Feature

Confiscation: *Waya* and other recent developments

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Part II

Waya applied

Waya was recently followed in *R. v Axworthy* [2012] EWCA Crim 2889 where a confiscation order, made after the appellant's conviction for theft of a Land Rover and attempting to pervert the course of justice, was quashed because the vehicle had been recovered and returned to its owner. The appellant submitted, and the respondent correctly conceded, that given the dicta in *Waya* [at para.29 of the Supreme Court's judgment] the confiscation order should be quashed as in circumstances where the vehicle had been recovered, making such an order would be disproportionate and in breach of Article 1 Protocol 1 [paras 6 and 11]: "where the item has been wholly restored to the loser, a confiscation order requiring the defendant to pay the same sum again does not achieve the object of the legislation of removing from the defendant his proceeds of crime, it simply amounts to a further pecuniary benefit and would be disproportionate" [para.12].

In *Waya* the Supreme Court set out principles as to how the benefit figure is to be calculated when mixed funds are used to purchase a property. The Court held that the mortgage advance did not form part of the benefit; this may impact on and reduce confiscation orders made in the future. While some practitioners have been surprised that a mortgage obtained through false representations does not form part of the "benefit", the authors respectfully submit that the Supreme Court followed rational legal reasoning in finding that the loan sum in these circumstances never became the defendant's or came into his possession [para.53]. In the case of an ordinary loan induced by fraud, the defendant does obtain the loan sum advanced because it comes into his control and possession: the defendant can use it either as he wishes or for the particular purposes for which it was advanced [para.48]. The defendant in *Waya* had no control over the disposal of the mortgage advance into the recipient's hands; the sole and predetermined purpose was to form part of the purchase price of the flat, with the mortgage lender having security for its repayment from the moment of completion. The defendant only obtained the right to have the mortgage advance applied in the acquisition of his flat and this thing in action had no market value at, or immediately after, completion. *Waya* does envisage cases where this will not be the case, namely in cases where the false representations included a dishonestly inflated valuation of the property being purchased, which may induce a larger loan than would otherwise have been made or a loan which is not fully secured as the lender believes, or where the property purportedly being purchased does not exist as in both cases the thing in action will have a real value to the defendant [para.53].

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Calculating/identifying "the benefit"—recent cases

Waya is not the only recent case to address how the benefit figure should be calculated; *Waya* and *Ahmad* involved the interpretation of s.76(4) of POCA and s.71(4) of the CJA respectively and there are a number of further recent cases which also provide guidance.

R. v James and Blackburn [2012] 2 Cr.App.R.(S.) 44 was applied in *Ahmad*: it was held, amongst other issues, that the appellant's expenses, for example for equipment purchased for use in the course of an excise duty fraud, did not form part of the benefit—the equipment was not obtained by the appellant "as a result of or in connection" with his criminal conduct. It was obtained as a result of a lawful transaction with the supplier; his criminal conduct formed no part of the transaction. The position of the Court of Appeal on this issue is made very clear in *Ahmad* (see Part I).

R. v Majid [2012] EWCA Crim 1023 cited *Ahmad* and addressed s.71 of the CJA. The appellant was convicted of conspiracy to cheat the public revenue. He was made subject to a confiscation order pursuant to the CJA. The appellant appealed against this confiscation order, both as to the finding on benefit and on realisable assets. In relation to the calculation of the benefit, it was submitted that the judge had erred by approaching the question of benefit by reference to the total value of the fraud rather than making an assessment of the value of the benefit the appellant obtained. In dismissing the appeal, it was held that the judge had applied the correct principle, namely that the benefit gained is the total value of the property obtained, not the appellant's net profit. This case, along with *James and Blackburn* and *Ahmad*, shows that expenses incurred should not be deducted from the benefit figure. Submissions were also made, citing *Ahmad* and *McIntosh*, that there was insufficient evidence to support the conclusion of the first instance judge and, in another reference to proportionality, that the determination of the appellant's assets should be just and proportionate [para.17]. The Court of Appeal found that the judge had "stood back from the detail of the case, looked at it as a whole and applied what… was logic which cannot be impeached" [para.25].

