

## Recoverable Amount

### Pensions

R v McGoldrick [2011] EWCA Crim 2444

13<sup>th</sup> October, 2011

This was a case involving a confiscation order based upon an erroneous, but agreed, figure as to the value of a pension policy as at the date of confiscation. The Court did not set out the details of how this miscalculation came about but it would appear that, whilst the pension had matured, the parties were unaware that only 25% of the policy could be realised by the appellant as a lump sum as at the date of confiscation; the remainder would be paid by way of annuity.

It is essential for practitioners to be familiar with the position in respect of pension policies, and similar policies such as endowments, for the purposes of confiscation. If a policy has not yet matured, often no money can be obtained by the holder *at all* and so the value for the purposes of the Available Amount is nil. For a reminder of the proper approach to such cases, see *R v Chen [2009] EWCA Crim 2669*.

### Hidden Assets

R v O'Connor [2011] EWCA 2476

11<sup>th</sup> October, 2011

The defendant was convicted of conspiracy to supply heroin and cocaine. He was made subject to a confiscation order, equal to the Criminal Benefit in his case, in the sum of £1,021,300. He was given 6 months in which to pay and the default term was set at five and a half years. He had organised the importation of large quantities of the drugs from Belgium into the UK, in two consignments of 20kg heroin and 18 kg cocaine.

The Benefit Figure was made up of the following:-

- i. Value of the drugs: the Judge had, at the appellant's invitation, used the wholesale value in Belgium, which was £780,000;
- ii. Cash transfers: £230,000 had been transferred to the appellant prior to the importations. The Judge rejected an argument to the effect that this was money that was contributed to

the purchase price of the drugs imported and that, to include both figures would represent double-counting. He did so on the basis that the appellant had not given evidence and, consequently, had not defeated the assumptions;

iii. Living expenses: £38,000 was an estimated figure as to the appellant's living expenses whilst he was at large.

No assets were either identified by the prosecution or disclosed by the appellant. The appellant had also chosen not to give evidence on his own behalf. In those circumstances, the Judge found that section 7 required him to make an order in the same sum as the Criminal Benefit figure. He gave justifications for his findings which are referred to in the judgment.

It was asserted by the appellant that this order was *manifestly excessive* because the Judge had been wrong to:-

- i. aggregate the part-payment for the drugs from the intended purchasers with their wholesale value;
- ii. include a figure provided by the Crown for living expenses whilst he had been at large, having absconded;
- iii. find that the Available Amount was equal to the Criminal Benefit.

The most interesting aspect of the judgment is that which deals with the third of these arguments. 'Common sense' arguments founded the basis upon which it was said that it was wrong for the Judge to have found that the Available Amount was equal to the Criminal Benefit figure, such as the fact that the appellant had not made a 100% profit on the drugs and, so, he would not have actually made a *profit* equal to the value of the drugs.

In relation to this point the Court considered the relevant authorities on determining the Recoverable Amount, including the case of *McIntosh et al* [2011] EWCA Crim 1501. In that case Moses LJ took a fresh look at his own judgment in the case of *Telli v RCPO* [2008] 2 CrAppR (S) 48, in light of *May* [2008] 1 AC 1028 and *Glaves* [2011] EWCA Civ 69.

In *McIntosh* the Judge had determined that, having disbelieved the appellant who had asserted that he had no assets, authority suggested he had to make an order in a particular sum. This was as a result of the judgment in *Telli* which he interpreted as being authority for the proposition that "*If the defendant does not satisfy the evidential burden then the court has no power to make a lesser order than in the amount of the benefit so found.*"

Having so found, the Judge nonetheless proceeded to make an order in a lesser amount, having found that "*despite what is said in Telli it would be wholly wrong for me to make an order in that sum*".

Moses LJ endorsed the Judge's approach, saying that he had applied *justice and proportionality*. He stated that the proposition identified by the Judge was correct but that, in such cases, a *just and proportionate* view of the facts might lead to the position where a defendant could satisfy the evidential burden even where his evidence proves to be *untruthful, unreliable, or even non-existent*.

