bust treatment and those who cannot. Unfortunately, there is overwhelming evidence that even trained legal professionals may as well flip a coin as rely on their own judgment on witnesses' demeanour.[20] Further, if there is one thing research has taught about vulnerable witnesses it is that professionals often fail to spot them.[21] Why should professionals assume they are better at spotting more subtle issues in an otherwise robust-seeming witness?

Alternatively, one might argue that what is improper in a police cell is acceptable in cross-examination because witnesses get the chance to say the good stuff beforehand to a friendly questioner, and a right of reply afterwards. The system, in other words, provides a balance. Unfortunately, advocates know perfectly well it is possible to use comment and innuendo to craft questions which are quite unanswerable either in cross- or in re-examination, and, if the author is honest—and speaks as a practitioner—that is often the intention.[22]

More importantly, it is very hard to see why counsel is ever ethically justified in laying unreliable and misleading evidence before the court. It is one thing to argue for a tendentious interpretation of the evidence in closing. It is quite another, surely, to manipulate the source material. One is proper advocacy. The other is something very much akin to evidence-tampering.

While the difficulties associated with obtaining reliable information from vulnerable witnesses are greater than those for robust adults, the research suggests quite strongly that judges and advocates need to be more vigilant in policing all cross-examination.

If, as Lord Chief Justice Judge put it, "the objective of cross-examination is to investigate the truth by questions which must be clearly understood by the witness,"[23] the conclusion to be drawn from the research is that any cross-examination involving an advanced vocabulary and complex sentence structures, heavily leading questions or emotional pressure must be monitored, even where the witness is a robust-seeming adult.

20 Snooks et al, *ibid.* at 13.

21 Joyce Plotnikoff and Richard Woolfson, *Measuring Up?* (Nuffield-NSPCC 2009).

22 And if practitioners aren't honest, luckily others have been: any review of advocacy manuals provides multiple clear admissions. See also Emily Henderson, "Mapping the Theory of Cross-examination in relation to Children" in Helen Westcott, Graeme Davies and Ray Bull (eds), *Children's Testimony: Psychological Research and Forensic Practice* (Wiley Publications, 2001) describing interviews with English and New Zealand barristers.

23 The Rt Hon The Lord Judge, "The Evidence of Child Victims: the Next Stage", Bar Council Annual Law Reform Lecture, November 21, 2013: http://www.barcouncil.org.uk/media/241783/annual_law_reform_lecture_rt_hon_the_lord_judge_speech_2013.pdf [accessed August 19, 2014] at 8.

Feature

Ahmad and *Fields*—Clarification by the Supreme Court or a Precursor to More Litigation? Recent Developments on Restraint and Confiscation.

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

Further to the authors' article earlier this year,[1] this paper discusses the Supreme Court judgment in the combined appeals of *Ahmad* and *Fields*, which was handed down on June 18, 2014.[2] An analysis of other recent appellate decisions follows.

In summary, the Supreme Court in *Ahmad* and *Fields* (Lord Neuberger, Lord Hughes, Lord Toulson, Lord Sumption and Lord Reed) held that in cases where there is a finding of joint benefit, a confiscation order should be made for the whole value of the benefit (as opposed to the benefit being apportioned between the respective defendants) but the confiscation orders should provide that they are not to be enforced to the extent that the sum has been recovered by way of satisfaction of another confiscation order.

As readers may recall, the applicants in *Fields* had argued that in a case where defendants jointly obtain property, the Court should ascertain each defendant's "beneficial interest" in the property obtained; and the *Ahmad* appellants had argued that the defendants should be treated as jointly and severally liable and so should only have to pay the benefit figure between them.

The Supreme Court, perhaps unsurprisingly, following a long line of authorities,[3] held that each of the appellants were correctly found to have benefited in the full amount. There is clearly a practical consideration in this reasoning as:

"... if the court could not proceed on the basis that the conspirators should be treated as having acquired the proceeds of the crime together, so that each of them 'obtained' the 'property', it would often be impossible to decide what part of the proceeds had been 'obtained' by any or all of the defendants. It is one thing for the court to have to decide whether a defendant obtained any property, which is required by the 2002 Act. It is another for the court to have to adjudicate on the respective shares of benefit jointly obtained, which is not required" [56].

