R Vs. May (Appellant)(on Appeal from the Court of Appeal (Criminal Division))

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Court : House of Lords

Decided On : May-14-2008

Judge : Appellate Committee: Lord Bingham of Cornhill, Lord Phillips of Worth Matravers, Baroness Hale of Richmond, Lord Carswell, and Lord Brown of Eaton-under-Heywood

Appeal No. : [2005] EWCA Crim 97

Appellant : R

Respondent : May (Appellant)(on Appeal from the Court of Appeal (Criminal Division))

Judgement :

The Committee (Lord Bingham of Cornhill, Lord Phillips of Worth Matravers, Baroness Hale of Richmond, Lord Carswell, and Lord Brown of Eaton-under-Heywood) have met and considered the cause R v May. We have heard counsel on behalf of the appellant and respondent.

1. This is the considered opinion of the Committee.

2. This is the first of a trilogy of appeals relating to the confiscation of criminal assets. They raise important questions on the interpretation and application of the statutes which, at the relevant times, governed this matter. To avoid unnecessary

repetition the committee will, in this opinion, give a broad overview of the legislative schemes in force from time to time, and review a number of the leading authorities. Much of this material is relevant, and will be the subject of cross-reference, in the succeeding appeals, Crown Prosecution Service v Jennings [2008] UKHL 29 and R v Green [2008] UKHL 30. This opinion addresses only the case of this appellant, Mr May.

The Facts

3. On 24 September 2001 in the Central Criminal Court before Judge Samuels QC, the appellant pleaded guilty to a count of conspiracy to cheat contrary to section 1(1) of the Criminal Law Act 1977. On 3 October 2001 he was sentenced to five years' imprisonment. On 2 August 2002 a confiscation order was made against him in the sum of 3,264,277 with six years' imprisonment in default of payment under the Criminal Justice Act 1988 as amended. On 28 January 2005 the Court of Appeal [2005] 1 WLR 2902 (Keene LJ, Hodge J and Judge Jones QC) allowed his appeal against sentence to the extent of substituting for the original sentence of five years' a sentence of four years' imprisonment; his appeal against the confiscation order was dismissed, and is the subject of this appeal.

4. The conspiracy involved the wrongful withholding and reclaiming of VAT from HM Customs and Excise, resulting in a loss to public funds of around 11m. There were a number of other conspirators, some before the court, some not. Limited companies had been incorporated solely for the purpose of dishonestly retaining and reclaiming the VAT on sales of high value computer processing units ("CPUs"). Between February 1999 and September 2000 four such companies in turn imported CPUs from the European Union, no VAT being payable on importation. The goods were then sold on to a trader in the UK, thereby attracting a liability to VAT at the standard rate of 17.5%. The UK trader (also party to the fraud and commonly known as the "buffer company") ostensibly paid the purchase price plus VAT for the goods. The dishonest import company (commonly known as the "missing trader"), however, instead of accounting for the VAT received, retained it and then disappeared as a trading entity before enforcement action could be taken. The UK trader would then export the same goods (another zero-

rated supply) back to the dishonest foreign supplier and itself reclaim the VAT which it had ostensibly paid to the importing company. This practice, with each importing company disappearing after a short trading life, is known as a "missing trader" or "carousel" fraud. It is a prevalent form of fraud, causing (the committee was told) very large losses to public funds. There were four phases of this conspiracy, referable to each of the four successive missing trader companies.

5. The appellant himself joined the conspiracy about halfway through and was involved only with the last two phases. With regard to these phases, however, he was found to be a joint principal, indeed the driving force, behind the fraud.

6. The VAT unaccounted for during phases 3 and 4 totalled 4,439,533. In determining the extent of the appellant's benefit, however, the judge subtracted from that figure sums amounting to 1,175,256 in respect of monies recovered from the missing traders' bank accounts and the proceeds of sale of a number of CPUs by the court-appointed receiver, leaving a net figure of 3,264,277. (It is now common ground that the judge erred in reducing the benefit figure in this way: he was confusing benefit with realisable assets.) The judge valued the appellant's realisable assets at 3,887,198, an amount exceeding the benefit figure. He accordingly made the confiscation order in the full sum of 3,264,277.

