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.