1 [2014] *Archbold Review* 6-9.

2 [2014] UKSC 36; [2014] 3 W.L.R. 23.

3 *May* [2008] UKHL 28; *Green* [2007] EWCA Crim 1248; *Allpress* [2009] EWCA Crim 8; *Mackle* [2014] UKSC 5.

However, the Court was careful to specify that the fact that defendants were jointly involved in the commission of a crime does not automatically justify a conclusion that they jointly obtained the resulting property and "judges in confiscation should be ready to investigate and make findings as to whether there were separate obtainings" [51].
The appeals were allowed in part on the basis that the recovery of more money than was obtained by the criminal enterprise would not be proportionate:

"To take the same proceeds twice over would not serve the legitimate aim of the legislation and, even if that were not so, it would be disproportionate. The violation of A1P1 would occur at the time when the state sought to enforce an order for the confiscation of proceeds of crime which have already been paid to the state" [72].

Thus in circumstances where a finding of joint benefit has been made, the particular confiscation order concerned can "*be enforced only to the extent that the same sum has not been recovered through another confiscation order made in relation to the same joint benefit*". The orders in each case were therefore amended to prevent recovery of more than the same joint benefit.
Whilst the judgment will prevent the State from recovering the proceeds of crime several times over (depending on the number of defendants), it may cause practical anomalies. Consider for example one multi-handed indictment split into three trials. It is unlikely that an application to stay the enforcement proceedings in relation to those defendants convicted in trial one pending the outcome of trial three (whenever that may be) will be successful. As such, depending on the realisable assets of those defendants in trial one, it is at least conceivable that those defendants subsequently convicted in trial two and three and then subject to confiscation proceedings, may find themselves in an advantageous position where most of the confiscation order has already been paid. The Supreme Court recognised that it may well produce inequality between criminal conspirators if the order is paid by only one of them. However, this issue was dismissed as an "inherent feature of joint criminality", with the example given of a victim of fraud suing conspirators; the victim would be "entitled to enforce against whichever defendant he most easily could". The Supreme Court held that, in such cases, "the losses must lie where they fall, and there is nothing surprising, let alone wrong, in the criminal courts adopting that approach" [73].
The Supreme Court also suggested that it is unhelpful to use technical property law concepts of "joint ownership" or "owners in common" when dealing with property obtained through a criminal enterprise; criminals who set out to steal an asset do not become "joint owners" of it in a legal sense. It is better, it said, to use the language of "obtaining" [44]-[45].

Restraint
In *CPS v Eastenders Group*, the appellant receiver appealed against a Court of Appeal decision declining to order the payment of his remuneration and expenses from the assets of the first respondent group of companies (Eastenders Group), or that the CPS itself should reimburse his costs.[4] This decision came after the Court of Appeal had quashed the restraint and receivership orders obtained by the CPS against Eastenders Group and two individuals who jointly owned the group of companies. The terms on which the CPS asked the receiver to act stated that his remuneration costs and expenses were to be drawn from the companies' assets, over which he had a lien. The CPS had not undertaken to indemnify him in the event that such assets proved insufficient.
The appeal was allowed in part. It was held that the companies' rights to property under Protocol 1 art.1 of the European Convention on Human Rights would be breached if their assets were taken to pay for the appellant's remuneration and expenses, and thus the appellant's lien over the companies' assets was unenforceable. However, the appellant did have a claim in unjust enrichment against the CPS and was entitled to recover his proper remuneration and expenses from the CPS because the work done and expenses incurred were at the CPS's request. The Court suggested that there might be cases where a "Pigott condition" would be appropriate, providing that if property was not shown to be the realisable property of the defendant, the receiver's costs should be borne by the applicant, i.e. the prosecutor.[5] Practical guidance was also provided by the Supreme Court, to prosecutors, list officers and Judges:

(a) When the CPS is proposing to seek a restraint order, particularly coupled with a receivership order, it should give the listing office as much notice as possible, together with a proper time estimate. It is not acceptable for such an application to be forced into a busy list, with very limited time for the judge to deal with it, except in the comparatively rare case of a true emergency application.

