

Criminal benefit

Retroactive Effect of May and White

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

13th July 2011 and 23rd June 2011

1. 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.
2. 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.*

Operating a Company Unlawfully

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

14th July 2011

3. 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.

4. 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.
5. 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.
6. 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.
7. 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.
8. The courts 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 courts judgment was very lenient in the circumstances. This case is notable only because it strongly reinforces earlier decisions on what constitutes benefit from criminal conduct.

Possessing v Obtaining

R v Willcox [2011] EWCA 2194

8th September, 2011

9. 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.
10. 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.
11. 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.

12. 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.

Criminal Benefit from VAT Evasion where Property is also “Obtained”

R v Young (Noel) [2011] EWCA 1176

12th May, 2011

13. The appellant pleaded guilty to conspiracy to defraud by evading liability to pay VAT on imported vehicles and concealing criminal property. The appellant was the organiser of a scheme to import high value vehicles from EU countries. The vehicles were registered using false or fraudulently obtained documentation and the VAT due on them was evaded. The judge at first instance made a confiscation order in the sum of £6,946,747.62.
14. The appellant contended that the judge had adopted the wrong approach by evaluating the benefit from the criminal conduct on the basis of the gross value of the vehicles rather than the amount of VAT which was lost.
15. The court dismissed the appeal. The court stated that there had been no error of law in the judge’s approach to the identification of the property transferred to the appellant and no evidence of unfairness in the judge’s assessment of the appellant’s benefit from the conspiracy.
16. The court highlighted the fact that the benefit figure was based on a conservative estimate of the appellants benefit, which relied upon his direct involvement and the amount of money transferred through into his account. On a strict application of the statutory assumptions the benefit figure would have been in the region of £64 million.

Lack of Evidence to Justify a finding of Joint Ownership

R v Clark [2011] EWCA Crim 15

17. Further to the developments in the law relating to the calculation of Criminal Benefit in the case of *R v May [2008] UKHL 28* and the subsequent case law, much of which has been considered in detail in previous issues of the News@One, the Court of Appeal gave guidance in relation to bailees in the case of *R v Clark [2011] EWCA Crim 15*.

18. The appellant was convicted of his involvement in a conspiracy to handle stolen cars. His role was to act as a bailee for the vehicles concerned and he containerised and transported them in preparation for shipment.
19. During the confiscation proceedings the Judge declared his Criminal Benefit to be £1.5 million, which was the value of the vehicles that had passed through his hands. On appeal the appellant argued that the Judge had been wrong to find that he had “obtained” the vehicles for the purpose of POCA.
20. The Court of Appeal allowed the appeal upon the basis that there had been insufficient evidence to justify a finding, on the part of the Judge, that the cars were jointly *owned* by the appellant and his co-conspirators.¹³
21. The only evidence was to the effect that he played an *important* role in the conspiracy but that alone was insufficient to justify such a finding. The Judge had failed to make clear findings in respect of the capacity of the appellant and whether he received and dealt with the cars as joint owner or bailee.
22. On the face of it the appellant had received the vehicles not for his own benefit but, rather, for the benefit of the other principal. In those circumstances, the Court of Appeal quashed the confiscation order and remitted the question of confiscation for the Judge to determine the Criminal Benefit afresh.

R v McCreesh [2011] EWCA 641

23. For similar reasons the appeal was allowed in the case of *R v McCreesh* [2011] EWCA 641. The appellant had been made subject to a confiscation order of just £651.03 with a Criminal Benefit figure of £3,165,971. He appealed against the latter figure.
24. The appellant was convicted of conspiracy to contravene section 170(2) of the Customs and Excise Management Act 1979. The offence involved the laundering of marked rebated gas oils, commonly known as Red Diesel, and Kerosene. The appellant sought to limit his role to that of a driver in a basis of plea that was not accepted by the prosecution.
25. Whilst a *Newton* hearing was listed, but not ultimately heard, the sentencing Judge sentenced upon the basis that the appellant was *more than a delivery driver*.
26. The appellant successfully appealed against the sentence that was imposed on the basis that the Judge ought to have held a *Newton* had he intended to sentence on that basis. That appeal post-dated the confiscation hearing.

27. In making his determination as to the Criminal Benefit the Judge determined that each of the defendants, including the appellant was *part of a joint enterprise* and that *each of them benefited from the whole of this criminal enterprise*.
28. Having set out the relevant line of cases dealing with the assessment of Criminal Benefit, the appeal was allowed. The Court noted, at para. 29 that “...*the Judge made no express findings in light of such evidence as had been put before him to justify a conclusion that the value of the benefit obtained was not simply obtained by ‘the conspiracy’ but had been obtained by the appellant whether in his own right or jointly with the other conspirators.*”sThe Court went on to find that whilst in many cases the Courts may be justified in drawing robust inferences, “*as the facts stood in this case we do not think that the Judge was justified in reaching the conclusion that he did. Nor did he make the findings that were open to him to justify the conclusion that he asserted.*”
29. The case was remitted back to the Crown Court for a fresh determination of the confiscation order.

Criminal Benefit in MTIC Fraud

30. For a demonstration of a robust approach by the Court of Appeal to Criminal Benefit in MTIC fraud cases see *Takkar v R* [2011] EWCA Crim 646, in which a £5,320,420 confiscation order was upheld.

Apportionment

R v George [2011] EWCA Crim 1777

21st July, 2011

31. 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.
32. 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.

33. 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.
34. The appeal concerned the finding of the judge, during those proceedings, that the appellant's role was at the centre of the conspiracy. In essence, it was argued that there was insufficient evidence before the judge to justify such a finding.
35. 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 drugs had been seized by the police.
36. 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.
37. 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.
38. 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.
39. 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.
40. The appeal was dismissed.

