

Feature

Confiscation: *Waya* and other recent developments

By Polly Dyer¹ and Michael Hopmeier²

This article is being published in two parts. Part II will appear in the next issue of Archbold Review

Part I

Introduction

The November 2012 Supreme Court decision in *R. v Waya* [2012] UKSC 51 focused on two key issues:

- (1) how a court calculates the benefit obtained under the Proceeds of Crime Act 2002 (“POCA”) when a mortgage is dishonestly obtained; and
- (2) what has been viewed as having far-reaching significance, whether a confiscation order made under POCA could violate a defendant’s right to the peaceful enjoyment of his possessions, guaranteed by Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (known as the “A1P1” (Article 1, Protocol 1) issue).

Before turning to the particular facts of *Waya*, it is worth observing some recent facts concerning confiscation orders and their enforcement, which may have some relevance when considering the Supreme Court’s guidance to first instance judges:

- (a) The National Fraud Authority (“NFA”), in what may be a conservative analysis of the cost of fraud to the UK economy, estimates the loss at £73 billion.³ This is for fraud alone and excludes the many other types of cases where a loss/benefit may arise, such as those concerning drug importation/supply and offences pertaining to illegal immigration. In all these cases (if brought to court and a conviction arises) there is scope for confiscation orders.
- (b) The Commons Public Accounts Committee, in its 75th Report of the Session, found, on analysing evidence from the Ministry of Justice, that there has been a startling growth in the level of confiscation orders outstanding, with over £1.3 billion outstanding by the middle of 2011-2012.⁴ According to the report, the Ministry of Justice acknowledges that 60% of the amounts owed under confiscation orders may never be recovered.⁵ It recommends that the Ministry take steps to set responsibilities for raising, collecting and accounting for confiscation orders to incentive collection agencies to maximise sums collected.
- (c) A number of critical reports by the media, such as the

BBC and the Guardian, have commented on the amount of unpaid confiscation orders and that, currently, it is unclear how the substantial outstanding amounts are to be recovered. The fact that this avenue of money is not being targeted effectively is looked at critically in the context of the Ministry of Justice being expected to find £2 billion extra savings a year by 2014-2015.⁶

The cost to the nation of (a) the failure to enforce orders actually made and (b) the cost of maintaining defendants in prison who are serving default sentences (current figures suggests it costs about £40,000 per year to keep a defendant in prison) must indeed be considerable.⁷ It is not known precisely how many defendants are currently serving default sentences in respect of confiscation orders and what this is costing the tax-payer each year.

There may be a variety of reasons why confiscation orders are not enforced. However, part of the problem may be the fact that some first instance courts are imposing “disproportionate” orders (usually in “hidden asset” cases) where the chances of enforcement are, in reality, small and the chances of defendants serving default sentences are therefore likely to be high. In *Waya* itself the first instance trial judge made an order in the sum of £1.54 million. As we shall see, the Supreme Court reduced it to £392,000.

Furthermore, it is unlikely to have escaped the notice of the learned judges in the Supreme Court that in *R. v Ahmad and Ahmed* [2012] 2 Cr.App.R. (S.) 85, two confiscation orders made at first instance in the sum of £72 million each, uplifted due to inflation to £92,333,667, were reduced to £12,662,822. Lord Justice Hooper noted [at paragraph 6] in that case that:

“none of the money has been paid and any sum eventually realised is likely to be far less than the £184,667,334 owed. The unpaid sum is presumably represented in the reported £1.26 billion of unpaid confiscation orders shown as an asset in the accounts of the Ministry of Justice and for which the Minister has received public blame (see e.g. The Sun 23/11/2011 under the headline “SOFT JUSTICE SCANDAL” “YOU KEN NOT BE SERIOUS” and 24/11/2011, under the headline “KEN FINES RAP”).”

Further, in reducing the confiscation orders, Lord Justice Hooper stated that “it seems to us that a confiscation order which, due to its magnitude, exceeds by far the likely assets of the defendant may operate as a disincentive to co-operate” [at paragraph 66].