In *R. v Sumal & Sons (Properties) Ltd* [2012] EWCA Crim 1840, the appellant company was convicted of being the owner of a rented property in a selective licensing area without a licence (contrary to the Housing Act 2004 s.95(1)). A confiscation order was made under POCA representing the total amount of the rent it had received during the period when the property was unlicensed. The company appealed to the Court of Appeal. Section 95(1) confines the offence to that of having control of or managing a house which was required to be licensed but was not. Section 96(3) of the Housing Act specifies that no rule of law relating to the validity or enforceability of contracts in circumstances involving illegality is to affect the validity or enforceability of the provisions of a tenancy or licence requiring payment of rent. It follows that the right to recover rent remained enforceable, notwithstanding that a landlord had no licence

for the house in question. Therefore, this was held to be inconsistent with the notion that the landlord was unlawfully obtaining rent (pursuant to s.76(4)) "as a result of or in connection" with his breach of s.95(1). There was no causal connection between the criminal conduct and the "benefit" received; the continued receipt of rent was not the product of the crime.

The Court of Appeal has, however, certified a point of law to the Supreme Court (*R. v Sumal & Sons (Properties) Ltd (Supreme Court Pronouncement)* [2012] EWCA Crim 3109), namely whether rental income from a property which was unlicensed contrary to s.95(1) of the 2004 Act could be a person's benefit as being property obtained as a result of or in connection with particular criminal conduct for the purposes of s.76(4) of the 2002 Act.

In *R. v Muia* the appellant appealed against a confiscation order made pursuant to the CJA following her conviction for offences concerning dishonest claims for social security benefits, which occurred over a number of years. During this period she had purchased a property, which she let out to a third party, accruing rental income, whilst she continued to live in council accommodation. The trial judge included the rental income from this property, pursuant to s.71(4), as part of the benefit figure. The appeal was dismissed: a judge was entitled to include it in a confiscation order as the offender would not have received the rental income "but for" her criminal conduct [para.18].

R. v Worrall [2012] EWCA Crim 1150 was another case involving s.76(4) of POCA. The appellant was convicted of conspiracy to keep a brothel used for prostitution. The judge had made a confiscation order under s.6 of POCA. In the particular brothel concerned, £40 was paid to the prostitute per client independently, whilst the brothel received £20. The question was whether the benefit figure should be £60 or £20 per client. The judge in the Crown Court had held the former. The appeal was successful as the Court held that the judge had erred by equating turnover with benefit: in determining whether a defendant has obtained property the court should, subject to any relevant statutory definition, apply ordinary common law principles to the facts as found (following *May*). As such, there was no basis for saying that the benefit obtained was more than £20 per client.

R. v Ramdas [2012] EWCA Crim 417 concerned five barrels which, when found on the appellant's business premises, contained a number of Jamaican dollar coins, which were stolen property. The appellant was convicted of possession of criminal property contrary to s.329 of POCA. He was made subject to a confiscation order. The appellant appealed on the basis that the benefit calculation was incorrect: he had not obtained a benefit as he had been a mere "custodian or courier" of the barrels and coins (as per *R. v Clark and Severn* [2011] 2 Cr.App.R.(S.) 58). This case turned on its facts and his appeal was dismissed. The judge had found, as was apparent from his remarks in sentencing and at the confiscation hearing, that the appellant was a full participant in the criminal enterprise (although no doubt not acting alone) and there was nothing to suggest limited involvement by him. As such, the appellant was not to be classed as a custodian or courier and, for the purposes of POCA, had obtained the barrels and coins as a result of or in connection with the offence.

R. v Clark and Severn [2011] 2 Cr.App.R.(S.) 55 was cited in *Ramdas*. In this case the Court of Appeal held that, when making a confiscation order in respect of an offender convicted of conspiracy to handle stolen cars, the judge had erred in ruling that the appellant had been a principal conspirator and that the assessment of his benefit should be the valuation of the vehicles that passed through his hands at the material times. The appellant's role had been assisting in shipping the cars. The Court held that the appellant was a mere bailee of the cars for the purpose of containerising and transporting them in preparation for their shipment. He received the cars in the capacity of bailee and as such he prima facie received the cars not for his own benefit but for the benefit of other principal conspirators. There was nothing to suggest that the cars were jointly owned by him with other principal conspirators [para.28]: a defendant may play an important role in a conspiracy without obtaining property for the purpose of the test of benefit.