R v Rooney [2010] EWCA Crim 2

41. Early in the New Year, on the 18th January, 2010, the Court of Appeal clarified the ramifications of the House of Lords case of *R v May [2008] UKHL 28* with respect to the apportionment of benefit.
42. In *R v Rooney [2010] EWCA Crim 2*, after referring to *May* and the cases referred to by the House of Lords in that judgment, the Court summarised that such cases will fall into one of three categories, at para. 36:-

“In short, the position is, as we understand it:

 - (a) if a benefit is shown to be obtained jointly by conspirators, then all are liable for the whole of the benefit jointly obtained.*
 - (b) If, however, it is not established that the total benefit was jointly received, but it is established that there was a certain sum by way of benefit which was divided between conspirators, yet there is no evidence on how it was divided, then the court making the confiscation order is entitled to make an equal division as to benefit obtained between all conspirators.*
 - (c) However, if the court is satisfied on the evidence that a particular conspirator did not benefit at all or only to a specific amount, then it should find that is the benefit that he has obtained.”*
43. On the facts of *Rooney*, an importation case relating to a consignment of cannabis resin with a wholesale value of £3.6 million, the Court of Appeal found that the judge at first instance had been entitled to divide the benefit equally among the conspirators and dismissed the appeal.
44. This decision was based upon the fact that no evidence had been placed before the judge on which he could properly have found that Mr. Rooney had benefitted only to the sum of £200, which was what he argued on appeal.
45. There would appear to remain a significant “grey area” between categories (a) and (b). There are examples of cases with similar facts to that of *Rooney* in which there has been no apportionment.
46. Indeed, the Court of Appeal has acknowledged, in the case of *R v McCaffrey [2010] EWCA Crim 325*, that the same set of facts can lead to two different results: in one case, apportionment; in the other, no apportionment.
47. Consequently, with proper preparation and anticipation of this issue, it is likely, in many cases, to be possible to persuade courts that defendants fall within (b) rather than (a).

48. For a more detailed analysis of apportionment please see my article in the first “News@One” (see below).

ARTICLE: “Having Your POCA Cake and Eating it: Apportionment”

Quinton Newcomb

What is “Apportionment”?

49. By virtue of the fact that Confiscation Orders are made *in personam* (against a particular person) and not *in rem* (against a thing) calculating the Criminal Benefit in confiscation cases is not an exercise in dividing up the money obtained from a particular crime between defendants, as if handing out slices of a cake.
50. The whole sum of the Criminal Benefit “cake” can be, and often is, deemed to be the Criminal Benefit for each of a number of co-conspirators or co-defendants, who are said to have obtained it *jointly*. However, the proliferating caselaw has established that, in certain circumstances, it is appropriate to apportion the Criminal Benefit between defendants.
51. There are two ways in which apportionment can operate:-
 - a) Where a crime takes place over a number of phases, or if it includes a series of separate substantive offenses, one can seek to limit the particular defendant’s criminal benefit to those phases or offences in which he participated (i.e. a *temporal* apportionment);
 - b) Where a group of individuals obtain property from crime which is intended to be divided between them, then one can seek to limit the particular defendant’s benefit to that *part* of the property which he actually obtained (i.e. a *role-specific* apportionment).

Relevant Caselaw – The Emerging Picture

52. The House of Lords considered the issue of apportionment in the case of *May [2008] UKHL 28*. Their Lordships determined that where a number of individuals have *jointly* obtained the proceeds of their crime, they should each be considered to have obtained the *full* value of those proceeds.
53. In that case the appellant pleaded guilty to a count of conspiracy to cheat the public revenue. A confiscation order was made against him in the sum of £3,264,277. This

was the full amount obtained by the conspiracy during the time that the appellant was involved (phases 3 and 4 of a four-phase conspiracy – an example of *temporal* apportionment).

54. The judge hearing the confiscation proceedings found that the defendants were jointly responsible for the fraud and that the property obtained through the fraud was obtained *jointly* by them. Each was consequently deemed to have benefited in the full amount jointly obtained.
55. Both the Court of Appeal and then the House of Lords dismissed the appeal. It was held that on the facts of the case this was not disproportionate due to the level of involvement of all of the defendants in the conspiracy.
56. A number of authorities dealing with apportionment were referred to by the House of Lords, many of which are referred to below. For an illustration of how apportionment should *not* work their Lordships provided the example of the case of *Porter* [1990] 1 WLR 1260 at para. 27.
57. In that case the total criminal benefit from a joint enterprise drugs offence was £9,600. The learned Judge hearing the confiscation proceedings determined that they had received this sum *jointly*.
58. Their Lordships stated that the Court of Appeal in *Porter* had erred in substituting orders for £4,800 against each of the Defendants because, for the purposes of the Act, each had obtained £9,600.
59. In *R v Rooney* [2010] EWCA Crim 2, after referring to *May* and the cases referred to by the House of Lords, the Court indicated that such cases will fall into one of three categories, at para. 36:-

“In short, the position is, as we understand it:

(a) if a benefit is shown to be obtained jointly by conspirators, then all are liable for the whole of the benefit jointly obtained.

(b) If, however, it is not established that the total benefit was jointly received, but it is established that there was a certain sum by way of benefit which was divided between conspirators, yet there is no evidence on how it was divided, then the court making the confiscation order is entitled to make an equal division as to benefit obtained between all conspirators.

(c) However, if the court is satisfied on the evidence that a particular conspirator did not benefit at all or only to a specific amount, then it should find that is the benefit that he has obtained.”

60. Examples of cases falling into the three categories outlined above are many and various but some illustrative examples are as follows.

(a) if a benefit is shown to be obtained jointly by conspirators, then all are liable for the whole of the benefit jointly obtained

61. The defendant in *R v Chrastny (No 2) [1991] 1 WLR 1385* was convicted of conspiring with her husband and another to supply cocaine and a confiscation order was made against her in the sum of over £2,670,000 (representing the full value of the property obtained pursuant to the conspiracy). The husband having absconded, the appellant wife contended on appeal that the proceeds of her and her husband's drug trafficking should be apportioned equally between them, relying on *Porter*. The court rejected that submission, and substantially upheld the order, although in a reduced sum. Their Lordships in *May* found that, on the assumption that the payments had been jointly received, this was the correct decision.