Waya

In *Waya*, the appellant had purchased a flat for £775,000, with £310,000 of his own, legitimate money and £465,000 provided by a mortgage lender. He had obtained this mortgage (which amounted to 60% of the purchase price) fraudulently

1 Barrister at QEB Hollis Whiteman

2 Circuit Judge

3 <http://www.homeoffice.gov.uk/publications/agencies-public-bodies/nfa/annual-fraud-indicator/annual-fraud-indicator-2012?view=Binary>, p.3

4 <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpublic/1778/1778.pdf>, p.9

5 *ibid.*, p.4

6 <http://www.bbc.co.uk/news/uk-politics-17438873>; <http://www.guardian.co.uk/politics/2012/mar/20/ministry-justice-fines-assets-report>

7 <http://www.prisonreformtrust.org.uk/PressPolicy/Parliament/AllPartyParliamentaryPenalAffairsGroup/WorkinginPrisonApril2012>; <http://www.fpe.org.uk/the-cost-of-prisons/>

on the basis of false representations about his employment record and earnings. He subsequently repaid this mortgage and remortgaged the property with a different lender. The appellant was convicted of obtaining a money transfer by deception contrary to s.15A of the Theft Act 1968 in relation to the original mortgage. A confiscation order pursuant to s.6 of POCA was imposed by the Crown Court. It should be noted that it had not been alleged that the defendant had a criminal lifestyle within the meaning of s.75 of POCA. By the time the application for confiscation was heard, the market value of the flat had increased to £1.85m. The Crown Court judge imposed a confiscation order of £1.54 million. This figure was reached by deducting from the then market value of the flat the sum paid out of the defendant's own money towards the original purchase price (£1.85m-£310,000). On appeal, the Court of Appeal reduced the amount to £1.11 million, representing 60% of the value of the flat since the mortgage of £465,000 had represented 60% of the value of the flat (£1.85m-40%). The appellant appealed.

Waya and calculation of benefit

The Supreme Court, in a nine-judge judgment, allowing the appeal (Lord Phillips and Lord Reed dissenting) and substituting a confiscation order in a reduced sum, held that since the loan from the mortgage lender had the sole purpose of forming part of the purchase price of the flat, it had never become the appellant's, nor come into his possession. As such, for the purpose of s.76(4) of POCA, which states that "a person benefits from conduct if he obtains property as a result of or in connection with the conduct", the property that the defendant had obtained as a result of or in connection with his criminal conduct was a *chose in action* consisting of a right to have the mortgage advance applied to the acquisition of the flat.⁸ At the date of completion, the *chose in action* had no market value but immediately after completion it came to be represented as 60% of any increase in the flat's market value over its acquisition price [paragraph 70]. In more simplistic terms, the Court made clear that the benefit did not arise from actually obtaining the mortgage itself, but it did arise when the property purchased with that mortgage increased in value. The confiscation order should then be equivalent to the benefit the defendant had derived from his use of the loan, which would be the increase in the value of the property attributable to the loan (in this case 60% of the increase as the dishonestly obtained mortgage funded 60% of the original acquisition). It should be noted that the application of this principle is subject to factual confines: in *Waya*, only the mortgage funds were the product of criminal activity, the rest was the appellant's own legitimately obtained money. A different result may emerge if both sources were illegally obtained and, as such, *Waya* remains open to further interpretation.

Waya and proportionality

In summary, in relation to the second issue, the Supreme Court held as follows:

- (a) Although POCA had removed all discretion from the Crown Court, the European Convention on Human Rights 1950 Protocol 1 Article 1 required that the deprivation of property had to be proportionate to the legitimate aim of removing from criminals the pecuniary

proceeds of their crime, the deterrent effect being secondary.

