SWEET & MAXWELL

Issue 5 June 27, 2017

Archbold Review

Appeal—new evidence cases—recommended approach by single Judge considering leave to appeal

SINGH (KUNWAR AJIT) [2017] EWCA Crim 466; March 29, 2017

Refusing an application for leave to appeal and an extension of time referred to the court by the single Judge, the court noted that applications to adduce fresh evidence were becoming increasingly prevalent, that many were entirely unmeritorious, and that they took up the limited time and resources of the court. For the assistance of the parties and the judges the court recommended that in respect of fresh evidence cases, (a) before making a decision, single Judges should inquire whether privilege had been waived, and if not, an explanation should be provided as to why it was not necessary; (b) if an application did not have a Respondent's notice and the single Judge would be assisted by one, the single Judge should direct the Respondent to consider the application and submit a response; (c) the single Judge should not simply refer the application to the full court without consideration. Once the single Judge had ascertained the position from trial representatives and the Respondent, he or she may well be in a position to determine whether the application was potentially arguable, and if not refuse it. If it were arguable, the single Judge should normally not grant applications for leave and an extension of time but should refer them to the full court; and (d) if the single Judge decided to refer an application, he or she should refer it for directions. The parties should then seek to agree those directions and submit them to the Registrar for approval by the court. Only if agreement could not be reached should it be necessary for there to be an oral hearing.

Burglary—Theft Act 1968 s.9(3)(a) and (b)—"dwelling"—whether unoccupied rental house was "dwelling"—matter of fact and degree—considerations—policy advantages

HUDSON v CPS [2017] EWHC 841 (Admin); April 28, 2017

The district judge had been entitled to conclude that where H had burgled a furnished house whose owner generally made it available to rent, but which had just become unoccupied, was a "dwelling", and thus H was guilty of burglary contrary to the Theft Act 1968 s.9(3)(a), not s.9(3)(b) ("non-domestic burglary").

(1) "Dwelling" was an ordinary English word; its meaning a question of fact for the jury, magistrates or a district judge. A question of law would only arise if the judge gave it a meaning which was unsustainable in law. The paradigm case of a dwelling was one which was occupied by an owner or tenant and thus their home. It was that feature which attracted the particular gravity of dwelling-house burglary. But it did not follow that the policy or logic of dealing severely with burglary of a dwelling meant that a building ceased to be a dwelling for the purposes of s.9(3) the moment it becomes unoccupied. Where a dwelling had become unoccupied, it was a question of fact and degree as to whether it was no longer a dwelling. Thus in the sentencing case *Sticklen* [2013] EWCA Crim 615, there were numerous factual pointers in favour of the building not being a dwelling: the premises had been unoccupied for many months and were bare and unfurnished. In H's case, however, the building had been occupied by a tenant until two days before the burglary. Until then, it was plainly a "dwelling" and not, for example, a commercial property. It remained fully furnished and equipped to be habitable. No doubt if these premises had remained unoccupied for an extended period of time and had ceased to be fit for habitation, different questions would have arisen. But, on these facts and on the natural meaning of the word, the building on the date of the burglary was a "dwelling", albeit temporarily and recently unoccupied. It had been constructed and designed as such and was habitable as such, even though at the time of the burglary it was vacant. In broad terms, the more habitable a building was as a matter of fact, the more it was likely to be a "dwelling".

(2) This conclusion was to be preferred: (a) It avoided the introduction into standard burglary cases of nice arguments as to the tenancy status of the property in question. For example, there was no need to inquire as to the marketing efforts made to re-let the premises; whether a lease was under negotiation or has been agreed; whether a new tenant has begun to move his or her possessions into the premises and, if so, to what extent; (b) This approach left the risk on the burglar. The policy of the law ought to be to deter the targeting of residential and apparently residential properties; (c) It was consistent with the broad view taken in other situations as to what constitutes a "dwelling" – by way of examples, a garden shed (*Rodmell*, (unreported, 24 November 1994)) and a hotel room (*Massey* [2001] EWCA Crim 531; [2001] 2 Cr.App.R (S) 80); (d) No unfairness was involved. Except where the Powers of Criminal Courts

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(Sentencing) Act 2000 s.111 (the "three strikes" provisions) applied, (in which case the defendant would already have committed two domestic burglaries), the fact that the premises were temporarily vacant could be argued in mitigation.

Evidence—WhatsApp message sent by a co-defendant not before the court—whether hearsay

MIDMORE [2017] EWCA Crim 533; April 28, 2017

M was convicted of causing grievous bodily harm with intent by throwing acid in a woman's face in a joint enterprise with G, who pleaded guilty. He submitted that a WhatsApp message containing a picture of the plumber's acid used in the attack and the words "This is the one face melter" sent by G to his girlfriend was inadmissible hearsay. The message was sent from the shop where the acid was purchased.

(1) The judge had been right to allow the admission of the message. The Criminal Justice Act 2003 ss.114-136 contained a very carefully constructed statutory code in respect of hearsay, replacing the common law which, save for the exceptions, was abolished. It was therefore important for a court when considering any application in respect of hearsay carefully to apply the statutory provisions without reference to the old law. Section 115 defined hearsay, and the definitions of the terms "statement" and "matters stated" were of central importance. The court adopted the approach in *Twist* [2011] EWCA Crim 1143, [2011] 2 Cr.App.R 17.

(2) The first question was what was the matter sought to be proved? The message was adduced as evidence in relation to G's intention shared with the appellant when purchasing the acid. The prosecution sought to use the message to show that the product was not purchased with the intention of using it as a drain cleaner, as they claimed, but with the intention of using it as it was used.

(3) Was the statement in the message a "representation of fact" (s.115(2))? It had long been established by numerous cases that a statement of a person's current intention could be a representation of fact. The same case law applied to s.115(2). Here, the question was whether the message was a statement of the current intention of G, which he shared with M. Was the message itself evidence of the matter sought to be proved or was the message merely a comment and therefore only evidence from which the matter sought to be proved, the purchase with that intention, could be inferred? Views could differ, but the court considered that, on balance, it was an implied representation of the intention and therefore fell within the definition in s.115(2) as it was a statement of the matter intended to be proved.