62. In *R v Green [2008] UKHL 30* the appellant pleaded guilty to three counts of drug-related offences: conspiracy to supply class A and B drugs, conspiracy to launder the proceeds of drug trafficking and conspiracy to import controlled drugs. The Judge dealing with the confiscation, arrived at a total benefit figure that included money retained by the appellant's two co-defendants. The appellant appealed on this point to the Court of Appeal and then the House of Lords.

63. The appeal turned on whether the appropriate measure of benefit is the total value of the property actually received by the particular defendant the court is considering. The appellant argued that the sums retained by the co-defendants should therefore have been deducted from the amount specified in the confiscation order.

64. The House of Lords rejected this argument, and upheld the decision in *R v May*. The court found that where money or property is received by one defendant on behalf of several defendants jointly, each defendant is to be regarded as having received the whole of it for the purposes of s.2(2) of POCA.

65. It did not matter that the proceeds might have been received by one conspirator, who retains his share before passing on the remainder to his co-defendants; what mattered was the *capacity* in which he received them.

(b) If it is not established that the total benefit was jointly received, but it is established that there was a certain sum by way of benefit which was divided between conspirators, yet there is no evidence on how it was divided, then the court making the confiscation order is entitled to make an equal division as to benefit obtained between all conspirators.

66. In *Rooney* the confiscation order dated from 2004 (before the judgment in *May* was handed down). The appellant was convicted of being part of a group dealing in

wholesale drugs. The trial judge, when deciding on the benefit that the appellant and his five co-defendants had obtained, relied upon *Porter* and concluded that the overall benefit was £3.6 million and that this should be apportioned equally between the defendants.

67. The Judge found that all were jointly involved in the moving of large quantities of drugs. No evidence was put forward at the confiscation hearing as to how the benefits obtained were split between the co-defendants. The appellant appealed on the basis that the only evidence of the benefit he received was £200 for work undertaken by him, and that he had a minor role in the overall conspiracy. The court dismissed his appeal.
68. The court stated, as set out at paragraph 42 of the Judgment, there was no evidence in front of the judge at the time of the confiscation to show that the appellants benefit was only the £200 he was paid to carry out the work, and there was no argument as to who had ownership of the drugs.
69. The court also noted that there had been no argument as to the value of the drugs being used as the basis of the benefit figure. The court implied that if the appellant disputed his benefit or the overall benefit of the conspiracy then arguments and evidence should have been put before the court at the time of the confiscation hearing – a cautionary shot across the bows for legal representatives dealing with confiscation everywhere.
70. In *R v Gibbons [2003] 2 Cr App R (S) 169* the defendant was one of four conspirators who had between them obtained £220,000 by fraud. But there was no evidence before the trial judge to enable him to determine how the proceeds had been divided between the conspirators or, it seems, to decide that they had been obtained jointly. He therefore divided the sum between the four, although failing (para 66) to specify the sum of benefit which he attributed to the defendant.
71. This equal division was criticised in argument in the Court of Appeal, but was, according to the House of Lords in *May* rightly upheld. The case was one which clearly called for a confiscation order. It would have defeated the purpose of the legislation to allow lack of information, which only the defendant and her co-conspirators could provide, to preclude the making of an order. An equal division was the fairest solution available in the circumstances.

(c) if the court is satisfied on the evidence that a particular conspirator did not benefit at all or only to a specific amount, then it should find that is the benefit that he has obtained

72. In the endnote to the judgment in *May* their Lordships state in plain terms, at para. 48 F:-

“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. It may be otherwise with money launderers.”

73. The case of *Allpress* [2009] 2 Cr. App. R. (S.) 58 dealt with the issue of money launderers and found that, in fact, the position is not *generally* “otherwise with money launderers”.
74. In essence, it was found that where you have a money launderer who, in effect, is no more than a cash courier or custodian then their criminal benefit is the fee or reward that they obtained as a result and *not* the value of the money that went through their hands (para. 80-82).
75. By way of example, Ms. Allpress acted as a courier on behalf of a drug trafficker. She made two trips to France, carrying on each occasion a sum in cash with a total sterling value of £156,210. She was paid £800 on each occasion, together with her expenses. The appellant admitted that she had benefited in the sum of £3,600 by way of payments and costs, but the sentencing judge found that her benefit was the sum of £156,210, and a confiscation order was made on that basis.
76. On appeal she argued that her Criminal Benefit ought to have been limited to the payments that she received in pursuance of her role in the crime. Their Lordships, following the principles established in *May* allowed the appeal, and her confiscation order was reduced to £3,600.
77. However, their Lordships found that rather counter-intuitively the position was entirely different where money was laundered through a bank account. This was in the context of a *solicitor* laundering money through the firm’s bank account (you have been warned!)
78. This finding was based upon the legal status of an account holder. When money is paid into a bank account it gives rise to a thing in action over that money in favour of the holder of that account and it was therefore, in law, *his* money (para. 85). This followed the findings of the Court in *R v Sharma (Ajay Kumar)* [2006] EWCA Crim 16; [2006] 2 Cr. App. R. (S.) 63.
79. A small chink of light was offered for those whose bank accounts are used and abused by others. Their Lordships stated, at para, 86:-

“We do not exclude the possibility of a case where money is paid into a bank account in the name of D, but which is in reality operated entirely by P for the benefit of P, and where it would be wrong, unusually, to conclude that D obtained monies paid into the account. This is more likely to arise in a domestic than a commercial context. We have in mind, for example, the possibility of a husband or father

operating an account in the name of his wife or child, which he treats entirely as his own and in respect of which the wife or child is a mere nominee.”