Background

7. In R v Cuthbertson [1981] AC 470 the House held, with an expression of "considerable regret" (p 479), that the power of forfeiture and destruction conferred on the court by section 27 of the Misuse of Drugs Act 1971 did not provide a means of stripping professional drug-traffickers of the whole of their ill-gotten gains or the total profits of their unlawful enterprises. This decision prompted the establishment of a committee under the chairmanship of the Hon Mr Justice Hodgson to assess how far the powers of criminal courts met the need to strip offenders of their ill-gotten gains. In its report on "The Profits of Crime and their Recovery" published in 1984 the committee considered (pp 8, 11) means of depriving offenders of the fruits of crime and of seeking to ensure that crime did not pay. The committee's objective was to restore the status quo before an offence had been committed and recommended that the courts should have power to

make confiscation orders, but recommended that only the net profits of offending should be confiscated (pp 74-75, and p 151, recommendation 12).

8. Full legislative effect was not given to the committee's recommendations on confiscation, but the report led to the enactment of a series of statutes directed to confiscation of the proceeds of criminal offending. The series began with the Drug Trafficking Offences Act 1986, and there followed (among the more important statutes) the Criminal Justice Act 1988, the Criminal Justice (International Co-operation) Act 1990, the Criminal Justice Act 1993, the Drug Trafficking Act 1994, the Proceeds of Crime Act 1995 and the Proceeds of Crime Act 2002. In these statutes the original confiscation regime established by the 1986 Act was modified, extended, elaborated and tightened, and effect was given to the obligations of the United Kingdom under the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (1991). But despite much refinement and differences between the 1986 and 1994 Acts on the one hand and the 1988, 1993 and 1995 Acts on the other, the essential structure of the 1986 regime has been retained. It requires the court, before making a confiscation order, to address and answer three questions: see R v Johnson [1991] 2 QB 249, 252-255; R v Dickens [1990] 2 QB 102, 105-106. The first question is: has the defendant (D) benefited from the relevant criminal conduct? If the answer to that question is negative, the inquiry ends. If the answer is positive, the second question is: what is the value of the benefit D has so obtained? The third question is: what sum is recoverable from D? In some cases (such as R v Chrastny (No 2) [1991] 1 WLR 1385, R v Walls [2003] 1 WLR 731 and R v Ahmed [2005] 1 WLR 122) there may be no dispute how one or more of these questions should be answered, but the questions are distinct and the answer given to one does not determine the answer to be given to another. The questions and answers should not be elided.

9. Although "confiscation" is the name ordinarily given to this process, it is not confiscation in the sense in which schoolchildren and others understand it. A criminal caught in possession of criminally-acquired assets will, it is true, suffer their seizure by the state. Where, however, a criminal has benefited financially

from crime but no longer possesses the specific fruits of his crime, he will be deprived of assets of equivalent value, if he has them. The object is to deprive him, directly or indirectly, of what he has gained. “Confiscation” is, as Lord Hobhouse of Woodborough observed in In re Norris [2001] UKHL 34, [2001] 1 WLR 1388, para 12, a misnomer.

The first question: benefit

10. Section 1(2) of the 1986 Act required the court first to determine whether D had benefited from drug trafficking, to which alone the Act was directed, and it was provided (section 1(3)) that for the purposes of the Act a person who had at any time “received any payment or other reward in connection with drug trafficking carried on by him or another” had benefited from drug trafficking. Any payments or other rewards received at any time in connection with drug trafficking were his proceeds of drug trafficking (section 2(1)(a)), and for the purpose of determining whether he had benefited the court was entitled, but not bound, to make certain assumptions about (among other things) the source of his property and expenditure (section 2(2),(3)) save to the extent that such assumptions were shown to be incorrect in the defendant’s case.

11. Part VI of the Criminal Justice Act 1988, applicable to crimes other than drug trafficking, empowered the courts to make confiscation orders requiring the defendant to pay such sum as the court thought fit if satisfied that a defendant had benefited from an offence or offences in at least a minimum amount (section 71(1),(2),(3)). He had benefited (section 71(4)) if he had obtained property as a result of or in connection with the commission of the offence or offences, and if (section 71(5)) he had derived a pecuniary advantage as a result of the offending he was to be treated as if he had obtained a sum of money equal to the value of the pecuniary advantage. “Property” was very broadly defined in section 102(1) of the Act to include money and all other property, real or personal, heritable or moveable, including things in action and other intangible or incorporeal property.

12. Section 1(2) and (3) of the 1986 Act were re-enacted in section 2(2) and (3) of the 1994 Act, so that the court’s duty to determine whether a defendant had benefited, and the definition of “benefited", remained unchanged. Section 4(1) of

the 1994 Act re-enacted the provision in section 2(1)(a) of the 1986 Act, but whereas the court had been entitled but not bound to make certain assumptions under section 2(2) and (3) of the 1986 Act, the court was now, under section 4(2)(a) and (3) of the 1994 Act, obliged to do so. The court was not, however, to make such an assumption (section 4(4)) if the assumption were shown to be incorrect in the defendant's case or if the court were satisfied that there would be a serious risk of injustice in a defendant's case if the assumption were to be made.