(b) The fact that such applications are made ex parte, and the potential seriousness of the consequences for defendants, mean that the prosecution and the court have a special duty of candour.[6] A material failure to observe that duty might well be regarded as serious misconduct within the meaning of s.72 of the Proceeds of Crime Act 2002 (POCA).

(c) Before making an application the prosecutor must consider carefully the statutory conditions for making such an order. Careful thought must be given to who it is that is alleged to have been party to the criminal conduct under investigation and to the potential adverse effect on others who are not.

(d) The making of a receivership order should never be a rubber-stamping exercise; a judge must look at such an application with a critical eye. The court has a responsibility to consider what conditions it should contain. Where third parties are likely to be affected, the court must still consider carefully the potential adverse consequences to them. A judge who is in doubt may always ask for further information and require it to be properly vouched for.

(e) A particularly complex case may merit being heard by a High Court judge.

In *Ashford v Southampton CCI*[7] the Court of Appeal also stressed the need for "scrupulous attention" to the statutory requirements and the need for the court to have the

4 [2014] UKSC 26.

5 *Pigott, Re* [2010] EWCA Civ 285; [2010] S.T.C. 1190.
6 Approving *Stanford International Bank Ltd (In Receivership), Re* [2010] EWCA Civ 137; [2011] Ch. 33.
7 [2014] EWCA Crim 1244.

material and the time it needs to consider the points that might be made on behalf of a defendant who is absent. This case also provides guidance for judges on how to approach the decision of whether there is "reasonable cause" to believe that the alleged offender had benefited from criminal conduct. Referring back to what Hooper LJ had said earlier in *Windsor*,[8] the Court said:

"It is vital that the judge is given material on which he can reach the conclusion himself that there is reasonable cause. He cannot find it just because he is told that an investigation has confirmed the suspicions".

Confiscation: recent cases

In *Onuigbo* the appellant appealed against a confiscation order.[9] Of the various issues raised before the Court of Appeal of particular significance for practitioners was a point relating to disclosure. At the confiscation hearing the appellant had not been represented by the team of legal representatives who represented her at trial because she had run out of money. Her former solicitors exercised a lien over the case papers and so the new representatives were entirely dependent upon the prosecutor to make disclosure of material for the purposes of confiscation. The prosecution provided all of its s.16 POCA statements and appendices together with the trial documents but refused to provide the schedule of unused material. At first instance it was ruled that the prosecution had provided sufficient material for the defendant to furnish particulars of her finances in accordance with s.18 of POCA. The Court of Appeal expressed puzzlement at this: the unused material could hardly be said to be irrelevant given that the issues at trial and confiscation were the same, namely the legitimacy of the source of funds passing into the appellant's bank accounts. Defence counsel in the confiscation proceedings, it said, had a justifiable interest in making his own examination of the schedule in case something had been missed. The Court of Appeal therefore held that it should have been made available to the defence prior to any rehearing; the prosecutor's function was the same as it would be in preparation for trial.

Calculation of benefit

In *Tatham*[10] the Court of Appeal summarised what it described as the "important principles" in cases concerning the fraudulent evasion of duty payable on the importation of cigarettes:

(a) mere couriers or incidental custodians, who are rewarded by way of fixed fee and have no beneficial interest in the tobacco, are likely to be excluded from the definition of "obtaining property" for the purpose of confiscation orders[11];

(b) the time at which the duty becomes chargeable on tobacco is when the ship carrying it enters the limits of the UK port and, as long as the requisite *mens rea* is present, "evasion" occurs from the moment that the excise duty is charged on the goods[12];

(c) whether a person "causes" the importation is a question of fact and causation must not be too remote.[13] Furthermore, s.1(4) of the Finance (No.2) Act 1992 imports (albeit indirectly) the test that such a person "causing" must retain a "connection" to the goods at or after the excise duty becomes payable[14];