On the facts of this case the appeal was dismissed. However, the judgment makes it plain that the assumptions can, in certain circumstances, be defeated in such cases without the need to call evidence from a defendant.

This is a question which arises commonly in cases involving a Criminal Benefit calculated according to a *pecuniary advantage*, such as evading duty, where what is "obtained" never actually materialises into an asset that could properly be included as part of the defendant's Available Amount.

## Beneficial Interest: Wives

Edwards v Crown Prosecution Service [2011] EWHC 1688 (Admin)

4<sup>th</sup> July 2011

The applicant applied for a declaration that she held a 50 per cent beneficial interest in three properties, which she owned jointly with her husband ('D') who had convictions for money laundering and was the defendant to confiscation proceedings concerning those properties. One of them, Turton Heights, was in the United Kingdom and the other two were in Spain. D accepted that from 1996 his earnings had included the proceeds of money laundering. However, he claimed that the money used to purchase Turton Heights, in 2003, had derived from the sale of previous matrimonial homes, Farnborough Road, and before that the Grange. He claimed that when the Grange was sold, the sale proceeds were used to purchase Turton Heights and one of the Spanish properties. During the years before his arrest, large sums of money had passed through his bank accounts. The couple had been married for almost 40 years and the appellant had brought up the children whilst D ran his business. She was not able to provide details of how the various purchases had been financed. At the confiscation hearing, D accepted that the appellant's quantifiable interest in the matrimonial estate was a ring-fenced sum of £108,818, representing one third of the value of Turton Heights, an amount which was paid to her. The appellant argued that she had provided consideration by bringing up the children of the family and it had been intended that she should have a 50 per cent interest in all three properties, irrespective of her financial contribution and the source of the money used to purchase them. She argued that it had not been established that the money used for the purchase of the Grange had not truly come from D's business and the equity in Farnborough Road.

The court refused the application on the following grounds. First, though the appellant was entitled to 50% of the earlier property, Farnborough Road, this had decreased as they moved to later properties. It was found that later properties had been tainted by D's criminal proceeds. It was also found that D had paid the deposit and serviced the mortgage on the later two properties, and there was no agreement between the couple as to the equity they would both hold in the property. Therefore the appellant's beneficial interest was reduced from 50 per cent because that was the common intention and because there was an element of gift: *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432 was followed. The ordinary presumption of an equal beneficial interest had been rebutted in relation to the United Kingdom properties. The best estimate of the appellant's beneficial interest in Farnborough Road was that reached in the confiscation proceedings. Second, all of the evidence in relation to the two Spanish properties was deeply unsatisfactory. There was no evidence that the appellant had made any contribution or given any consideration to the properties. Therefore placing the properties into her name could be regarded as by way of gift. The presumption of equal beneficial ownership had been rebutted.

On that basis the court found that there was no further sum due to the appellant. This case restates establishes principles, but it does highlight important evidential considerations. The key in similar matters is the importance of clear financial and documentary information setting out the way in which assets were funded.

## Receivership

### Discharging a Receiver

McCracken v CPS (No transcript available at the time of writing)

1<sup>st</sup> November, 2011

This was an appeal from a ruling by a High Court Judge in which he found that CPR Rule 69.10 was exhaustive in setting out the circumstances in which the Court could discharge an enforcement receiver.

The appellant sought a discharge of the enforcement receiver on the basis that he had been granted the power to take possession of, and sell, a property in which she claimed to have an interest.

At the application in the High Court the respondent CPS successfully argued that the Court had no jurisdiction to entertain the appellant's application because CPR Rule 69.10 stated

that the enforcement receiver could only be discharged on completion of the receiver's duties.