R. v Lambert & Walding [2012] 2 Cr.App.R(S.) 90 applied the dicta in *May* (and *R. v Green* [2008] UKHL 30) in addressing joint benefit. The appellants appealed against the imposition of their respective confiscation orders. The judge had held that there had been a joint venture between the two co-defendants, with both benefitting jointly. As such, he made joint and several orders rather than apportioning the benefit figure between them. The appellants submitted that this was unlawful, a breach of the European Convention on Human Rights 1950 Article 1 Protocol 1 as the combined effect of the orders meant the State would receive the benefit figure twice, and an abuse of process. The appeals were dismissed and it was held that, applying the language of the statute, it was not disproportionate to make an order depriving a defendant of a benefit which he had in fact and law obtained within the limits of his realisable assets. The offender was protected to the extent that the sum recoverable would not exceed either the joint benefit or his realisable assets. It was not an abuse to seek a confiscation order where a substantial order was inevitable.

R. v Gangar & White [2012] EWCA Crim 1378 illustrates the importance of distinguishing between where co-defendants jointly benefit and where they have joint realisable assets. The appellants appealed against confiscation orders made under the CJA following their convictions for investment fraud. The Crown Court judge had found that the appellants had joint assets and, considering that he was bound to do so by *May*, he treated the whole of that sum as being available to each individually. The issue was whether he had been right to do so. The appeals were allowed. The judge had erroneously applied the principle in *May* (which addressed the determination of the benefit) to determining the available amount. A court is not to make an order that is beyond a defendant's means to pay. If there was a jointly owned asset, the court had to determine the extent of each owner's beneficial interest. If a defendant was not the sole beneficial owner, the proceeds could not be treated as being all his. This is the position whether the other co-owner is a defendant or an unconnected third party. If all jointly held assets were treated as being wholly available to both appellants, then the result would be orders which, by definition, required one or other defendant to pay what he does not have: if one was satisfied, it becomes impossible to satisfy the other. Therefore, in this case the orders were quashed and replaced by orders that did not contain any double counting of available assets.

In the recent case of *R. v Druce* [2013] EWCA Crim 40 the appellant appealed against the amount of a confiscation order imposed after he had pleaded guilty to being concerned in a money laundering arrangement and to possessing criminal property. The judge at first instance had rejected the appellant's claim that some of the hidden assets had passed out of

his control. On appeal, the appellant sought to admit fresh evidence, in the form of an affidavit, in which he attempted to explain why his earlier evidence about the hidden assets had been lacking. The Court of Appeal held that there was no rational basis on which to admit a witness's fresh evidence for the purpose of trying to explain inadequacies in his earlier evidence. In view of the appellant's evidence at first instance, the Court held that it was difficult to see how the judge could have reached a different conclusion. The appeal was, therefore, dismissed in relation to this issue (grounds three and four). It was allowed to a limited extent in that the benefit figure was reduced to take into account a concession by the Crown that there had been an element of double counting.

Beneficial interests in property—recent cases

It is becoming increasingly common for a Crown Court judge (who may have little, if any, experience in civil or family law) to be faced with submissions in confiscation proceedings that a family member or other third party claims to have an equitable or beneficial interest in property asserted by the prosecution to belong solely to the defendant thereby (if the claim is well founded) reducing the value of available assets. The task of the judge in such cases is by no means simple or straightforward. Guidance has been provided in recent decisions which have helpfully clarified and reinforced the principles for assessing an equitable interest. *Jones v Kernott* [2011] UKSC 53 has become a key case on this issue. The appellant appealed against a decision that a property co-owned by her and the respondent was held by them as tenants in common in equal shares. The appellant and respondent had purchased a property and mortgage in their joint names. They had lived there together, sharing the household expenses for over eight years. Subsequently, the respondent had moved out of the property, whilst the appellant had remained with their children. The respondent had made no further contribution towards the expenses. This situation continued for over 14 years, before the property was put up for sale. The respondent commenced proceedings in the County Court, claiming a declaration under s.14 of the Trusts of Land and Appointment of Trustees Act 1996. A declaration was made that the beneficial interest was split 90%/10% in favour of the appellant. That decision was upheld on appeal; however the Court of Appeal had allowed the respondent's appeal.