(d) "holding" for the purposes of reg.13(1) of the Tobacco Products Regulations 2001 (the Regulations) is a legal concept. It does not require physical possession of the goods and constructive possession can be sufficient. The test for "holding" is that the person is capable of exercising *de jure* and/or *de facto* control over the goods, whether temporarily or permanently, either directly or by acting through an agent[15];

(e) a "holder" need not have any beneficial ownership in the goods (nor need he have "caused" their importation). However, a courier or person in physical possession who lacks both actual and constructive knowledge of the goods, or the duty which is payable upon them, cannot be the "holder" within reg.13(1) of the Regulations.[16]

In *Hussain*, a confiscation order was made in relation to fraudulently imported cigarettes.[17] They were said to be worth £56,255.40 on the lawful market. However, the cigarettes could not have been lawfully sold in this country because there had been no assessment of the quality and safety of the product. Accordingly, the Court of Appeal held that their value was their value on the illegitimate "black market". The only evidence of the black market value came from the defendant himself, and an order was substituted in this sum, adjusted for inflation to £40,096.42.

In *Carnall*[18] and in *Elsayed*[19] the Court of Appeal reiterated that the correct value to be applied when calculating benefit in drugs cases is the street value of the drugs, rather than the wholesale value.

In *Perrin*, it was held that, pursuant to s.74(4) of POCA, the benefit obtained by an offender convicted of cheating the Revenue was the sum routed back to him out of share subscription monies raised as part of his scheme to facilitate and induce others to unknowingly submit claims for tax relief based on false share values.[20]

In *Hussain*,[21] it was held that rents received by a landlord who had let his property to tenants in breach of a planning enforcement notice constituted his benefit for confiscation purposes, notwithstanding that the leases were lawful.

Available amount

In relation to the burden of proof, the Court of Appeal in *Newell* re-emphasised that clear and cogent evidence is required from the defence to satisfy the court that money does not belong to the defendant but another.[22] Similarly, in *Ernest* the judge had rejected the appellant's evidence that he had no hidden assets.[23] That being so, the judge was entitled to conclude that the appellant had not discharged the burden of establishing that his realisable assets were less than the benefit figure obtained as a result of his general criminal conduct.[24]

8 [2011] EWCA Crim 143.
9 [2014] EWCA Crim L.R. 465.
10 [2014] EWCA Crim 226.
11 *May* [2008] UKHL 28.
12 *Bajwa* [2012] 1 W.L.R. 601.
13 *Chambers* [2008] EWCA Crim 2467; *Taylor and Wood* [2013] EWCA Crim 1151.
14 *Bajwa* [2012] 1 W.L.R. 601.
15 *Taylor and Wood* [2013] EWCA Crim 1151.
16 *Ibid.*
17 [2014] EWCA Crim 1181.
18 [2014] EWCA Crim 287.
19 [2014] EWCA Crim 333.
20 [2014] EWCA Crim 1556.
21 [2014] EWCA Crim 2344.
22 [2014] EWCA Crim 761.
23 [2014] EWCA Crim 1312.
24 Similar pronouncements were made in the cases of *Carnall* [2014] EWCA Crim 287 and *Bowler-Degan* [2014] EWCA Crim 1190.

Absconders

With so little previous case law in this area, *Okedare* is of particular interest.[25] Here it was held that a person who had absconded and been convicted of a criminal offence in his absence could subsequently be made subject of a confiscation order under POCA at a confiscation hearing from which he had also absented himself because he was still on the run. The court had the power to make such an order under s.6, as applied by s.28.

Certificates of inadequacy

The Court of Appeal held in *Mundy v CPS* that a defendant is not entitled to a certificate of inadequacy under s.14 of the Drug Trafficking Offences Act 1986 unless he can demonstrate that an asset has reduced to a nil value.[26] In this case, the value of a Spanish property had been taken into account in the original confiscation hearing as part of his realisable property. The applicant contested this, arguing that it was currently the subject of contested legal proceedings in Spain and, as such, was not realisable, could not be seized, and therefore should be considered afresh after the issue of a certificate of inadequacy. Rejecting this argument, the Court of Appeal said that the applicant was not entitled to a certificate of inadequacy as he could not prove that he had insufficient assets to meet a confiscation order. Any difficulty in realising his interest in his property had to be disregarded; once the Spanish proceedings were resolved, the availability and value of the property could be determined.