CPR Rule 69.10 provides:-

69.10

*(1) A receiver or any party may apply for the receiver to be discharged on completion of his duties.*

*(2) The application notice must be served on the persons who were required under rule 69.4 to be served with the order appointing the receiver.*

The Court of Appeal allowed the appeal, finding that:-

- i. As the receivership order itself provided that the order was to remain in force until varied or discharged, it carried an implication that the appellant could apply to vary it or discharge it;
- ii. CPR Rule 69.10 was *permissive* and not *prescriptive* in nature, and it would be wrong to read it as providing an exhaustive list of circumstances in which an application to discharge the order could be made.

The case was duly remitted back to the High Court.

## Enforcement

### Establishing a Beneficial Interest

RCPO v Johnson and Backhouse [2011] EWHC 1950 (Admin)

25<sup>th</sup> July, 2011

This is a Criminal Justice Act 1988 case in which the Court provided some guidance to prosecuting authorities who seek to establish that defendants have an interest in property held by a third party. RCPO were making an application to expand the scope of an order for an enforcement receiver against the defendant, to include an aircraft that was held by a third party.

The defendant, Mr. Johnson, was convicted of cheating the revenue and conspiracy to contravene section 17(1)(b) Theft Act 1968 in June 2006. He had been involved in a VAT carousel fraud worth some £20 million and had provided false accounting information in order to avoid detection. In October 2006 he was further convicted of money laundering, as

a result of laundering £6.25 million for an associate who was involved in a separate carousel fraud.

A confiscation order was made in the sum of £26 million and the Judge found that his Criminal Benefit was £167 million.

Mr. Backhouse was a businessman and associate of the defendant. Amongst a number of other companies in various jurisdictions, in June, 2009 he had a 100% shareholding in a company called "G-Jet J Ltd", a private company, limited by shares. That company owned an aircraft.

In 1998 another company controlled by Mr. Backhouse, Citation Flying Services ("CFS") had entered into a refinancing deal for the aircraft with a company called Finova, whereby Finova purchased the aircraft from CFS and immediately hired it back to CFS for 84 months, with an option to purchase.

During the currency of the hire purchase agreement, in 2002, CFS indicated that, against the \$1,350,000 sum that was the principal for the aircraft, a company controlled by the defendant, Helix, would be injecting \$354,003.60 in order to reduce that balance.

In fact, a payment in the sum of \$637,482 was made by one of the defendant's companies to CFS and it was from this sum that the \$354,003.60 was paid: the defendant had now paid approximately 50% of the purchase price of the aircraft.

In correspondence with Finova in 2002 it was clarified, on behalf of Helix, that the money had been injected in exchange for certain rights to use the aircraft and a share of any sale proceeds. This was clarified, in other documentation produced in 2003, to be a right to 50% of the sale proceeds.

Further, it was clarified that Helix would have no other rights or interests in the aircraft. In terms of operating the aircraft there was evidence that, for example, the expenses were borne on a 50/50 basis. The evidence reflected that the defendant paid approximately £70,000 in expenses whilst the agreement was in existence.

There was a complicated sequence of documents, agreements, and correspondence, which purported to clarify the nature of the agreement and showed how events had transpired between the parties.

In particular, correspondence between Mr. Backhouse and the defendant in 2003 suggested that there came a time when the defendant had failed to keep up with his financial obligations under the agreement.

As a result, it was finally agreed that the defendant would stop making payments altogether upon the agreement that he would receive further benefits and that this would bring their contractual relationship to an end.

The aircraft was sold shortly after the end of the agreement in 2004 to Mr. Backhouse, trading as DAS. The total purchase price was \$1,609,750. On the same date the aircraft was sold on to G-Jet J for \$1,600,000.

RCPO obtained a restraint order and an order for a management receiver against the defendant. Part of the receiver's investigation into the defendant's assets involved making enquiries with Mr. Backhouse as to the defendant's interests in the aircraft.

Mr. Backhouse indicated that, whilst there had been a business relationship in respect of the aircraft, which had ended in 2003, the defendant did not have an interest in the aircraft itself, CFS or G-Jet J Ltd. Pursuant to court orders and requests by the receiver, Mr. Backhouse disclosed various documentation associated with the aircraft.