The Supreme Court held that, following *Stack v Dowden* [2007] UKHL 17, where a property is brought in the joint names of a cohabiting couple (married or unmarried), both responsible for the mortgage, but with no express declaration of their respective beneficial interests, the presumption is that the beneficial interest follows the legal estate, therefore it will be split 50/50. Any challenge to the presumption is not to be lightly embarked on given that a decision to jointly buy a property indicates a commitment to a joint enterprise [paras 19–22]; however, it can be rebutted by evidence of a contrary intention. Each case will be fact specific. It will be for the court to decide the parties' common intention (and if necessary impute an intention) as to what their shares in the property should be, in light of their whole course of conduct in relation to it [paras 31; 46–47] (*Gissing v Gissing* [1971] A.C. 886; *Oxley v Hiscock* [2004] EWCA Civ 546). In the instant case, the court made a finding of fact that the parties' intention regarding beneficial interests did in fact change, an intention which could be inferred from their conduct [paras 48–49].

Jones v Kernott was applied in *Re Ali* [2012] EWHC 2302, where six family members applied for declarations of beneficial interests in five properties covered by a restraint order. It was held that the starting point was the legal ownership of each property and that it was for the party asserting that beneficial interests were held other than as per the legal title to prove their case (*Stack v Dowden* applied). Applying *Jones v Kernott*, there were two questions to be asked, namely whether it was intended that the other party would have any beneficial interest in the property at all and, if so, what that interest was. In answering the first question there needed to be evidence of an actual agreement, arrangement or understanding between the parties, which had to be based on evidence or express discussion between them (*Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107). The court could have regard to the whole course of dealing between the parties in order to ascertain or impute their intentions when considering the second question. The applicant's credibility is essential in such a case [paras 109–111].

It was held in *R. v Perrey* [2011] EWCA Crim 2316 that in order to establish that a person had acquired a beneficial interest there has to be some evidence as to when and how that beneficial interest was acquired. In this case there was none. The appeal was confined to the inclusion in the value of the realisable property of the entire value of the appellant's matrimonial home. The property had been purchased and registered in the sole name of the appellant's wife. The Crown Court judge had included it as realisable property on the basis that the appellant had been the sole owner of the previous matrimonial home when it was sold and the proceeds of the sale had been used (somewhat indirectly) to purchase the new house. By placing this property in his wife's name, the appellant had made a gift to her of the property in that he had procured the conveyance of the property to her without any significant consideration being provided. The basis of the appeal was that it was submitted that the judge should have determined that the beneficial interest was 50/50 as between the two and that his wife had provided consideration for her interest because she had had a beneficial interest in the previous home. The appeal was dismissed as there was no evidence to show that the appellant's wife had acquired a beneficial interest in the first property: she had made no significant contribution to the house and no steps were taken to vest it in her name (which led to the inference that this was not the intention).

Jones v Kernott was applied by *Crown Prosecution Service v Piper* [2011] EWHC 3570 (Admin). The applicant wife claimed a half-share beneficial ownership in the matrimonial home that she shared with the respondent, her husband, and which was registered in his sole name. A receivership order had been made over her husband's assets because he had failed to satisfy a confiscation order. The court was required to determine whether there had been a common intention for the applicant to have a beneficial interest, if so, the size of the beneficial interest and whether the power of sale should be postponed to enable the applicant to buy the respondent's interest. Judgment was made in favour of the applicant: she had discharged the burden and displaced the presumption that equity followed the law.

Whether she had a beneficial interest depended on her and her husband's common intention. This intention may change over time but in this case the "crunch question" was whether the husband and wife had a common intention at the date of the husband's arrest and the time the restraint order was made [para.56]. The court, having reviewed the whole course of dealings between husband and wife, decided that everything about their interaction led to the conclusion that the applicant had an interest which amounted to

a co-ownership even though neither party had consciously formed such an intention. The applicant's beneficial interest was found to amount to a half share even though she had not paid half the purchase price as there was no indication that they had intended that she should only have a fractional share calculated by reference to their respective monetary contributions. On the evidence, co-ownership had been their common intention.

Similarly, in *Edwards v CPS* [2011] EWHC 1688 (Admin) the presumption of an equal beneficial interest in a jointly owned property was rebutted because that was the common intention of the parties.

In *R. v Ghori* [2012] EWCA Crim 1115 the appellant submitted that the judge had erred in failing to discount a charging order made in favour of a third party. The Court emphasised that the onus was on the appellant to show that his property was so encumbered by producing clear and cogent evidence and that the court may look critically at that interest on the evidence before it. The fact that a charging order has been made in favour of a third party does not, of itself, necessarily mean that the third party has an interest in the property. It was held that the judge had been entitled on the evidence before her to conclude that the charging order was merely a device and the property remained the appellant's: the burden was on the appellant and he had failed to establish that the value of the property, by reason of the charging order, was diminished.