Calculation of benefit in a second confiscation order

In *Chahal*, the Court of Appeal confirmed that where there was a second application for a confiscation order requiring an assessment of the benefit received from general criminal conduct, s.8 of POCA confined the assessment of the amount of benefit to the period after the date of the first confiscation order.[27]

Compensation and confiscation

In *Beaumont*, the Crown Court judge had imposed not only a confiscation order but also a compensation order in the same amount, having decided that the defendant had sufficient means to satisfy both orders given her available assets (which included 50 per cent of the equity in the home she jointly owned with her husband and their savings in a joint bank account).[28] On appeal the defendant argued that the judge should have ordered the compensation to be paid out of the confiscation order because she no longer had any income from employment and it would be practically impossible for her to pay both orders. The Court of Appeal held that whilst in principle the justice of the case supported the imposition of both orders, a compensation order requires the court to be satisfied that the appellant would have sufficient means to satisfy both orders in full. Here she did not have the means to satisfy both orders out of income and savings; she was unemployed, the prospects of her obtaining significant income in the future were slight, and her savings had been reduced. Thus a s.13(6) order was made for the full amount of the confiscation order sum, and the monies paid under the confiscation order would be used to satisfy the compensation order. Applying settled case law,[29] the Court also held that it is not generally appropriate to make an order which could be satisfied only by the selling of the family or matrimonial home.

Costs

In *R. (on the application of Virgin Media Ltd) v Zinga* the costs of an appeal against a confiscation order arising out of a private prosecution were paid from central funds under the Prosecution of Offences Act 1985 s.17.[30] It was held that it was necessary to determine whether it had been proper and reasonable to instruct the solicitors and/or advocates actually instructed (which would in any significant prosecution involve the examination, testing and seeking of tenders from the competition in the relevant market before selecting the solicitor and advocate instructed), and that the relevant costs had been reasonably incurred.

Some helpful reminders

In *Eddishaw*, the Court of Appeal has reminded us that evidence is required before a confiscation order can be made.[31] A confiscation order made following a defendant's guilty plea to conspiring to cheat the Revenue by producing counterfeit vodka was quashed, because in valuing the benefit obtained, the judge's finding that the wholesale black-market value of counterfeit vodka was £5 a bottle had not been supported by any evidence. In *Aniakor* it reminded practitioners to double-check that the confiscation order is being made under the correct Act.[32] And finally, in *Hodge* it reminded practitioners of the need to get their maths right.[33]

What next?

With the rise of organised crime and economic crime in particular, including cyber crime, the flow of confiscation cases looks unlikely to diminish.

Though UK practitioners will not be troubled by the EU's new Directive on freezing and confiscation because the UK has elected not to opt into it,[34] judges and practitioners in England and Wales do have some legislative novelties to look forward to in the clauses of the Serious Crime Bill, which is currently before Parliament. The provisions of Part 1 include a further tightening of the time to be allowed for payment, "compliance orders" which may restrict a defendant's travel outside the UK, longer default sentences in respect of orders in excess of £1 million and a loosening of the condition for the making of restraint orders, to make it reasonable grounds to "suspect", rather than (as now) reasonable grounds to "believe". Further, circuit judges can now look forward to determining third-party interests at the confiscation order stage; "crash courses" on the identification and assessment of beneficial and equitable interests may soon be urgently required.

25 [2014] EWCA Crim 1173.
26 [2014] EWHC 819 (Admin).
27 [2014] EWCA Crim 101.
28 [2014] EWCA Crim 1664.
29 *Hackett* (1988) 10 Cr.App.R (S.) 388; *Holah* (1989) 11 Cr.App.R. (S.) 282.
30 [2014] EWCA Crim 1823. For further details, see p.1 above.
31 Court of Appeal (Criminal Division), November 10, 2014.
32 [2014] EWCA Crim 2171.
33 [2014] EWCA Crim 377.
34 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127.