(4) Was it a purpose of the sender to cause the recipient to believe it or act on it (s.115(3))? Even though the message fell within the definition in s.115(2), the statement or representation was not made to cause the girlfriend to believe the statement or to act on it as true. Nothing in it could suggest that it was sent to cause the girlfriend to believe the acid would melt a face or to cause her to act on that basis or to believe that it was his intention so to use it or to act on that basis.

(5) Section 115(2) may have been satisfied, but s.115(3) was not, and therefore the message was not hearsay.

Prosecution—"commercial" prosecution of fraud by local authority—Local Government Act 1972 s.222—appeal against preparatory hearing—nature of proceedings—jurisdiction of court to review prosecution decision—whether decision unreasonable—whether common law right to prosecute—remedy—public policy considerations

AB [2017] EWCA Crim 534; April 28, 2017

The appellants were charged with conspiracy to defraud and doing acts intended to pervert the course of justice arising out of an alleged fraud against the Legal Aid Agency, it being alleged that they had been party to false claims for payment in respect of work which their solicitors' practice in London had not performed. The value of the alleged conspiracy was £4 million. The allegations were investigated and prosecuted by the Fraud Investigation Department of Thurrock Council, a local authority in Essex, in pursuance of agreements between it and the Agency. The agreements provided for the division of retained funds confiscated under the Proceeds of Crime Act 2002, or, failing that, direct remuneration of the Council by the Agency. The arrangement followed low level decisions by the police not to investigate the allegations.

(1) The appeal was against a preparatory ruling under the Criminal Procedure and Investigations Act 1996 s.35(1) that the prosecution was not invalidly brought under the Local Government Act 1972 s.222 (where a local authority considers it expedient for the promotion or protection of its inhabitants, it "may prosecute or defend or appear in any legal proceedings"). The better course was to proceed on the basis that the application to the judge had been, in substance, an application for a stay for abuse of process, as consistent with *R (Barons Pub Company Ltd) v Staines Magistrates' Court* [2013] EWHC 898 (Admin) (magistrates' courts have no power to review prosecutorial decisions except as abuse of process).

(2) It was clear from the cases that the court did have the jurisdiction to review the Council's decision to prosecute. It was, however, an exercise to be carried out sparingly and within the parameters of the very broad discretion granted to the Council under s.222. There was a high hurdle to be overcome before the court would interfere with a local authority's exercise of discretion under s.222. In *Barking and Dagenham v Jones* [1999] All ER (D) 923, Brooke LJ, rightly, had not understood *Mole Valley District Council v Smith* [1994] 2 HLR 442 as finding that there was no such role for the court. In *Brighton and Hove v City Council v Woolworths plc* [2002] EWHC 2565 (Admin), (2003) 167 J.P. 21, the court had accepted that the Council had no power to prosecute "because such a prosecution could not be expedient for the promotion or protection of the interests of the inhabitants of their area as required by [s.222]".

(3) In deciding whether to prosecute under s.222, the relevant considerations were not limited strictly by geography. In so far as it was suggested in *Woolworths* (at [33]) that a breach outside a local authority's area could not be expedient for the purpose of s.222, it was wrongly decided (see eg *R (Sharyn Donnachie) v Cardiff Magistrates Court* [2009] EWHC 489 (Admin), [2009] CTLC 51; and the summary in *Oldham v Worldwide Marketing Solutions* [2014] EWHC 1910 (QB), [2014] PTSR 1072, [28]). It was permissible to take broad policy considerations into account (*Oldham*, [24]-[25]). However, in this case, the decision to prosecute fell outside the ambit of the Council's broad powers under s.222. There were no proper grounds for it to consider that it was expedient for the promotion or protection of the interests of the inhabitants of Thurrock to prosecute the Appellants (and not to refer this very serious matter to the DPP for prosecution). The Council could not reasonably have thought that there were. For the requirements of s.222 to be met, the interests of the inhabitants of Thurrock must be engaged over and above their interests merely as ordinary citizens of the nation. The clear policy of the 1972 Act, as re-

flected in the wording of s.222, was that the power in question was being conferred for the benefit of the inhabitants of Thurrock *as such*. The Council's motive in doing so had been broadly commercial, to subsidise the Fraud Investigation Department, a form of general financial justification which did not come close to meeting the requirements of s.222.

(4) Contrary to the Council's submissions, s.222 was not merely declaratory (or "exhortatory") of a local authority's common law right to prosecute. Despite an analysis of the legislative history of s.222 from the Borough Funds Act 1872 s.2, the submission was misconceived. Local authorities were purely the creatures of statute, and may only engage in activities which they are permitted to by the 1972 Act and related Acts.

(5) The DPP had now informed the court and the parties that she had exercised her powers under the Prosecution of Offences Act 1985 s.6(2) to take over the conduct of the prosecution and to continue it. It was not necessary for the court to consider whether the proceedings should be stayed. The proceedings must therefore continue with the DPP conducting the prosecution. The court simply declared that the Council had no power to prosecute under s.222.

(6) The court offered the following observations on the wider public policy issues. (a) The unhappy facts of the case demonstrated the dangers inherent in a system where agencies tried to act as substitutes for prosecutions by the CPS in respect of national issues. The agreement between the Legal Aid Agency and the Council was troublesome in so far as it sought to distribute 50% of any confiscation proceeds as *"incentivisation payments"*, the reminder going to the Treasury. The relevant arrangements made by the Home Office for the distribution of 50% of assets recovered by means of a confiscation order were not intended to benefit a local authority undertaking the kind of arrangement the Council made with the Agency. The Incentivisation Scheme was plainly intended for prosecutions undertaken in the normal course of operations of a governmental agency or local authority, not for the type of money-making enterprise which the Council had arranged with the Agency. There was no Treasury or Home Office consent in place specifically directed at this arrangement. Ignoring the question of whether or not the arrangement made between the Agency and the Council was legal, there was obvious scope for conflicts where a Council as prosecutor had a real financial interest in undertaking the prosecution under such arrangements. The court also raised questions as to the proper decision making of the Agency and the Council; (b) It was in the public interest that major prosecutions were handled by the single prosecuting agency established by statute to conduct them. There had been a desire for the Council's Fraud Investigation Unit to become a significant financial investigation and prosecution service. The issue of the legality of the Fraud Investigation Unit itself was not explored before the court, which declined to express any view. But insofar as the Council sought to use the Department to provide a national prosecutions unit, that not only fell outside the scope of s.222, but it was also harmful to the public interest to have such a unit established as an alternative to the CPS. The CPS was a statutory body; it performed a vital public function and ensured consistency in decision making. A local authority prosecution unit would have no statutory basis whatever; and it would be inimical to the public interest to have a parallel prosecution service for cases such as this.