13. The 1995 Act made certain amendments to section 71 of the 1988 Act, substituting new provisions for subsections (1)-(3). One effect of this was to remove the discretion of the court in section 71(1) of the 1988 Act to make an order requiring payment of such sum as the court might think fit. Under subsection (1A) as substituted the court was first to determine, as under the drug trafficking legislation, whether the defendant had benefited from any relevant criminal conduct. The provisions of section 71(4) (defining "benefit") and (5) (relating to the deriving of a pecuniary advantage) were retained. New provisions extended the regime to cover a course of criminal conduct (section 2, inserting a new section 72AA), and in this context certain assumptions might be made, but not if such an assumption was incorrect or liable to cause injustice.

14. The 2002 Act brought together the regimes, hitherto distinct, originally established by the 1986 and 1988 Acts, and provided for the making of confiscation orders against those found to have a criminal lifestyle. Thus under section 6(4)(a) of this Act the court must first decide whether the defendant has a criminal lifestyle. If so, the court must decide (section 6(4)(b)) whether he has benefited from his general criminal conduct. If not, it must decide (section 6(4)(c)) whether he has benefited from his particular criminal conduct. Section 76(4)-(6) define the meaning of benefit. Thus subsection (4), borrowing the language of section 71(4) of the 1988 Act, provides that a person benefits from conduct if he obtains property as a result of or in connection with the conduct. Subsection (5), echoing section 71(5) of the 1988 Act, provides that if a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage. Subsection (6) provides that references to

property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and some other. “Property” is broadly defined in section 84(1) to mean all property wherever situated including money, all forms of real or personal property, things in action and other intangible or incorporeal property.

15. For obvious reasons of chronology the earliest authorities pertinent to this first question arose under the 1986 Act and the courts rightly endeavoured to decide whether, applying the language of the statute and the statutory presumptions when and as appropriate, the defendant had received any payment or other reward in connection with drug trafficking carried on by him or another. In R v Osei (1988) 10 Cr App R (S) 289 the appellant was held to have done so. She was a drug courier armed, it seems, with a sum of cash to enable her to show that she could support herself in order to enter the country, and the court held (p 293) that “payment” was apt to cover not merely a profit or fee but also a payment of this kind. The same interpretation was applied in R v Smith (Ian) [1989] 1 WLR 765, 769, where “any payments” were held to mean any payment in money or in kind, not net profit after deduction of expenses. This interpretation was applied again in R v Simons (1993) 98 Cr App R 100. In that case the appellant had bought five consignments of drugs from a Hong Kong supplier and sold them on to an African buyer, from whom in each case he had received the purchase price which he had paid on to the supplier. The proceeds of sale, the Court of Appeal held (p 102), were not profit made in the sale but the sale price. The court regarded it as clear (p 104) that where there is a chain of contracts each purchase price is a payment. The court went on to observe, obiter (p 104), that this result could not be avoided by treating the intermediary as a postman, and those acting as a conduit should not be treated differently. But this, with respect, is more problematical: under the 1986 Act the first question was always whether, on the facts (and allowing permissible inferences) the defendant had benefited by receipt of any payment or other reward, which a mere intermediary might possibly not. It does not necessarily follow from the mere possession of drugs that a person is not a mere minder or custodian: see R v J [2001] 1 Cr App R (S) 273; R v Johannes [2001] EWCA Crim 2825, [2002] 2 Cr App R (S) 109. In R v Banks [1997] 2 Cr App R (S) 110 the Court of Appeal again held, applying the 1994 Act, that sections 2(3) and

4(1) were directed to gross payments and not net profits.

16. In R v Gokal (unreported, 7 May 1997, Buxton J) the judge had to consider the meaning of section 71(4) of the unamended 1988 Act. He held that section 71(4) requires “what can fairly be described as an obtaining by the defendant himself” and that “the obtaining of property under section 71(4) must be by the defendant personally". These statements are not incorrect, but they should not, with respect, be understood as excluding joint receipts from the operation of the section, nor cases where payment is made to a third party at the behest of the defendant.