- (b) A judge had to refuse to make a disproportionate confiscation order but this was not a reincarnation of a general judicial discretion [paragraphs 19-24].
- (c) Where a defendant had restored the proceeds of crime/where sums had been recovered in full, it would be disproportionate to make a confiscation order as it would not satisfy the statutory purpose and would be an additional financial penalty. Instead, an additional penalty should be made, for example, a fine or imprisonment.
- (d) It was clear that a confiscation order for more than the net proceeds of crime was proportionate (*R. v May* [2008] UKHL 28 applied). It is not disproportionate to require a defendant to repay the whole of a sum jointly obtained with others, to require several defendants to each pay a sum where it had been obtained successively by each of them, or to require a defendant to pay the whole sum obtained without setting off the expenses of the crime [paragraph 26].
- (e) There is a significant difference in applying this principle to those cases involving a criminal lifestyle and those which do not. In relation to particular criminal conduct cases, the dicta in *Waya* may well be of considerable use in seeking to ensure that the benefit figure matches precisely that gained from the specific offence. In the former, the statutory assumptions under s.10 are already qualified by s.10(6) (a) and also s.10(6) (b), and can only be applied if there is no serious injustice and they should, therefore, usually be proportionate [paragraph 25].

The judgment places a responsibility on Crown Court judges not to make confiscation orders which involve a violation of A1P1 [paragraph 18].⁹ This is not to be viewed as a challenge to the so-called "draconian" nature of POCA but merely a re-statement of the fundamental aim of the legislation, namely to recover the financial benefit a defendant has obtained from his criminal conduct.¹⁰

Indeed, whilst *Waya* may encourage more frequent challenges to confiscation orders on this ground in the future, the authors suggest that the principles of fairness and proportionality which *Waya* makes clear should be adopted by first instance judges in confiscation cases, are helpful restatements of principles which have already been promulgated in earlier cases. The Supreme Court has, however, additionally considered the application of the Human Rights Act 1998 to the determination of the quantum in confiscation orders. Thus, in *R. v McIntosh and Marsden* [2012] 1 Cr.App.R. (S.) 60, the appellants appealed against confiscation orders made under the Criminal Justice Act 1988 ("CJA") following their convictions for conspiracy to defraud the public revenue. The appellants gave evidence that they had no realisable assets. The judge at first instance disbelieved them and found that they had concealed their assets. Given this finding, the judge stated that he was compelled to make

⁸ It should be noted that s.76(4) of POCA effectively corresponds with s.71(4) of the CJA 1988.

⁹ Roberts, Matthew, "R v Waya-important new POCA Case", 10 December 2012 (<http://www.9parkplace.co.uk/news-and-events//2012/12/10/r-v-waya-important-new-poca-case/>).

¹⁰ As stated at paragraph 4 of the Explanatory Notes to the Statute (<http://www.legislation.gov.uk/ukpga/2002/29/notes/division/2/1/>); see also *Waya* at paragraph 21.

a confiscation order in the full sum of the benefit under s.71(6) of the CJA [paragraph 6]. The appellants submitted that, notwithstanding the judge's findings on their dishonesty, he was not bound to make an order in the full amount of the benefit. The appeals were dismissed.

It was held, in a judgment given by Moses LJ, that the court "must strive to achieve justice and proportionality within the confines of the statutory scheme" [paragraph 10]. Specifically regarding s.71(6), there was no principle that a court was bound to reject a defendant's case that his current realisable assets were less than the full amount of the benefit merely because it concluded that the defendant had not revealed their true extent or value; a just and proportionate view of the facts as a whole may enable a defendant to satisfy that evidential burden even when his own evidence proves to be an untruthful and unreliable or even non-existent source of the nature and extent of his current assets [paragraph 19]. In this instance, the sentencing judge's findings had formed a sufficient basis for the conclusion that the appellants had assets with which to pay the full benefit amount; his conclusion that the "only order" he could make was in the full value of the benefit was an order made in the circumstances of the case, following the factual findings.

In *R. v Bagnall and Sharma* [2012] EWCA Crim 677 it was held, however, that it was not disproportionate to require a defendant to establish the source of monies which he holds are from a legitimate, and not criminal, source. This burden was not unfair or contrary to Article 6 of the European Convention of Human Rights [paragraphs 34 & 40].