SENTENCING CASE

Historic offences

L [2017] EWCA Crim 43; (26 January 2017)

The appellant, now aged 51, was sentenced to 30 months' imprisonment following his conviction for sexual offences on two female relations when he was aged between 14 and 17 and they were considerably younger. The single question for the court was whether the sentencing judge had power to impose the sentence.

The prosecution's case was that on two separate occasions the appellant indecently assaulted two different complainants. The sentencing judge described the offences as one of the worst cases of indecent assault that could be imagined. The victims were very young and the impact upon them was long-standing and serious.

Had the appellant committed these acts in the recent past, as an adult, he would be sentenced to a period of at least 10 years' imprisonment based on current guidelines. The maximum sentence for offences of indecent assault at the time of his offending was five years' imprisonment. The sentencing judge had taken that maximum as a starting point, and then reduced that sentence by 50% to reflect the appellant's youth at the time of the offence.

The single ground of appeal was that the judge's powers were constrained by the statutory maximum penalty at the time of the offence for an offender aged 14. The maximum powers of the juvenile court for a 14-year-old would have been three months' detention for a single offence with a maximum of six months for consecutive terms. A 14-year-old offender committed to the Crown Court for sentence would have faced a maximum of six months for a single offence and 12 months for consecutive terms.

Reliance was placed on *Forbes* [2016] EWCA Crim 1388 to support the proposition that sentencing the appellant as an adult to a longer sentence than would have been available to the court had he been sentenced as a 14-year-old offender contravened Article 7 of the European Convention on Human Rights.

Dismissing the appeal, the court stated that following *Forbes*, the position is as follows:

(a) The general principle is that the relevant maximum penalty is the maximum penalty available for the offence at the date of the commission of the offence.

(b) There is an exception to the general principle where the offender could not have received any form of custodial sentence at the time he committed the offence.

(c) The exception is no licence for any broader inquiry. If custody was available at the time of the offending for the offender, the age of an offender at the time of the commission of the offence is relevant solely to the assessment of culpability. The only constraint in those circumstances on the powers of the sentencing court is the statutory maximum for the offence. The court should not analyse the nature of the custody available for a young offender at the time, the maximum length of that custody, the court's powers to commit for sentence as a grave crime or the principles governing sentencing of young offenders, in so far as they go beyond the importance of assessing culpability and maturity.

The court concluded that on the facts of this case, reliance on *Forbes* was misplaced. If the appellant had been sentenced for these offences as a 14-year-old, the sentencing court would have had at least one custodial option available. The fact that a custodial sentence could have been imposed, irrespective of its maximum length or nature, is sufficient to satisfy the requirements of Article 7 and the principles of common law fairness.

Features

The Rise of Synthetic Cannabinoids ("Spice") and their Impact On The Prison Estate

By Joe Stone, QC[1]

Spice - Defined and Effects

Spice is the brand name of various herbal smoking products sometimes erroneously known as *"legal highs"*. It is one of a number of products containing novel psychoactive substances (NPS), specifically synthetic cannabinoids. However, Spice has also become a common term for synthetic cannabinoid smoking mixtures in general not just those branded as "Spice". Synthetic cannabinoids are chemicals designed to mimic the effects of THC (Tetrahydrocannabinol), the main psychoactive compound in cannabis.

In 2015, samples analysed from online vendors and 10 prisons found the most commonly identified synthetic cannabinoids were 5F-AKB-48 and 5F-PB22.[2] The majority of the substances recorded were found to be mixtures of more than one different compound.

In England and Wales an initial popular brand of synthetic cannabinoid was Spice. The original version (JWH-O18) was banned in 2009. Common brand names at present are Annihilation, Hipster, Green Joker, Kronic, Pandoras Box Reborn and Vertex Space Cadet.

There have been few scientific studies into the effects of synthetic cannabinoids and none at all for some compounds, therefore much of the information about effects comes from anecdotal reports. User reports range from effects similar to cannabis, with pleasant feelings of relaxation and happiness, increased appetite and increased sociability to feeling ill, uncomfortable and anxious. Hallucinations, visual distortions, confusion and memory loss have also been reported. Users have also experienced vomiting, headaches, rapid heart rates, loss of coordination, inability to control their bodies, stupor and breathing difficulties. In high doses or in susceptible individuals synthetic cannabinioids have been associated with paranoia and aggressive behaviour.

Many synthetic cannabinoids are more potent than cannabis and this, coupled with the lack of information about the dose present in NPS products, means that it is easy for users to take high doses and suffer unpleasant effects. The effects manifest rapidly after smoking, reports suggesting usually between 5-15 minutes, and the "high" can last anywhere from one to 12 hours depending on the compound and dose although most users report the effect lasting for about four to six hours.

Why is Spice a problem on the Prison Estate?

In a recent HM Inspectorate of Prisons report[3] the nature of the problem was outlined:

> NPS — synthetic cannabinoids have created significant additional harm and are now *the most serious threat to the safety of the prison system* that our inspections identify.

The most recent informed academic analysis on spice consumption has been carried out by a team based at Manchester Metropolitan University and the University of Manchester. In a detailed article entitled *Adding Spice to the Porridge - The development of a synthetic cannabinoid market in an English Prison*[4] the team reported on research conducted into an adult male Category B prison (unidentified) from May to October 2015 which involved in-depth interviews with prisoners and staff, observations of prisoner-led focus groups, workshops and restorative justice circles involving discussion of synthetic cannabinoid use and markets; and analysis of routinely collected prison data measuring drugs seizures, incidents of violence and incidents of self-harm.