R. v Ghori referred to *R. v Rowsell* [2011] EWCA Crim 1894, where the Court of Appeal had stated that "in applying the Proceeds of Crime Act 2002, the court cannot ignore ordinary rules of property and trust law without specific statutory authority". In *Rowsell* the appellant appealed against a confiscation order made under POCA 2002. He was the registered legal owner of land valued at £20,000. However, the land had been divided, with each purchaser of a plot paying money to the appellant. Whilst each purchaser had paid money to the appellant, no interest had been registered in their favour at the Land Registry. The judge at first instance found that, as legal owner, the appellant was to be regarded as having a full interest in the property and that its market value formed part of the available amount. The appellant asserted that the land had been divided so that he had the beneficial interest in only one tenth of it and the various purchasers had the beneficial interest in the remainder. The judge, whilst accepting the extent of the appellant's beneficial ownership, stated that he could not establish the beneficial claims of the purchasers because for the purposes of s.79(3) there was no formal claim or other evidence to support them. The appellant on appeal submitted that the judge ought to have held that the recoverable amount referable to the land was limited to the value of his beneficial interest, namely one tenth. The appeal was dismissed: although it was accepted that others had paid money to the appellant, there was no reliable evidence, such as, for example, a declaration of trust, upon which the beneficial interest of those other persons could be established. No details had been given as to the precise nature of their interest i.e. whether a licence or something more had been obtained was unclear and no equitable interest had been registered. Therefore, the judge had rightly been unable to take into account any other interest and came to the only conclusion available on the evidence. The judgments of *Ghori* and *Rowsell* are indicative of the Court of Appeal's approach where a defendant is asserting the beneficial interests of others, which if found will reduce his available amount, namely that the onus is on the defence to provide clear and cogent evidence; anything less will result in the whole value of the property being taken into account.

R. v Alom [2012] EWCA Crim 736 repeats the starting point as enunciated in *Stack v Dowden*: the presumption is equity follows the law. The burden is on the person attempting to prove this is not correct. Furthermore, Baroness Hale's finding at para.69 of *Stack v Dowden* that "where legal ownership is clearly expressed, it will be a rare outcome that beneficial ownership does not follow the same pattern" was referenced and emphasised [para.23]. In this matter, a confiscation order had been made under POCA. The contentious matter on appeal was the beneficial interest the appellant supposedly had in a property. He asserted, along with his parents, all three the legal owners and appearing on the mortgage of the property, that he had only assisted his parents in obtaining the mortgage and it was their common intention that his parents alone should be the joint beneficial owners. The judge's finding of fact had been that the appellant had failed to discharge his burden of showing that the legal title did not reflect the beneficial ownership. As such, the appeal was dismissed.

R. v Harriott [2012] EWCA Crim 2294 concerned the timing and means for determining equitable interests: in this case it was held that the Crown Court judge had fallen into error by concluding that he could not hear evidence and make a finding that a spouse had an equitable interest in a property (he had thought that the equitable interest would have to be asserted in separate civil proceedings and the Crown Court could not declare his interest).

Don't forget to assist the Judge!

R. v Waithe [2012] EWCA Crim 1168 impresses upon trial advocates that a judge is entitled to assistance, particularly from the Crown, in determining the correct amount of a confiscation order. The judge at first instance had not been directed to the appropriate figures and was permitted to fall into error. The Court of Appeal "[found] that disappointing. The Crown was there to advance its case and to assist the judge. He was entitled to better" [para.22].

Endnote

(1) The confiscation of the proceeds of crime has proven to be a vital tool in the fight against economic crime of all kinds, including corruption. The principle that a criminal should not benefit financially from his crime is universally accepted as fair and just. Each year more countries throughout the world adopt asset recovery provisions in their legal systems.

(2) As economic crime, both domestic and international, appears, according to the NFA, to continue to increase, confiscation orders are vigorously pursued by the authorities upon conviction of defendants and are vigorously contested in many cases, particularly where "disproportionate" orders may be sought.

(3) The Proceeds of Crime Act 2002 continues to provide a fertile area for practising lawyers and academics alike to debate and argue the meaning of its provisions and their interpretation on the facts of any particular case. *Waya* and the cases referred to in both parts of this article should provide assistance to the hard-pressed first instance judge and practitioner in approaching these cases fairly and properly. However, there seems little doubt that the Court of Appeal and the Supreme Court will be kept busy in this area of the law for some time to come.