Feature

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

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

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

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

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

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

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

4 [2013] EWCA Crim 517.

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

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

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

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

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

Joint liability

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

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

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

5 [2013] EWCA Crim 1104.
6 [2013] EWCA Crim 2090.
7 [2013] EWCA Crim 644.
8 [2013] EWCA Crim 1306.
9 "Confiscation: '*Waya*' and other recent developments"; Ibid.
10 *Fields* [2013] EWCA Crim 2042.
11 [2008] 1 A.C. 1028.

Approach

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

Calculation of benefit

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

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

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

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

The available amount

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

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

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

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

Postponement

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

Enforcement

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

Restraint

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

Recent decisions

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

Conclusion

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

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

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