The Manchester team findings

The Manchester team found that, because of the huge profit margins on their resale, there was now a flourishing market in synthetic cannabinoids – to the point where their sales are eclipsing those of cannabis and heroin. They also found that these substances are finding their way into prisons not only by the traditional routes, such as the post, prison visits, corrupt prison staff and by being thrown over prison walls, but by new methods: drones, or by spraying the substance in liquid form onto books, letters and children's drawings.

As regards the impact synthetic cannabinoid markets in this setting are having upon prisoners, the prison system and the wider criminal justice system, the research uncovered:

> …strong evidence that the licence recall system - a cornerstone of offender management, intended to act as a deterrent and motivation for offenders to change their behaviour - is routinely and systematically abused to bring synthetic cannabinoids into prison.

The team also found that:

> The consumption of synthetic cannabinoids also appeared to be affecting recovery journeys of prisoners, particularly when these substances were available on drug recovery wings. Furthermore the widespread consumption of synthetic cannabinoids impacted upon the physical and mental health of prisoners as well as their financial circumstances. Staff were increasingly required to respond to immediate issues associated with anxiety, depression and in some extreme cases, violence and psychotic episodes which in turn created a culture of apprehension prison staff. The findings offer support for the suggestion that the recent steep rise in seri-

1 Doughty Street Chambers.

2 Home Office 2015 - *Annual Report on the Home Office Forensic Early Warning System (FEWS) - A System to identify New Psychoactive Substances (NPS) in the UK.*

3 HM Chief Inspector of Prisons for England and Wales: Annual Report 2014-15.

4 Rob Ralphs, Lisa Williams, Rebecca Askew and Anna Norton; *International Journal of Drug Policy* 40 (2017) 57-69; available online at: http://www.sciencedirect.com/science/journal/09553959/40.

ous violence, self harm and suicide in prisons can be attributed at least in part to the parallel growth in the consumption of synthetic cannabinoids.[5]

Conclusion - Abolition of Mandatory Drug Testing?
The Manchester team concluded that:

> …the rise in synthetic cannabinoid use in custody and the size of the drug market are posing significant challenges to the management of offenders; including healthcare, appropriate drug detection techniques, licence recall and sanctions for both use and supply. The primary motivation for consumption in this setting is the avoidance of drug use detection and that this is likely to supersede other motivations for consumption in the future. We propose a revision of mandatory drug tests (MDT) both in prisons and in the management of offenders in the community.

The team argues for the removal of MDT for cannabis detection on the basis that:

> … it has the potential to significantly lessen the demand for synthetic cannabinoids as a replacement for other detectable substances and thus significantly diminish the market and associated harms. In doing so users of synthetic cannabinoids may instead consume cannabis, a drug that has the potential to cause far less harm to users and those around them.[6]

Of course, whether this would be politically acceptable remains a moot point. On the other hand, present systems are conspicuously failing and it is time for more imaginative solutions to be found.
The option of more sophisticated tests to find these NPS does not seem to be a panacea. Early forensic warning systems indicate that the compounds in NPS are constantly changing. Manufacturers are seen to simply replace banned chemicals with other often stronger more dangerous substances. As the Manchester team point out:

> …the latest update from the European Monitoring Centre for Drugs and Drug Addiction identifies 160 new strains of synthetic cannabinoids in Europe alone since the original Spice was banned in the UK in 2009.[7] Thus it is doubtful MDT's will keep pace with newly formed chemical structures. The investment in the development of MDT's capable of detecting synthetic cannabinoids is therefore a flawed and expensive strategy.

Clearly, a durable solution to this growing problem needs to be found.

[To be followed by a further article on the impact of Spice on defences raised at trial.]

5 Citing the Annual Reports of HM Chief Inspector of Prisons for England and Wales 2013-2014, 2014-2015 and 2015-2016; ibid, *Changing patterns of substance misuse and service responses: A thematic review by HM Inspectorate of Prisons* (2015); Ministry of Justice Statistics Bulletin 28 April 2016, *Safety in Custody Statistics England and Wales Deaths in Prison Custody to March 2016, Assaults and Self Harm to December 2015*; and Rehabilitation for Addicted Prisoners Trust, Research and Policy Briefings Series no.4 - *Tackling the Issue of New Psychoactive Substances in Prisons* (2015).

6 See V Brakoulias (2012) "Products containing synthetic cannabinoids and psychosis", *Australian and New Zealand Journal of Psychiatry* - 46(3).

7 *Perspectives on drugs. Legal approaches to controlling new psychoactive substances.* European Drug Monitoring Centre for Drugs and Drug Addiction (2016).

Confiscation: An Update (Part 1 – Benefit, Realisable Amount and Proportionality)

By Polly Dyer[1] and Michael Hopmeier[2]

Introduction

As the practitioner will be aware, at a confiscation hearing, the court will make a finding as to (1) the defendant's benefit from criminal conduct (either general or particular) and (2) the realisable amount (how much money the defendant can realise). Pursuant to s.6(5) of the Proceeds of Crime Act 2002 ("POCA"), which was introduced by Sch.4, para.19 of the Serious Crime Act 2015, after doing so the court must also consider whether it would be disproportionate to require the defendant to pay the recoverable amount. This article provides an update on recent developments in confiscation case law, and will address each of these three stages in turn.