In summary, he maintained that the defendant had no share in the aircraft after he relinquished his entitlements under the agreement in 2003, that he had not been aware of the defendant's criminality, and that that theirs had been an arms-length business relationship.

RCPO went on to obtain an order for an enforcement receiver. Expressly *excluded* from the list of assets that the receiver could sell was an aircraft, the beneficial owner of which was the respondent in this case, Mr. Backhouse. With this application RCPO sought to establish that Mr. Backhouse had an asset (the aircraft) that the receiver was entitled to, in order to satisfy the confiscation order against the defendant.

The Judge found that Mr. Backhouse had shown himself to be evasive when dealing with the receiver and, in relation to certain issues, he had lacked candour. He had drip-fed information to the receiver which was ultimately incomplete. In his evidence he had blamed others, such as his legal advisors, for the deficiencies in the information that he had provided.

Ultimately, the Judge found that it was difficult for him to accept his evidence on issues other than those for which there was documentary support.

The Judge found that the 2001 operating agreement was genuine. However, he found that the purported "clean break termination" in 2003 did not represent an act on the part of the defendant that was met with proper consideration; it did not make commercial sense for him to walk away with nothing for his investment of \$637,000 plus £70,000, except the use of the aircraft for two years [para. 54].

RCPO's principal claim was that the defendant had a beneficial interest in the aircraft. The Judge found that whilst the defendant *may* have owned a beneficial interest in it at some point in time, given the number of transactions that had taken place, and given the lack of analysis of how those transactions had impacted upon that interest, it was not open to him to find that he had *retained* that interest [para. 59].

A secondary submission in relation to the monies that were originally invested by the defendant also failed [para. 61].

However, in light of his earlier findings the Judge found that, when he relinquished his rights to possession of the aircraft the defendant made a tainted gift, within the meaning of the Act, to the value of \$461,268.59, which represented the value of his investment minus various expenses [para. 64].

As part of his conclusion the Judge made the following observation which is a point that must be absorbed, whether prosecuting or defending:-

*“65. In establishing a regime for pursuing the proceeds of crime Part VI of the Criminal Justice Act 1988 assumes the ordinary rules as to how a defendant has an interest in property. That means that the prosecution must analyse how under ordinary principles of property and trust law a defendant acquired and hold (sic) property which is said to be subject to the confiscation order...”*

## Criminal benefit

### Possessing v Obtaining

R v Willcox [2011] EWCA 2194

8<sup>th</sup> September, 2011

This is a case which might have had the potential to clarify a point of principle but for the decision of the Crown not to resist the appeal whilst “*standing by their submissions*” in relation to it.

The appellant had been made the subject of a confiscation order in the sum of £1,231.50 as a result of her conviction for possession of a Class A drug and supply of a Class A drug. It would appear that at least part of that order represented the value of the drugs relating to offence of simple possession.

Where he is charged with simple possession, can a defendant properly be said to “*obtain property as a result of or in connection with the conduct*”? It might be thought that, in truth, he *obtains* it *before* the commission of the offence (not *as a result of it*); the offence relates to the *possession* and not the *acquisition (or obtaining)* of the drugs.

This remains an issue for those prosecuting and defending in such cases but, in the absence of any authority on the point, it remains something that in the opinion of the author can be argued either way.

## Apportionment

R v George [2011] EWCA Crim 1777

21<sup>st</sup> July, 2011

This case demonstrates the difficulties that defendants bring upon themselves, for the purposes of confiscation, where they fail to acknowledge their guilt post conviction and, consequently, are at the mercy of a Judge's view of the case.

It is another reminder that in cases in which there is real scope for arguing in favour of, for example, apportionment, a defendant is generally best served by providing candid evidence as to their precise role and remuneration (real or anticipated) from the offence. In many cases they really do have nothing to lose, and much to gain, by doing so.

The appellant was convicted after trial of conspiring to supply Class A drugs (cocaine). There were two co-defendants in the case; one had pleaded guilty and the other had been acquitted. The appellant was made the subject of a confiscation order in the sum of £70,800, a sum equal to the Available Amount, the Judge having found the Criminal Benefit to be £222,000, which represented the total value of the drugs involved.