R. v Ahmad and Ahmed [2012] 2 Cr.App.R.(S.) 85 (referred to above) considered, in the context of calculating the benefit, the meaning of the words "in connection with its commission" in s.71(4) of the CJA.¹¹ The appellants appealed against confiscation orders made pursuant to the CJA following their convictions for conspiracy to defraud the public revenue. This case involved particular criminal conduct. When addressing the benefit, the judge in the Crown Court had found that the benefit was not only the VAT which had been paid out by HMRC as a result of the fraud, but the total amount of money which had passed through bank accounts controlled by the appellants in furtherance of the fraud, concluding that this was property obtained in connection with the commission of the offence. It was held (disapproving *R. v Waller* [2009] 1 Cr.App.R.(S.) 76) that the words "in connection with" must be construed with the word "benefit" in mind: to say that in assessing the benefit the court does not take into account the costs incurred by the

¹¹ It should be noted that this case is subject to an appeal to the Supreme Court

criminal in committing the offence is very different from saying that the costs should be added on to the benefit [paragraph 53]. To make a confiscation order which included within the benefit the cost of committing the crime was seen as contrary to the object of the legislation and that part of the order would operate by way of a fine [paragraph 35]. Issues of justice and proportionality were raised in *Ahmad*: the Court held that the fact there was such a large discrepancy between the loss to the complainant and the amount of the confiscation order (in this case the loss to the revenue was £12.5 million but the confiscation orders were in the sum of £72 million (before the uplift)) meant something had gone wrong—it could not be realistically suggested that the appellants had the means each to pay £92 million and they were already serving long sentences with a 10 year sentence to be served consecutively in default [paragraph 56]. The Court inferred from the fact *Waya* was being reargued that there was a concern about how the law of confiscation had developed. *Ahmad* also addressed the consequences of a conclusion that a defendant has hidden assets, with the reasoning in *McIntosh and Marsden* being endorsed.

Conclusions on *Waya*

Waya is clearly a very important case.

Firstly, it provides guidance on calculating the benefit in cases where mixed funds (legitimate and illegitimate) are used to purchase a property.

Secondly, judges are reminded to be fair and sensible in their judgments. The helpful Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings, produced by the CPS in May 2009, asserts that the guidance in *R. v Sivaraman* [2009] 1 Cr.App.R.(S.) 80, in which the Court of Appeal emphasised the need "to apply the words of the statute in as commonsensical a way as possible" [paragraph 13], should be borne in mind by prosecutors. In *Waya*, the Supreme Court emphasises the need for judges to apply common-sense and practicality. Henceforth, in cases following *Waya*, it may thus be that the difficulties in the payment and/or enforcement of confiscation orders, which Lord Justice Hooper highlighted in *Ahmad*, are alleviated, at least in some instances. *Waya* should not, however, be seen as advocating a move away from what has been described as the "draconian" nature of POCA. Applying proportionality and fairness does not detract from the legislative purpose of the legislation, namely that criminals should not profit from their crimes.

In Part II the authors review the most recent cases concerning the calculation and identification of "benefit", as well as the approach and principles to be adopted where beneficial interests in assets are claimed by third parties.

In the News

The latest consultation, *Transforming Rehabilitation – a revolution in the way we manage offenders* describes the Government's proposals for reforming the delivery of "offender services" in the community "to reduce reoffending rates whilst delivering improved value for money for the tax payer".

The proposals include:

- opening the majority of probation services to competition, "with contracts to be awarded to providers who can deliver efficient, high quality services and improve value for money";
- commissioning to be managed centrally, with specifications informed by local delivery requirements within 16 regional contract package areas, to generate economies of scale and deliver efficiencies, whilst responding to local needs;

- contract package areas to align closely with other public service boundaries, to support more integrated commissioning in the future;
- more scope for providers to innovate, with payment by results as an incentive to focus on rehabilitating offenders – we expect to see increased use of mentors and an emphasis on addressing offenders' 'life management' issues;
- key functions to remain within the public sector, including the direct management of offenders who pose the highest risk of serious harm.

Responses must be submitted by February 22, 2013. See <https://consult.justice.gov.uk/digital-communications/transforming-rehabilitation>