The calculation of benefit

In *McDowell & Singh*[3] two appeals were linked together because of common features: (a) the defendants were sole directors and shareholders of companies; (b) they were convicted of offences of trading whilst they were unregistered or unlicensed to do so; (c) the defendants claimed that trading generally was lawful – the criminal offences criminalised a failure to register or obtain a licence rather than the activity of trading per se; (d) it therefore followed, the defendants argued, that any benefit from "trading" was not a benefit from criminal conduct; and (e) any benefit from criminal conduct, the defendants argued, should be limited to a benefit from the discrete issue of failing to obtain a licence.
The Court of Appeal held that whether cases involving "regulatory offences" give rise to the availability of a confiscation order will depend upon an analysis of the statute which creates the offence. The question for the court is therefore whether the statute creates a prohibited act. If the offence creates a prohibited activity, which is carried out by the defendant, he will have benefited from crime. However, if the offence does not prohibit an activity, but merely regulates the way in which the activity can be carried out, then the defendant will not have benefited from crime by carrying out the underlying activity.
McDowell had been convicted of an offence relating to international dealing in military equipment, namely being "knowingly concerned in the supply, delivery, transfer, acquisition or disposal of controlled goods", contrary to the Trade in Goods

1 Barrister at QEB Hollis Whiteman.
2 Circuit Judge at Kingston Crown Court.
3 [2015] EWCA Crim 173.

(Control) Order 2003. That order allowed the Secretary of State to grant a licence for such trading. The Order therefore created a prohibited activity, which could, in certain circumstances be authorised. The underlying activity was therefore unlawful, and receipts from that activity were McDowell's proceeds of crime. Singh had been convicted of carrying on a scrap metal business without having registered with the relevant local authority (s.1(1) of the Scrap Metal Dealers Act 1964). There was no activity prohibited by the relevant act. It simply required Singh to register (free of charge) with his local authority. The Act therefore did not create a prohibited activity. Singh's profits from working as a scrap metal dealer were therefore not the proceeds of crime. Accordingly it appears that, generally, offences involving conduct that requires prior *authorisation* will be criminal per se, and a criminal benefit can be derived from carrying out the activity. However, offences involving conduct which only requires prior *registration* will be "regulatory" in nature and a criminal benefit will not be derived from carrying out the underlying activity.

The court in *Palmer*[1] held that a confiscation order could be made in respect of an offence contrary to the Private Security Industry Act 2001. Section 3(1) of the Act criminalised the undertaking of licensable activity without a licence. Such activity thus amounted to criminal conduct within the meaning of s.340(2) of POCA and a confiscation order could be made in respect of the benefit.

In the UK, VAT is chargeable on the supply by registered traders of goods and services ("outputs"). A registered trader who has spent money on buying goods in the course of his business is entitled to reclaim the VAT element as an "input". A "missing trader" or "carousel" illegally manipulates the rules relating to trading with other European Union member states in order to reclaim "input" VAT fraudulently. It involves: (1) a fictitious or unidentified importer (or "missing trader"); (2) a series of intermediate traders ("buffers") who pass the goods along the chain; (3) a final UK purchaser and exporter, who does not charge VAT, but who reclaims VAT.

In *Chahal*[2] the defendants ran buffer companies, which made little profit, but seemed to exist principally to obscure the "missing trader". The defendants were found to have benefited from crime in the sum of the total input tax reclaimed. On appeal it was argued that those who acted as "buffers" did not benefit from crime because their role was to pass the funds on to others involved in the criminality. It was argued that the true beneficiary from crime was the final UK purchaser. The Court of Appeal held that simply because a party acted as a buffer and did not see the full fruits of the criminality because he elected to pass the funds on to the next stage of the fraud does not mean that the buffer did not "benefit" from crime. The court is not concerned with profit made by a defendant. Normal accounting practice relates to lawful traders conducting lawful business, where transactions are not a sham or designed to obscure criminality. Each payment to or receipt of a credit by a buffer therefore falls to be considered as part of "benefit". The defendants made huge sums of money through the reclaiming of money from HMRC – it was entirely proper to treat the reclaimed input tax as benefit.

Boyle Transport[3] addressed "piercing the corporate veil", a common issue for the appellate courts. The Court of Appeal held that where an issue of lifting the corporate veil was raised in criminal confiscation cases, Crown Courts needed to take into account the general propositions which were applicable to such cases:

(1) the test was not simply one of justice, which would be vague, unprincipled and give rise to uncertainty and inconsistency in decision-making;

(2) in assessing the reality of the matter, the Crown Court could not depart from the established principles which related to the separate legal status of a limited company;

(3) the confiscation process under POCA was not aimed at punishment and the punishment addressed by the sentence should not be topped up by the confiscation process;

(4) the principles relating to the doctrine of lifting the corporate veil in the confiscation context were the same as in the civil courts – POCA contained no provision sanctioning a departure from the ordinary principles of company law;

(5) regard should be had to the nature and extent of the criminality involved;

(6) where a company involved in relevant wrongdoing was solely owned and controlled by the defendant, it did not necessitate a conclusion, in a confiscation case, that it was an alter ego company, whose turnover and assets were to be equated with being property of the defendant himself;

(7) all such decisions had to be geared to the facts and circumstances of the case ([88–97], [106], [108], [112], [126], [131]). In such cases regard should be had to the situations set out in *Seager*[4] as to when the corporate veil may be pierced (the concealment and evasion principle). In the later case of *Powell* and *Westwood* it was held that the Crown had failed to establish the necessary conditions for personal liability.[5]

In *Mehmet*[6] the Court of Appeal was asked to find that the appellant was a mere custodian of monies, rather than a beneficiary. The appellant had admitted being involved in a conspiracy whereby he would enter banks and obtain monies fraudulently. He would hand over cash for a modest payment, said to be £200. The court did not accede to the argument that the appellant should be treated as a mere custodian. There was a distinction to be made between a courier or custodian of stolen property who sought to exercise no rights in relation to the property, and a person who obtained the property from another and thereby assumed the rights of the owner. By his actions, the appellant had usurped the rights of the true owners of the monies. Couriers, by contrast, hold property with the permission and under the direction of the person who transferred it to them.

In *Muddassar*[7] where the criminal lifestyle provisions applied, the Court of Appeal reiterated that it was open to the judge at the confiscation proceedings in determining the benefit figure, to draw robust and legitimate inferences from the evidence he received, in a case where defendants declined to give evidence.