80. In light of the highly technical way in which the Court drew a distinction between those who launder money through bank accounts and those who launder cash, it is difficult to see how their Lordships could justify such an exception in future cases without contradicting their own *ratio* in *Allpress*.
81. In practice, such a situation it is unlikely to emerge often and it may be some time before we have an authority specifically on point.
82. In *R v Sivaraman (Mylupillai) [2008] EWCA Crim 1736*. The appellant pleaded guilty to conspiracy to evade excise duty in respect of hydrocarbons, contrary to the Customs and Excise Management Act 1979 s.170(2). He was employed as a manager of a service station and had conspired with the owner of the station to accept deliveries of “off road” diesel and sell it on after removing the red dye it was marked with. He did this with eight to ten deliveries. The appellant received payments of £15,000 for his part in the conspiracy. The overall amount of duty evaded was £128,520. At the confiscation hearing the judge found that the appellant’s benefit was £128,520. The appellant appealed this decision.
83. The Court of Appeal upheld the appeal and found that the judge should have found that the appellant’s benefit was £15,000, and they provided a summary of the relevant principles that had led them to this conclusion (see above).

Mixed Cases

84. It is clear that apportionment can, depending on the circumstances, work to affect only certain individuals within a group of defendants. For example, defendant A is found to be a principal to a conspiracy and is involved from the beginning. The total value of the conspiracy is £2 million and the principal conspirators are found to have obtained the benefit *jointly*. Defendant A’s criminal benefit is £2 million.
85. By comparison, defendant B is found to be an active participant in the same conspiracy but he performs a specific role for which he is paid £30,000. He never obtained, for the purposes of the Act, the £2 million jointly with the principals. Consequently, his criminal benefit is £30,000.
86. In this way there is no hard and fast rule that if apportionment is to take place it must take place for every defendant. An example of where this concept might arise is provided by the facts of *R v Patel [2000] 2 Cr App R (S) 10*. The appellant, a postmaster, pleaded guilty to one count of conspiring to obtain property by deception.

He had obtained payment of £51,920 from the Post Office by using stolen benefit books and forging signatures. He had then paid a share of the proceeds to an accomplice. A confiscation order was made against him in the full sum of £51,920.

87. It was argued on his behalf on appeal that the judge had had a *discretion* to order payment of a smaller sum, and that he should not in any event have ordered the payment of more than what was left to the defendant after paying his accomplice.
88. Their Lordships in *May* found that these submissions were rightly rejected by the Court of Appeal. The defendant admitted receiving in his hand the sum ordered, and what he did with the money afterwards was irrelevant. (This was consistent with the ruling in *R v Currey (1994) 16 Cr App R (S) 421, 424*, that what matters is whether someone has obtained money, not whether he has retained it).
89. The accomplice was not before the court and his position was not discussed. It was, however, clear according to the House of Lords that if he had not obtained the full sum jointly with the defendant, he would have been subject to a finding that he had benefitted to the extent of the *payment* he had received.

A Judicial Lottery?

90. The extent to which this area of confiscation law is pervaded by an air of Judicial lottery has been recently demonstrated by the Court of Appeal in the case of *Regina v Colin Dean McCaffrey, Dean McCaffrey [2010] EWCA Crim 325*.
91. The defendant brothers pleaded guilty to counts of conspiracy to rob. A single robbery was carried out in pursuance of the conspiracy and the items stolen had a trade value of £1,639,311.
92. The case for the prosecution was that the applicants and their uncle, Benjamin Murphy, had planned and executed the robbery with others. Benjamin Murphy absconded after his release on bail.
93. A co-defendant, Rhodes, had a lesser role. He was involved in the conspiracy as a vehicle purchased by him was used in one of the reconnaissance trips and he used a van to transport the conspirators and the stolen property back from Sheffield to Manchester. The learned judge certified a benefit of £12,000 in respect of Rhodes on the basis of his lesser role.
94. Having heard the two defendants give evidence, the judge was satisfied that neither was telling the truth in relation to their involvement as to when they were first brought into the conspiracy.

95. The conclusion of the judge was that the robbery was carried out, planned and orchestrated by three principals, namely the applicants and Murphy. Although there were others whose responsibility lay elsewhere, the judge considered that he *could* make an order that each of the three conspirators had benefited in the full sum. However, on the facts, each benefited to the value of one third of the stolen amount, less various sums which had been recovered.
96. The defendants stated that they had very limited available assets but the judge was satisfied that the applicants had assets elsewhere, even though the investigators had been unable to find them.
97. The judge was satisfied the applicants knew where the jewellery was and could get to it. As a result he made a hidden assets order for the full value of the jewellery obtained and divided it equally between the 3 defendants. The order in the case of Colin McCaffrey was in the sum of £537,517 and in the case of Dean McCaffrey, the order was in the sum of £539,937. The appeal against these orders was dismissed.
98. At para. 14 of the judgment the following is stated:-
- “In his submissions, counsel for the applicants accepted that the judge could have made orders in respect of each of them for the whole sum. Indeed, that is consistent with what was said by Lord Bingham, giving the judgment of the House of Lords, in the case of May [2008] 1 AC 1028, especially at paragraph 45.”*
99. It might be thought that a position whereby the Court of Appeal believe that one set of *facts* could lead to two entirely separate findings is entirely unsatisfactory. In essence, the court is saying that a finding for the criminal benefit in the sum of £1,639,311 for each defendant would have been *equally* justifiable.
100. In circumstances where a hidden assets order up to the full value of the criminal benefit is a possibility, as it was for these defendants, (remembering that the starting point in Section 7(1) of the Act is that the order will be made in the sum of the criminal benefit) this is the difference between a maximum default sentence of 5 years and 10 years.

An Opportunity Missed?

101. In *May* the House of Lords, on one view, missed an opportunity to *clearly* define the precise parameters of apportionment. Instead, we have three vague categories, the boundaries of which are blurred as shown by cases such as *McCaffrey*.