The appeal concerned the finding of the Judge that the appellant's role was at the centre of the conspiracy. It was argued that there was insufficient evidence before the Judge to justify such a finding.

As a pilot, the appellant had been responsible for importing the drugs by plane. There was evidence that he had flown the drugs into the country on the day in question and then driven them to a co-conspirator, after which the police had seized the drugs.

There was also evidence that the appellant had made two further flights within two weeks of the seizure and that the drugs were of a high purity, suggestive of their proximity to the top of the supply chain. In addition there was phone contact with two co-conspirators in the build up to the relevant importation.

The appellant maintained his innocence throughout those proceedings and, consequently, asserted that he had never benefited from any criminal conduct [para. 9]. Whilst his position was set out by his counsel he did not give evidence during the confiscation hearing.

For the purposes of calculating the Criminal Benefit the Judge found that the appellant was "*near the top of the distribution chain, well above it reaching street level*", before coming

“unhesitatingly” to the conclusion that the wholesale value of the drugs was properly regarded as his Criminal Benefit and making no apportionment of benefit between him and his co-conspirators.

The Court found that in light of the fact that there had been no basis of plea and no compelling evidence from the appellant as to his role, and in light of the evidence in the case, the Judge was justified in rejecting the contention that the appellant was someone who could be categorised as a “mere courier” or “very minor contributor” simply rewarded by a fee.

The appeal was dismissed.

## Operating a Company Unlawfully

R v Weintroub (Adrian Mark) & Weintroub (Jeremy)

14<sup>th</sup> July 2011

The appellants appealed against confiscation orders made against them under the Proceeds of Crime Act 2002. They had been directors of a company. The company went into insolvent liquidation. The appellants were therefore prohibited by the Insolvency Act 1986 s.216 from acting as directors of a company with the same, or a similar, name. However, they started another company using the same name and were found guilty of contravening s.216. They had received approximately £72,830 each in salary and dividends whilst directors of the second company. During the confiscation proceedings they argued that the majority of customers would have come to the company because of the merits of its product, not because of its name. Therefore the amount of benefit from their conduct was the amount which could be attributed to customers who had relied on the company's name. The Judge accepted that argument and made confiscation orders in the sum of £7,500, approximately 10 per cent of the total benefit they had received.

The court dismissed the appeal, and found that the lower court should have found that the benefit figure was the full amount that they had obtained from trading in circumstances in which they were prohibited. The court's reasoning as set out at paragraph 8 to 12 of the judgment was that as the appellants had carried out illegal activity all the money that they had gained from that illegal activity was their benefit figure. Therefore the lower court's judgment was very lenient in the circumstances. This case is notable because it strongly reinforces earlier decisions on what constitutes benefit from criminal conduct.

## Retroactive Effect of May and White

R v Nanglu (Sarabjit Singh) [2011] EWCA Crim 1840; R v Parsons (Andrew) [2011] EWCA Crim 1728

13<sup>th</sup> July 2011 and 23<sup>rd</sup> June 2011

All three of these matters involved confiscation orders that were made before the decisions in *R v May* [2008] UKHL 28 & 29 and *R v White and others* [2010] EWCA Crim 978. In these authorities it was stated that, if someone was a courier, custodian or someone who clearly did not, for example, “obtain” the drugs, within the meaning of POCA as clarified in *May* and *White*, then this should be reflected in their confiscation orders and, as such, they should be permitted to rely upon these authorities when they appeal.

In all these three matters the Crown agreed to reduce the Criminal Benefit to what they were paid for their involvement in the relevant offence. These cases are likely to lead to a considerable number of appeals by those with old orders who can be categorised as falling within the description in the endnote of *May*, namely *mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property.*

**Quinton Newcomb Barnaby Hone**

Chambers of Michael Hubbard Q.C. and Karim Khail Q.C.

**ONE PAPER BUILDINGS**