The calculation of the realisable amount

Bello, Adeniran & Bello[8] re-emphasised that when determining the beneficial interest a defendant holds in a property, a key issue will be to determine the "mutual intention" of the parties. In this case, the value of two properties which were registered in the names of two of the defendants' children were taken into account when determining the available amount. On the facts Mr Bello had located the properties, he had bid on them at auction, and he (generally) managed the properties. Rents were paid into accounts under the control of Mr and Mrs Bello. Funds were not remitted to the children; rather Mr Bello himself used them to pay the mortgages on the properties. The judge could not be said to have fallen into error in concluding as he did.

1 [2016] EWCA Crim 1049.
2 [2015] EWCA Crim 816.
3 [2016] EWCA Crim 19.
4 [2009] EWCA Crim 130.
5 [2016] EWCA Crim 1043.
6 [2015] EWCA Crim 797.
7 [2017] EWCA Crim 382.
8 [2015] EWCA Crim 731.

Tainted gifts

In *Lehair*[9] the appellant sought to argue that a deposit of stolen monies into her husband's bank account was not a tainted gift pursuant to s.77(5)(a) of POCA because the transfer occurred on the date on which the offence was committed. The court (unsurprisingly) held that a literal interpretation of s.77(5)(a) would lead to:

> …absurdity or gross anomaly. [...] It could not have been intended that criminals have a day's grace to dispose of their assets or to require either the prosecution, the enforcement agencies or the court to devise a scheme, outside the Act, to catch relevant assets…We have no hesitation in endorsing the argument that there must be a purposive construction of the provision and in doing so, the subsection must read as though the date upon which an offence is committed must refer to the actual time of commission and after which any tainted gift will fall for the consideration in the court's powers of confiscation.

In *Usoro*[10] it was held that child maintenance payments made by the defendant were not tainted gifts within s.78 of POCA. In *Johnson*[11] the court provided guidance on the approach which a judge should take where the Crown sought to recover the value of a tainted gift which appeared to be worthless at the date of the making of the confiscation order. It was held that the judge should carefully consider three matters: the robustness of the evidence of the value of the tainted gift, the proportionality of making an order in the sum sought and whether the term of imprisonment to be imposed in default should be reduced. Although there was an obligation to impose a term of imprisonment in default when making a confiscation order, where the court was satisfied that enforcement was impossible, it could make a substantial reduction in the term imposed in default. That would inevitably be a wholly exceptional course, as the court would usually have limited confidence that an asset which had been apparently given away could not be recovered by the offender or that he could not satisfy the order by other means.

Section 10A –"Interested parties"

The Court of Appeal has also provided further clarification in relation to the (relatively) new s.10A in POCA. An individual is not entitled to make representations to the court under s.10A of POCA as an "interested party" if the defendant has no interest in the property concerned i.e. if the individual is a recipient of a tainted gift. Of course the individual can still give evidence on behalf of the defendant, but will not be an interested party in his/her own right: *Hayes.*[12] More recently in *Taylor*[13] Manchester Crown Court, sympathising with the difficulties faced by the wife in her s.10A application, reiterated that:

> "at the end of the day…cases in which the joint legal owners are to have intended that their beneficial interests should be different from their legal interests will be very unusual".

Proportionality

"Proportionality" played a key role in the Supreme Court's determination in the case of *Harvey*[14]. The Supreme Court considered whether, in assessing the amount of the benefit obtained by a company for the purpose of a confiscation order, any VAT accounted for and/or paid for to HMRC should be subtracted from the turnover figure prior to any final calculation of the benefit.[15]

The Supreme Court held that as a matter of ordinary principles of statutory construction, the VAT paid or accounted for to HMRC was not to be deducted as this was incompatible with the plain language of s.76(4): a person obtains money or property if he assumes the right of owner over it and, following cases such as *Banks*[16] and *May*[17] it was a core feature of confiscation proceedings that the gross proceeds of crime were considered as opposed to the net profit. In this instance, the company had been the legal owner of the money in its bank account. The argument for deduction failed to focus on the moment when the moneys were paid into the account, but depended on later payments out of the account (see [13], [30], [94-102]).

However, by a three-two majority (Lords Hughes and Toulson dissenting), the court allowed the appeal on the basis that including the VAT which had been accounted for and/or paid for to HMRC would be disproportionate. Following *Waya*, where the proceeds of crime were returned to the loser, it would be disproportionate to treat such proceeds as part of the benefit obtained by the defendant as it would amount to a financial penalty, which should not be imposed through the application of POCA. Given that VAT was effectively collected by a taxpayer, the instant situation was quite similar to that of property restored to the victim, and the policy behind the principle was in part that a defendant who made good a liability to pay should not be worse off than one who did not.

The majority distinguished VAT from income and corporation tax in four ways (see [25-29]). Of particular relevance was the fact that income tax and corporation tax are computed on a taxpayer's overall, or aggregate, net income, and therefore cannot be allocated to a particular transaction or the obtaining of particular property. By contrast, a VAT liability arises on each taxable supply, and therefore can be directly and precisely related to the obtaining of the property in question under POCA. In a case where the VAT on a particular transaction has been paid, or even accounted for, to HMRC, the government would enjoy double recovery through VAT and POCA.[18]

Whilst only applicable to cases where VAT has been accounted for and/or paid to HMRC, the job of a Crown Court judge certainly has not become any easier as a result of *Harvey*. It has also left open the position regarding VAT for which a defendant is liable but for which he has not accounted. There may well be a possibility of utilising some of the findings in *Harvey* to argue for a deduction in such circumstances, particularly those relating to how VAT can be distinguished from corporation and income tax (see [27-28]). The case of *Harvey* following close on the heels of *Ahmad*[19] does allude to the fact that whilst POCA remains as draconian as ever, arguably even more so given the changes introduced by the Serious Crime Act, which include the reduction on time to pay and the increase in default sentences, the Supreme Court is concerned to ensure that confiscation orders are proportionate and do not result in double recovery.

However, it should be remembered, as the Court of Appeal observed obiter in *Alston & Alston*[20] that findings that a confiscation order would be disproportionate are limited to "exceptional cases".