102. It would appear from the judgment that the Court was not prepared to commit to drawing the line at which a confiscation order would begin to offend the Human Rights Act and Protocol No. 1 of the ECHR.

103. In Janet Ulph's article, *Confiscation orders, human rights, and penal measures (L.Q.R. 2010, 126 (Apr), 251-278)* she observes the following with reference to the court's approach, on page 270:-

"In May, the House of Lords considered that, in general, there would be no breach of Protocol No.1 because the law merely deprived the criminal of property which he had wrongfully received. However, somewhat surprisingly, it was added:

"There might be circumstances in which orders for the full amount against several Defendants might be disproportionate and contrary to art 1 of the First Protocol, and in such cases an apportionment approach might be adopted, but that was not the situation here and the total of the confiscation orders made by the judge fell well below the sum of which the Revenue had been cheated."

This comment is puzzling at first sight. If each member of a gang had control of the whole property for a short period of time, it is difficult to see how the courts can order apportionment without creating a decision which conflicts with case law establishing that, as soon as a defendant obtains legal possession of property, he has received a benefit which reflects its value. Yet it may be that this comment was made because their Lordships wished to avoid appearing intransigent, when they could not anticipate every type of circumstance which might arise."

104. Some encouragement, then, that there may be opportunities for practitioners to challenge decisions by Judges at first instance *not* to apportion Criminal Benefit.

105. However, as was again demonstrated in the case of *McCaffrey* the Court of Appeal will undoubtedly be reluctant to interfere in all but the most oppressive of cases.

Practical Application of Apportionment

106. There will be defendants who will have no prospects of arguing in favour of apportionment. Indeed, in the *Allpress* category of cases, where the defendant receives money into a bank account, the door to this avenue would appear to be firmly shut.

107. However, another category of defendants may find themselves involved in a substantive offence or conspiracy that was far more serious, and more lucrative, than they ever appreciated at the time at which they were involved.

108. Their role may have been a relatively peripheral one, and they may have been performing a very discreet role on the basis that they would receive a *share* in what was obtained or a *fee* for their services.
109. Such defendants should be informed that if they are prepared to indicate how the benefit was divided and, in particular, what exactly they received out of the total property obtained by the group then this is likely to work greatly in their favour.
110. In addition, meticulous examination of the available evidence, assisted by the services of a forensic accountant in appropriate cases, can assist the defendant in establishing exactly *what* he received and *when*.
111. Through such detailed analysis, and by “following the money”, a clear picture can be presented in the Section 17 response. In the best-prepared cases this will be a picture that any prosecutor or Judge will find difficult to circumvent.
112. In practice, apportionment seems to work in this way: if a defendant provides the court with evidence as to what he received, and in what *capacity*, then a Judge may be inclined to apportion that part of the benefit to him (assuming his assertion is not at odds with the Crown’s evidence as to his role).
113. If, however, a defendant stays silent as to what he received and there is evidence that the benefit was obtained *jointly* then a Judge will be unable to justify apportionment. In those circumstances the defendant is likely to be saddled with a Criminal Benefit figure that represents the full value of the proceeds of the crime that he and others have committed.
114. Unless or until apportionment is defined more satisfactorily by Parliament or the higher courts, defence advocates should highlight the inconsistencies and unfairness that can arise in their particular case and invite prosecutors and Judges to temper the strict application of the Act with a large slice of common sense.

Mortgage Fraud (Mixed Funds)

115. The Court of Appeal handed down judgment in the case of *R v Waya* [2010] EWCA Crim 412 on the 25th March, 2010 in which they clarified the proper approach to criminal benefit in mortgage fraud cases where mixed (tainted and untainted) funds are used to purchase the property in question.
116. The defendant had been convicted after trial of a single count of obtained a mortgage advance by deception. He purchased a property for £775,000 in 2003, partly by the use of legitimately obtained funds in the sum of £310,000 (40% of the value) and

partly by means of the fraudulently obtained mortgage in the sum of £465,000 (60% of the value).

117. In April, 2005 the fraudulently obtained mortgage was redeemed early when the defendant obtained a second mortgage in the sum of £838,943 from a different lender. This was a mortgage obtained legitimately.

118. The defendant was arrested for the first fraud in November, 2005 and by the time that the confiscation proceedings were heard the property was valued at £1,850,000.

119. The prosecution contended that the criminal benefit was the full £1,850,000. It would appear that the defendant's representatives did not challenge this contention although the learned judge did make a small concession by deducting from this figure the £310,000 in legitimate funds that he had put into the property when it was purchased. An order was made for £1,540,000.

120. Whilst counsel for the appellant ingeniously sought to argue that the criminal benefit was nil, the Court of Appeal acceded to the Crown's submission to the effect that the criminal benefit was 60% of the value of the property when the confiscation was heard in 2008.

121. The reason was that 60% of the funds put *into* the property had been tainted and, pursuant to section 80(2) of the Act, the court had to apply the greater of the following sums:-

(a) the value of the property (at the time the person obtained it) adjusted to take account of later changes in the value of money; or

(b) the value of the anything still held by the defendant which directly or indirectly represents the value of that property.

122. It did not matter that the original, fraudulent, mortgage had been paid off with a new legitimate one: by virtue of section 80 the money was traced from the original advance of money into a 60% share in the property. That was the property "obtained" through criminal conduct for the purposes of the Act.

123. If there were any doubt after the remarks in *May* then this decision places firmly beyond doubt the fact that the cases of *R v K* (unreported) 1 October 1990 and *R v Layode* (unreported) 12 March 1993 are to be abandoned by the POCA regime, being cases limited in relevance to the Criminal Justice Act 1988.

124. Practitioners should be alive to financial investigators and prosecutors who still seek to use these cases as justification for ignoring the significance of mixed funds. This judgment explains very clearly why legitimate shares of property must be excluded from the criminal benefit calculation.

