302.
19 [2013] EWCA Crim 1052.
20 [2007] EWCA Crim 1536.
21 [2013] EWCA Crim 1291.
22 [2013] EWCA Crim 892; [2013] EWCA Crim 575; [2013] EWCA Crim 40.
23 [2013] EWCA Crim 360.
24 [2013] EWCA Crim 360.
25 [2013] EWCA Crim 502.

of a tainted gift, that it did not matter whether there was a likelihood of the gift being returned by the recipient. Section 81 of POCA, which is headed "value of tainted gifts", contains no provision linking the value of the gift to its recoverability. Furthermore, as a matter of public policy, the purpose of the provisions is to prevent a defendant dissipating his assets by giving them away. If he is able to say that assets are of no value because he cannot get them back, it would defeat the purpose of s.9(1)(b). The case of *Najafpour* did not affect this matter as it addresses s.9(1)(a) (and "free property" e.g. a loan to another) rather than "tainted gifts".[26]

Postponement

The case of *Johal* has provided guidance for judges on how to approach the issue of postponement of confiscation hearings.[27] The Court of Appeal held that a judge had not erred in finding that there were "exceptional circumstances" under s.14(4) of POCA to justify postponing the conclusion of confiscation proceedings beyond the two-year permitted period under s.14(5) where both Crown and defence had filed their statements late, there were listing difficulties, and adverse weather conditions. Parliament had intended a broad interpretation of "exceptional circumstances" in s.14(4). Further, the failure to specify the period of postponement was not a bar to recovery as it was a procedural error (rather than a substantive error) (s.14(11); *Soneji*[28]).

Enforcement

There has been a significant development in enforcement. The recent case of *R. (on the application of Lawson) v Westminster Magistrates' Court* distinguishes between the issuing of a warrant for the arrest of a defendant (s.83 MCA 1980) for a means enquiry (s.82 MCA 1980) into payment of a confiscation order after the service of a default sentence (which is impermissible) and the issuing of a warrant for the arrest of a defendant for a means enquiry pursuant to Sch.5 of the Courts Act 2003.[29] Schedule 5 of the Courts Act 2003 relates to the powers of a "fines officer" to take enforcement action independently of any enforcement decision by the court (which is not permitted after a defendant has served a default sentence). This allows effective enforcement of the confiscation order beyond the activation of the default period.

Restraint

Where a defendant has breached a restraint order, the prosecution may now bring a charge of perverting the course of justice, rather than merely bringing proceedings for contempt. The case of *Kenny*[30] suggests that charges of perverting the course of justice should be reserved for cases with "serious aggravating features"; however, this has been interpreted to include cases involving defendants using funds for a purpose other than for which they were released by the court (see *Norman* for example,[31] where the appellant used funds released in order to enable her to pay for a car, to pay school fees for her daughter instead).

Recent decisions

In addition to the cases discussed above, the following very recent cases should be noted. In *R. (on the application of Virgin Media Ltd) v Zinga (Munaf Ahmed)* it was confirmed that confiscation could be pursued in private prosecutions.[32] In *Chalal*, the Court found that where there is a second application for a confiscation order (stemming from another, subsequent conviction), which requires an assessment of the benefit received from general criminal conduct, s.8 of POCA confines the assessment of the amount of benefit to the period after the date of the first confiscation order.[33] In *Mackle*, a case decided by the Supreme Court, it was held that in a situation where a confiscation order had been imposed by consent, consent was not binding if based on a mistake of law and incorrect legal advice.[34]

Conclusion

Consideration by the Court of Appeal and the Supreme Court of the provisions of POCA continues apace; 2013 saw some 60 new cases. The message from the Court of Appeal, in general, appears to be carry on as before—findings of disproportionality are likely to be rare, and (currently) only if involving full restoration (or an analogous situation). What is apparent from the case law is that the proper approach to addressing oppression is to make an order that is not oppressive rather than staying proceedings (*Beazley*; *Morgan*[35]).

The forthcoming Supreme Court decisions in *Ahmad* and *Fields* will no doubt provide ample material for discussion by lawyers and academics. In this article the authors do not presume to predict what the result will be. But readers may look forward to a further update in a few months' time, when the latest developments in this important and fast-moving area will be examined.

26 [2009] EWCA Crim 2723.
27 [2013] EWCA Crim 647.
28 [2005] UKHL 49.
29 [2013] EWHC 2434 (Admin).
30 [2013] EWCA Crim 1; [2013] Q.B. 896.
31 [2013] EWCA Crim 1; [2013] EWCA Crim 1397.
32 [2014] EWCA Crim 52.
33 [2014] EWCA Crim 101.
34 [2014] UKSC 5.
35 [2013] EWCA Crim 567; [2013] EWCA Crim 1307.

In the News

Deferred Prosecution Agreements

On February 11, 2014 the government issued the Crime and Courts Act 2013 (Commencement No.8) Order 2014 (SI 258/2013), which brings into force the provisions relating to deferred prosecution agreements on February 24. Three days later, on February 14, the shadier parts of the world of business received a joint Valentine from the Director of Public Prosecutions and the Director of the Serious Fraud Office in the shape of 20-page Code of Practice for their operation. The full text of the Code can found on line at http://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf.

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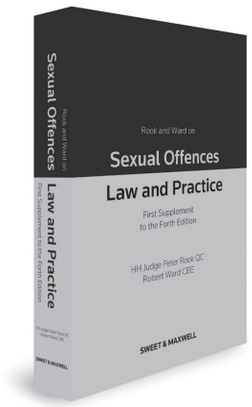

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