The "proportionality" argument was used effectively, however, in *McCool & Harkin*[21] where at first instance both defendants' benefit from criminal conduct was held to include the entirety of social security payments received after making false representations. The Court of Appeal in Northern

9 [2015] EWCA Crim 1324.
10 [2015] EWCA Crim 1958.
11 [2016] EWCA Crim 10.
12 2016 WL01085958.
13 Unreported 9 February 2017.
14 [2015] UKSC 73.
15 For the facts, see the authors' article in [2014] *Archbold Review*, Issue 10.
16 [1997] 2 Cr.App.R. (S). 110.
17 [2008] UKHL 28.
18 In *Smith and Ouzman Ltd*, in January 2016 at Southwark Crown Court, Mr Recorder Mitchell QC rejected the submission that income tax and national insurance paid should be deducted from the recoverable sum on the basis of double recovery.
19 [2014] UKSC 36.
20 [2015] EWCA Crim 936
21 [2015] NICA 31.

Ireland held that this did not reflect the proportionality approach required by *Waya*. Both defendants would have been entitled to a lesser amount by way of social security payments in any event, and so the benefit from criminal conduct should be limited to the difference between the legitimate amount that would have been payable, and the illegitimate amount in fact obtained. The authors would suggest that it is doubtful that this case would in fact have been decided differently prior to the re-emphasis of "proportionality" in *Waya*.

The issue of whether gross proceeds should be confiscated was also considered in *Dewart*[22] where the appellant was convicted of fitting a group of lorries with devices for evading the tacograph recording equipment, so enabling drivers to work for longer periods than those permitted by law. The appellant contended that the benefit should have been limited to the net profit made from the work undertaken illegally and it was disproportionate to hold otherwise. Referencing the decision of *King*[23] the Court held that a court in making a decision will need to consider the distinction between legitimate business activities which are tainted by associated illegalities and cases where the entire undertaking is unlawful. A finding of the latter militates in favour of making an order that is directed at the gross takings of the business. In this case the business had been manipulated to work in an entirely unlawful way. It was therefore proportionate to make a confiscation order in relation to the gross profit figure. A similar argument was advanced, unsuccessfully, in *Holbrook*.[24]

The Court of Appeal also considered proportionality when giving guidance on making both a confiscation and compensation order in *Davenport*.[25] In *Balqis*[26] a judge included the entirety of the value of a property in the appellant's benefit figure, despite that property being subject to an outstanding mortgage. The court re-emphasised that following the now well-established principles in *Waya*, to comply with the requirements of proportionality, the outstanding mortgage should not form part of the benefit figure; a defendant has not "obtained" that part of the property.

In *Kakkad*[27] the appellant had been convicted of conspiracy to supply class A and B drugs. It was argued that it was disproportionate to make a confiscation order because his benefit had been fully extinguished when the police seized the drugs. The argument was rejected – unsurprisingly, in the light of the previous decisions in *Smith*[28] and *Islam*[29]. In such a case the court is concerned with the value of the property to the offender when he obtained it. Different policy considerations arise where the offender restores property to the owner. Furthermore, the court reiterated that proportionality should be considered in the context of the final order and the legislation as a whole. The value of seized drugs will not form part of his "free property", from which the amount to be paid is calculated. *Kakkad* was applied in *Brooks*.[30] The court also reiterated in *Brooks* that in relation to hidden assets the court has an obligation to come to a just and proportionate view based on the whole of the evidence [41] (see also *Kelly*[31]).

Smith was also followed in *Doran & Gray*[32] where the Court of Appeal emphasised that if a defendant derived a pecuniary advantage in consequence of the evasion of a debt, even a fleeting advantage, then he was to be treated as having received that pecuniary advantage and, provided there was no risk of double recovery by HMRC, a confiscation order in the amount of the pecuniary advantage obtained is proportionate. More recently, in *Neuberg*[33] it was held not to be disproportionate for a court to make a confiscation order where an offender had obtained a benefit through carrying on a business under a prohibited name (she had pleaded guilty to trading under a prohibited name contrary to s.216 of the Insolvency Act 1986), and to determine that the benefit obtained through carrying on that business under the prohibited name concerned was the turnover (reliance had been placed on *McDowell & Singh* (see above), which the court held had no connection to *Waya*).

Conclusion

The number of confiscation cases taken to appeal continues apace. But the appellate courts have been keen to emphasise that it is only an exceptional case, likely involving double counting, where it will be disproportionate to treat the full proceeds of the criminal activity as subject to confiscation.

[In Part 2 the authors will be examining other recent issues including "consent orders", procedure and enforcement.]

22 [2015] NICA 35.
23 [2014] EWCA Crim 621.
24 [2015] EWCA 1908 (Crim).
25 [2015] EWCA Crim 1731. The case will be discussed in Part II.
26 [2016] EWCA Crim 1726.
27 [2015] EWCA Crim 385.
28 [2001] UKHL 68.
29 [2009] UKHL 30.
30 [2016] EWCA Crim 44
31 [2016] EWCA Crim 1505.
32 [2015] EWCA Crim 384.
33 [2016] EWCA Crim 1927.

Unconscious Sex

By J.R. Spencer

At a recent conference[1] Paul Jarvis gave an interesting paper about some issues of consent which ss.74-76 of the Sexual Offences Act 2003, for all their complexity, leave awkwardly obscure. One of these is whether a person can validly consent in advance to sexual acts carried out upon them when they are unconscious.

The issue came before the Supreme Court of Canada in *JA*.[2] A woman complained to the police that her partner had choked her insensible, and while she was in that state, penetrated her anus with a dildo. On the basis of this complaint the partner was, understandably, prosecuted for sexual assault. Then having tried unsuccessfully to have the prosecution stopped, she changed her story and told the court that she and her partner had been experimenting with "erotic strangulation" and

1 The first in a series intended to promote discussion on criminal justice issues between academics and practitioners; see https://www.law.ox.ac.uk/research-and-subject-groups/assize-seminars-cutting-edge-criminal-law/assize-seminar-2017.