Cigarette Importations

R v Bajwa (Naripdeep Singh) [2011] EWCA Crim 1093

14th June, 2011

125. Five appellants were convicted for conspiracy to fraudulently evade duty chargeable on cigarettes. Between March and September 2004 the appellants had conspired to smuggle into the United Kingdom a shipping container containing seven million counterfeit cigarettes from China. Before it arrived the appellants were arrested and the bill of lading was seized. The container was seized by customs on its arrival into the United Kingdom.
126. At the confiscation proceedings all of the appellants asserted that the conditions of the Proceeds of Crime Act 2002 s.75(2)(c) were not fulfilled as they had not been involved in the conspiracy for a period of six months. All the appellants asserted that they had not benefited from the conspiracy as they had not obtained a pecuniary advantage under s.76(5) as they had never become liable to pay any duty on the cigarettes so could not be said to have evaded duty.
127. The judge ruled that as the relevant offence was a conspiracy the crucial question was whether that had been committed over a period of at least six months and that it was irrelevant whether a particular defendant had only participated for a shorter period.
128. He further ruled that all had received a pecuniary advantage and should therefore be treated as having a criminal lifestyle for the purpose of s.6. The appellants appealed on these two grounds.
129. The Court of Appeal allowed the appeal on both grounds. First a defendant could only come within s.75(2)(c) if it was demonstrated that he had committed the relevant offence for a period of at least six months and the judge had erred in ruling to the contrary.
130. That approach was consistent with the object of s.75, which was to identify particular defendants who had a criminal lifestyle and s.75(2)(c) should be construed consistently with s.75(2)(a) and s.75(2)(b). This was set out at paragraphs 55 to 56 of the judgment.
131. Second, the judge was wrong to conclude that all the appellants had obtained a pecuniary advantage within s.76(5) and a benefit under s.76(4). The judge was therefore wrong to conclude that the appellants had a criminal lifestyle for the purposes of s.6(4). A person was only liable to pay excise duty on tobacco imported

by sea if he was holding the goods at the excise duty point, or he caused the goods to reach the excise duty point.

132. In passing judgment the court stated that judges at first instance faced great complications when applying the Act in confiscation proceedings, which resulted from offences of smuggling tobacco products. It was not in the interests of justice or of the public that the law should be so complicated and it was time it was simplified.

R v Redmond (Ian David) [2011] EWCA Crim 203

24th May, 2011

133. The appellant pleaded guilty to being knowingly concerned in the fraudulent evasion of duty. The appellant had agreed to take delivery to his warehouse of contraband cigarettes, which had been imported from outside the European Union. It had been agreed before the judge that he had benefited in the sum of £365,075.35, representing £304,007.26 in respect of the excise duty evaded and £64,968.09 in respect of the VAT evaded. The judge found that the appellant had realisable assets of £131,089.10 and made a confiscation order in that sum.

134. A number of issues arose on appeal. The appeal was partially allowed and the confiscation order was reduced to £54,140.76. Customs had conceded that as the appellant had not held the cigarettes at the excise duty point or caused them to reach it; he was not liable to pay excise duty. The part of the confiscation order which related to excise duty had therefore to be quashed.

135. The next issue was whether the appellant was liable to pay VAT on the consignment. That depended on whether the prosecution had established that duty had not been paid on the cigarettes within the EU. The court found that this had been established. The next issue was the value of the cigarettes. There was a lack of evidence and the only safe course was to value them at the price at which they left the factory, namely 5 pence a packet. That led to a value of £5,368, the VAT being £939.49. That was the only sum which the prosecution had proved to represent the value of the appellant's benefit in evading VAT on the value of the cigarettes. No doubt in future this will lead HMRC to obtaining proper evidence to the value of cigarettes being brought into the country.

136. The next question was whether the "value of imported goods" for the purposes of the Value Added Tax Act 1994 s.21 included, in the case of tobacco goods smuggled from outside the EU, the duty which would have been levied if the goods had been legitimately imported and properly declared. Parliament had intended that the expression "all ... duties ... levied" in s.21 (2) (a) should mean all "duties ... due", that being the expression used in Directive 77/388. Such a construction gave purposive

effect to the Directive and avoided the absurdity of allowing smugglers to evade the VAT which would otherwise be due on the excise duty. Accordingly, excise duty was "levied" for the purposes of the 1994 Act when the goods were "charged" by law with duty at importation by virtue of the Tobacco Products Duty Act 1979 s.2, whether or not the duty was in fact charged or levied. In this case, the excise duty and the VAT on it were "levied" when the goods were smuggled into the UK. By reason of s.1 (4) of the 1994 Act, VAT arose on the importation of goods from places outside the EU and should be charged and payable as if it were a duty of customs, which liability continued after the importation. Therefore the appellant was and remained liable for the VAT due on the excise duty.

137. The appellant had argued that, as it had been decided that the "value" of the cigarettes was much less than originally claimed it was logical that the VAT to be levied on the value should also be reduced. That was not correct. Excise duty was not simply a percentage of the "value" of the tobacco product; it was based on the recommended UK retail price for the relevant cigarettes.

138. Accordingly, the fixing of the "base value" of the cigarettes at a mere £5,368 did not determine the level of duty chargeable on the cigarettes by virtue of s.2 of the 1979 Act. The excise duty chargeable at importation was £304,007.26 and the appellant was liable to pay VAT of £53,201.27 on that sum. That was part of his benefit from his offending. The total benefit, taking into account the VAT of £939.49 on the value of the cigarettes, was therefore £54,140.76.

139. The principles expressed by the court are a direct extension of the earlier cases of *R v Bell*; *Peratikou*; *R v Middlecote*; *R v Bevan*; *R v Leigh* [2011] EWCA Crim 6 and *R v Kullar* [2011] EWCA Crim 420, which are detailed paragraph 47 to 55 in the Summer 2011 Newsletter (and see below). All of these cases originate from the late 2010 decision of *R v White; Dennard; Perry; Rowbotham* [2010] EWCA Crim 978, which was detailed in the spring 2011 addition of the newsletter (and see below).

140. *R v Redmond* and *R v Bajwa* develop these cases one step further, and in doing so establish a clear principle in these types of cases on three important questions: when tax is due, what constitutes a criminal benefit, and what evidence is needed to establish the value of the goods in question.

R v Bell [2011] EWCA Crim 6

141. Since the decision in *R v White; Dennard; Perry; Rowbotham* [2010] EWCA Crim 978 ("White and Others") (see below), which was dealt with in the last edition of News@One, several appeals have been allowed based upon it.

142. In the case of *R v Bell; Peratikou; R v Middlecote; R v Bevan; R v Leigh* [2011] EWCA Crim 6 it was found that in each case, prior to confiscation orders being made, no one had applied their mind to whether each of the appellants had obtained a pecuniary advantage due to their involvement in the respective offences at the point of importation. It was not disputed, on appeal, that none of these appellants had the relevant causal link with the evasion of duty. Their appeals were allowed.
143. The case of *R v Kullar* [2011] EWCA Crim 420 related to a confiscation order made against the appellant for his role in providing inland storage facilities for the cigarettes concerned; other defendants had been responsible for the importation itself.
144. It was found, in light of the decision in *White and Others*, that the Judge who made the confiscation order had been referred to the wrong regulations and, indeed, erroneous case law based upon those regulations. It was found that when the *correct* regulations were applied in the context of the case law founded upon them there was insufficient evidence to allow an inference to the effect that the appellant had obtained any pecuniary advantage.
145. In light of the fact that the appellant accepted that he had been paid £400 for the use of his storage facilities, the original order was quashed and replaced with a confiscation order in that sum.

R v White [2010] EWCA Crim 978

146. The 5th May, 2010 saw the Court of Appeal adjudicate on a crucial point, which had significant ramifications for hundreds of other cases, in *R v White; Dennard; Perry; Rowbotham* [2010] EWCA Crim 978 ("*White and Others*").
147. The point arose out of *May* [2008] UKHL 28; [2008] 1 AC 1028; [2009] 1 Cr App R (S) 31 and *Jennings* [2008] UKHL 29; [2008] 1 AC 1046; [2008] 2 Cr App R 29 ("*May and Others*") and the application of the relevant principles by the Court of Appeal in *Chambers* [2008] EWCA 2467 and *Mitchell* [2009] EWCA Crim 214.
148. The point was this. In *May and Others* it was established that someone evading VAT or duty by smuggling only "obtains" a pecuniary advantage, for the purposes of the Act, where he *personally* owes that VAT or duty.
149. This represented a significant *change* in the law brought about by the case of *Jennings*. In the Court of Appeal it had been determined that in order to "obtain" a pecuniary advantage by smuggling *all that is required is that the defendant's acts should have contributed, to a non-trivial (that is, not de minimis) extent*.
150. The House of Lords disapproved of the Court of Appeals formula, replacing it with the following, at para. 14:-

“14. ... a person benefits from an offence if he obtains property as a result of or in connection with its commission, and his benefit is the value of the property so obtained, which must be read as meaning “obtained by him””.

151. Whereas before *Jennings* in the House of Lords they were unimportant, due to the way in which the Court of Appeal had defined “obtain”, the regulations which define whether or not an individual *personally* owes VAT or duty immediately took on a new significance for confiscation proceedings.
152. In *Chambers*, in order to show that the appellant was *personally* liable to pay duty on the cigarettes he had smuggled, the respondent relied on the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992, 1992/3135 (“the 1992 Regulations”) not knowing that they had been superseded (so far as tobacco products were concerned) on 1 June 2001 by the Tobacco Products Regulations 2001, 2001/1712 (“the 2001 Regulations”).
153. In fact, Regulation 28 of the 2001 Regulations amended the 1992 Regulations so as to provide that, with exceptions, Part II and Part III of the 1992 Regulations do not apply to tobacco products from 1 June 2001.
154. Whether he had obtained a pecuniary advantage would depend on whether liability arose under paragraph 13(3)(e) of the Regulations, which would impose liability on him if he was a person who “*caused the tobacco products to reach an excise duty point.*”
155. Their Lordships declined to enter into making a determination as to whether under the *correct* regulations the appellant had, indeed, been personally liable and, consequently, obtained a pecuniary advantage. Rather, they simply allowed the appeal and quashed the confiscation order.
156. After the case of *Chambers*, HMRC and RCPO undertook a hugely labour- intensive and laborious exercise which was known as the “Chambers Review”, during which they looked at hundreds of old cases in order to see whether the same mistake had been made.
157. After that review, in *White and Others* the Court of Appeal grappled with the regulations that they had not been prepared to grapple with in *Chambers*, the judgment was then to be applied to the other relevant cases that had been identified through the *Chambers Review*.
158. At the end of a complex judgment, in which the relevant regulations and directives were considered, the Court of Appeal came to the following significant conclusions:-

(a) excise duty becomes chargeable at importation, namely, when the goods are brought by sea, the time when the ship carrying them comes within the limits of a port;

(b) excise duty shall become chargeable at the time of release for consumption, which, in the case of an irregular importation, is the time of importation;

(c) the person liable to pay the duty is the person holding the tobacco products at the excise duty point, which, in the case of smuggled tobacco, is the time of importation;⁴

(d) any person who caused the imported goods to reach the point of importation is also liable to pay the duty, provided that he retains a connection with the goods at that time. Therefore, for the purposes of tobacco smuggling, any of the following are liable to pay:-

i. the person making the delivery in B for commercial purposes in B;

or

ii. the person holding the products in B with the intention of delivering them in B for commercial purposes in B (this includes the importer himself – see c);

or

iii. the person in B receiving the products for use for commercial purposes in B by a trader;

or

iv. the trader who in B is using the goods for commercial purposes in B.