2 [2011] 2 SCR 440.

that she had consented both to his half-strangling her and to his performing sexual acts upon her body while she was unconscious. At first instance the judge[3] convicted him, ruling that even if the complainant's evidence was true, her consent was invalid because it is impossible to consent to sex in advance. The Ontario Court of Appeal, by a majority, thought otherwise and quashed the conviction. But on further appeal to the Supreme Court of Canada the trial judge's ruling was approved, this time by a majority of six justices to three, and the defendant's conviction reinstated.[4]

What would be the legal position if this case arose in England? The decision in *JA* was based on the wording of the relevant provision of Canadian Criminal Code.[5] This is significantly different from the wording of the consent provisions of the Sexual Offences Act 2003, which suggest – at least at first sight – that the result here would be different. Section 75 provides that if "the complainant was asleep or otherwise unconscious at the time of the relevant act" this gives rise to an evidential presumption that the complainant did not consent and that the defendant did not reasonably believe she did. But this presumption, like every other evidential presumption, is rebuttable. In principle this means that it is open, in such a case, for the defendant to lead evidence suggesting that, despite being unconscious, the complainant really did consent: and the defendant is then entitled to an acquittal unless the Crown can persuade the court that she did not. If the law allows the defendant to lead evidence that the unconscious person did in fact consent, then logically it must also accept the possibility that an unconscious person can do so. And in practical terms, the only way in which an unconscious person can give consent is to give it in advance.

Not everyone is happy to accept this, and some maintain that, in order to protect the complainant's sexual autonomy properly the law should treat all forms of advance consent to sexual activity as invalid. Among those who take this line are Rook and Ward, who argue that consent to sexual activity must mean "actual consent in the mind of the complainant at the time of the sexual activity in question", a quality which cannot be present in the mind of an unconscious person. They therefore "consider it likely that the courts in this jurisdiction would interpret the meaning of consent in the same way as the Canadian Supreme Court."[6] Sensing that this rule could be thought capable of producing harsh results, they then qualify its effect by saying "The necessity to prove that the defendant did not reasonably believe that the complainant was consenting will ensure that no injustice arises."

Jarvis does not find Rook and Ward's qualification of the rule that they espouse convincing. If consent to sexual acts given in advance of unconsciousness is legally invalid, he says, a person who realises that the object of his sexual attentions is unconscious cannot believe that this person validly consents. Such a defendant is in the same position as one who has deceived the apparently consenting person as to his identity, or the nature and purpose of the act: situations expressly covered by s.76, which decrees that in these cases the deceived person is conclusively presumed not to consent, and the defendant to understand this.

If this is so, it would seem to follow from the rule espoused by Rook and Ward that the husband who wakes his sleeping wife by kissing her on the lips, or by touching her more intimately, has in theory no defence to a charge of sexual assault – even if he believes, reasonably and rightly, that she would welcome this; or even if, before falling asleep, she had asked actually asked him to wake her in this way. This does not seem a desirable conclusion for the law to reach; and Jarvis therefore questions whether the need to protect sexual autonomy, or the other policy reasons advanced, are really strong enough to require the law to reach it.

For myself, I cannot see how Rook and Ward's view about the invalidity of consent given in advance of unconsciousness can possibly be squared with the terms of s.75 of the Sexual Offences Act. Furthermore, the argument about the need to protect autonomy surely cuts both ways. If someone really wishes to allow another person to have sexual contact while they are unconscious, the law is interfering with their sexual autonomy if it tells them that they cannot do so and that if the other person does touch them he will commit a crime.[7] I suspect the theory that a person cannot give advance consent to sexual behaviour when unconscious grew up as part of the rejection of the archaic rule that husbands cannot rape their wives – a rule based on the notion that a wife on marriage gives irrevocable consent to future sex. But the two situations are clearly different. The ancient matrimonial rule denied the wife the right to refuse sex, even if she did not want it. The supposed rule about unconscious sex denies a person the right to permit sex, even if they wish to do so.

In reality, the issue under discussion is most likely to arise in the context of the condition which psychologists have labelled "somnophilia": a fetish in which a person's sexual desires are directed towards sexual acts carried out upon the bodies of persons who are unconscious.

To satisfy such a desire, a person will usually have to persuade his partner to take a drug that renders him or her unconscious. Even if practised only on consenting patients, amateur anaesthetics is a dangerous pursuit which can easily cause death or serious injury: as witness the old manslaughter case of *Pike*, who accidentally killed one of his sexual partners by getting her to inhale a cleaning fluid containing carbon tetrachloride.[8] In view of this, it could be argued that the danger involved in practices of this sort is a good reason for treating as legally invalid the purported consent of those who agree to submit to sexual acts when they are unconscious.

This may indeed be so. But the mischief in such behaviour, surely, is not the invasion of the unconscious person's sexual autonomy but the risk to life and limb. And if their consent is to be overruled on paternalistic grounds of public policy[9], it is surely not their consent to sex that should be treated as invalid but their consent to the administration of the substance intended to render them unconscious. In such a case the appropriate offence, if any, is not one of the sexual offences, but the offence of maliciously administering a noxious thing contrary to s.23 of the Offences Against the Person Act 1961.[10]

3 At a bench trial – i.e., a trial by judge alone.
4 The penalty imposed is not revealed in the report.
5 Section 273.
6 *Rook and Ward on Sexual Offences Law and Practice*, 5th ed (2016), §1.183.
7 A point made by the dissenting Canadian justices in *JA*.
8 [1963] Crim LR 563.
9 A contentious issue; the decision of the House of Lords in *Brown* [1994] 1 AC 212, where by a majority the House of Lords held that a person cannot validly consent to the infliction of actual bodily harm in the context of sado-masochism, has prompted much discussion.
10 "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding ten years." As interpreted by the courts, intent to harm is not a necessary ingredient of this offence, and the informed consent of the "victim" is not necessarily a defence: see *Cato* [1976] 1 WLR 110.

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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) 888019

Archbold Review is published in 2017 by Thomson Reuters (Professional) UK Limited, trading as Sweet & Maxwell.
Registered in England & Wales. Company number 1679046. Registered office 5 Canada Square, Canary Wharf, London E14 5AQ.

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www.sweetandmaxwell.co.uk
ISSN 0961–4249

Typeset by Matthew Marley
Printed in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire, SO40 3WX

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