159. On the facts of the case their Lordships placed import on the fact that the defendants had not been aware of the proper regulations applicable to their cases at the time of his confiscation hearing, at which they chose not to give evidence. This deprived them of the opportunity to make an educated choice as to whether to do so or not.

160. They went on to analyse the evidence in order to determine whether the court at first instance would have made the same decision had it been aware of the applicable regulations.

161. The appellant *Dennard* had been found in a vehicle containing tobacco, which had been smuggled into the country between the afternoon of the day before, and the morning of, his arrest.

162. The Recorder found, for the purposes of sentence, that both of them played a significant (and, necessarily, more than a de minimis) part in the 'getting of the property out of the crime'.

163. In particular, he referred to them becoming concerned in the removal and continuing concealment of the goods and stated that they provided an important link in the chain between the importation and ultimate sale.
164. The Court did not find that the judge would *inevitably* have found that Dennard was holding the tobacco products at the point at which they were imported. Nor could they say that he would have *inevitably* found that he retained a connection with the goods at the excise duty point, which he would have had to even if he were to have found that they caused the tobacco products to reach the point at which they were imported. The appeal was allowed.
165. The evidence against *White* showed that it was he who was directing matters from the UK and issuing instructions and paying for the transport; it was he who needed to be and was involved in any major decisions relating to the smuggling arrangements; and, most importantly, it was he whose cash was being used to buy the tobacco.
166. In the case of *White*, in the face of overwhelming evidence their Lordships found that he *would* have inevitably made the converse finding and that, consequently, the appeal should be dismissed.
167. In the other two cases *Rowbotham* and *Perry* the respondent (RCPO) did not seek to argue that they were holding the tobacco products at the point at which they were imported and, consequently, the appeals were allowed.
168. The defendant *Rowbotham* had, on two occasions in 2003 and 2004 respectively, been found by the authorities to be in possession of a large quantity of cigarettes upon which duty had not been paid.
169. In both cases he stated in interview that he had been promised a relatively paltry sum in order to look after the cigarettes for a limited period (2003) and transport them (2004), respectively.
170. He entered a written basis of plea to the 2003 matter that limited his involvement to harbouring the cigarettes in return for the promise of £200, which was never paid over to him. This was accepted by the Crown. A confiscation order was made in the full sum of the duty evaded in respect of both consignments of cigarettes.
171. The defendant *Perry* had entered a guilty plea on a written basis, which was not challenged by the Crown, to the effect that he had provided storage for smuggled cigarettes for 2 weeks and had transported 8 boxes of tobacco to that storage from within the jurisdiction (after they had passed the point of importation). The confiscation order was made in the agreed sum of the duty evaded.
172. Interestingly, the Court invited submissions in relation to the position in law of the lorry driver who does no more than knowingly imports the cigarettes on behalf of

another. Whilst they indicated that they did not find it necessary to rule on this definitively as it did not arise directly in the appeals that were before them, they made the following observations, at paras 189 and 190:-

“189. ...It tentatively seems to us that a lorry driver who knowingly transports smuggled tobacco will, for the purposes of the Regulations, have caused the tobacco to reach an excise duty point and will have the necessary connection with the goods at the excise duty point. We are concerned as to whether the driver falls within Article 7(3), assuming that it is necessary for him to do so.

190. If he does so, it would remain a matter of domestic law whether he has obtained a benefit for the purposes of confiscation proceedings. We note, in this respect, that in paragraph 48 of May it was said that a defendant “ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject” (underlining added) and that: “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.”

173. It is difficult to interpret this as anything other than a clear expression on the part of the Court of Appeal that a lorry driver who knowingly imports cigarettes for another ought *not* to be found to have “obtained” the pecuniary advantage due to the principles set out in *May*, notwithstanding the clear terms of the regulations which would seem to suggest otherwise.

174. It is extremely important for those dealing with defendants in cigarette importations to consider this case carefully, particularly before submitting any basis of plea. Defendants ought to be informed from the very outset of the potential significance for confiscation of their possession of, and status in relation to, the cigarettes at the various stages of the importation.

Relevance of the *Destination* of the Property Obtained from Unlawful Conduct

175. On the 19th May, 2010 the Court of Appeal delivered judgment in *R v Del Basso* [2010] EWCA Crim 1119. The issue was whether the court had been right to impose a confiscation order on two offenders who had failed to comply with an enforcement notice by operating a park and ride facility, in breach of planning permission, despite their submission that the scheme had not been run for personal profit but to provide income for a football club.

176. The appellant submitted that the majority of the benefits they received from the enterprise went back into the business to pay for costs and any profit was given to the football club.
177. The judgement is interesting as it looks at whether the way the benefits were spent can be taken into consideration by the court, and whether the intention behind the criminal enterprise can be considered. Particularly, whether it is a legitimate excuse to say that the enterprise intended to benefit a good cause or independent third party.
178. The appeal was dismissed and the court made the following findings:-
179. First, it was necessary to revert to the words of the Act. It was clear that the legislation looked at the property coming to an offender which was his, and not what happened to it subsequently. The court was concerned with what an offender had obtained "so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control". The court followed the reasoning in May. Whatever disposition of that property was made was irrelevant. If the position was otherwise the court would be required to make a series of almost impossible value judgments.
180. Second, in the circumstances the language of the Act did not permit the court to look at what appellants actually made net of all expenses. It was for the judge to find as a fact what property they had obtained and, the extent of the benefit. What happened to that benefit after it had been obtained formed no part of the statutory test.
181. Third, the confiscation proceedings were not an abuse of process. It was appellants' duty to obey the law and they chose not to do so. They had been given several months to comply by the local authority and it was only after the second prosecution that the confiscation proceedings were commenced.

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