17. R v Simpson (David) [1998] 2 Cr App R (S) 111 is a more difficult case. Simpson pleaded guilty to conspiring to possess the proceeds of drug trafficking. He had made five trips to Ireland taking with him a total of 2.5m, the proceeds of drug trafficking. He had been paid 25-30,000 for each trip and on arrest en route to Dublin had 540,000 with him. The trial judge found that he had benefited from drug trafficking to the extent of 3m. He assessed the proceeds of drug trafficking (p 116) as equivalent to the aggregate value of the drugs deals and not the aggregate value of the rewards paid to the money launderers for their money laundering, basing himself on R v Simons, above. The Court of Appeal, following R v Banks, above, accepted (pp 117-118) that there might be multiple recovery if the same sum passed through the hands of successive dealers, but found no reason (p 118) to construe the definition of proceeds of drug trafficking as requiring as a pre-condition that property or other reward should pass to a defendant. It may be agreed that words, not in the statute, should not be read into it. But the question under sections 2(3) and 4(1) of the 1994 Act is whether a defendant has received any payment or other reward in connection with drug trafficking, and this will ordinarily require a payment or reward to him, whether on his own or jointly.

18. No such problem arose in R v Moran [2001] EWCA Crim 1770, [2002] 1 WLR 253, a case under the unamended 1988 Act. The defendant, a market trader, had cheated the Inland Revenue by failing to disclose profits. A confiscation order had been made in the amount of tax underpaid plus interest. This was rightly held to be the pecuniary advantage, within the meaning of section 71(5), which the defendant

had obtained. R v Smith (David) [2001] UKHL 68, [2002] 1 WLR 54, arising under section 71(1A) (4) and (5) of the amended 1988 Act, raised a very similar point. The defendant had pleaded guilty to fraudulent evasion of excise duty. Duty of some 130,000 should have been, but had not been, paid on the importation of a consignment of cigarettes. The defendant had been liable to pay the duty, as evidenced by his plea of guilty, and the House held, for reasons given by Lord Rodger of Earlsferry, that the defendant derived a pecuniary advantage at the moment when he imported the cigarettes, irrespective of what happened to them later. A similar result was reached by the Court of Appeal in R v Ellingham [2004] EWCA Crim 3446, [2005] 2 Cr App R (S) 192.

19. In R v Olubitan [2003] EWCA Crim 2940, [2004] 2 Cr App R (S) 70, a case under the amended 1988 Act, the defendant was convicted of conspiracy to defraud. At the confiscation hearing he was found to have benefited to the extent of 123,000 and an order was made in the smaller sum of 88,000. The evidence, however, showed that he had joined the conspiracy on the day that police action brought it to an end by interception of a dummy consignment arranged to trap the conspirators. On these facts the Court of Appeal rightly held that the defendant had obtained nothing from his participation in this conspiracy, observing (p 78) that section 71 (1A) and (5) are

“not to be construed so that a person may be held to have obtained property or derived a pecuniary advantage when a proper view of the evidence demonstrates that he has not in fact done so".

The second question: the value of the benefit

20. Section 2(1)(b) of the 1986 Act provided that the value of a defendant’s proceeds of drug trafficking was to be the aggregate of the values of the payments or other rewards he had received at any time in connection with drug trafficking carried on by him or another. For the purpose of assessing the value of these proceeds the court was entitled but not bound to make the assumptions referred to in para 10 above (section 2(2), (3)). The aggregate of the defendant’s proceeds was, prima facie, the amount ordered to be paid under the confiscation order (section 4(1)).

21. Section 71(4) of the 1988 Act provided that the defendant's benefit was the value of the property he had obtained as a result of or in connection with the commission of the relevant criminal offence, and the value of a pecuniary advantage (section 71(5)) was the money value of that advantage.

22. Section 4(1)(b) of the 1994 Act, following section 2(1)(b) of the 1986 Act, provided that the value of a defendant's proceeds of drug trafficking should be the aggregate of the values of the payments or other rewards he had received at any time in connection with drug trafficking. As when determining whether a defendant had benefited from drug trafficking, the court was now required when assessing the proceeds of drug trafficking to make the assumptions referred to in para 10 above, but not where such an assumption was shown to be incorrect or the making of it liable to cause injustice. "Property" was broadly defined in section 62(1), following section 102(1) of the 1988 Act, and (section 63(2)) anything received in connection with drug trafficking included a reference to anything received both in that connection and in some other connection.

23. In section 72AA, inserted into the 1988 Act by section 2 of the 1995 Act, the court was required, in assessing the value of the defendant's benefit from a course of criminal conduct, to make the assumptions referred to, save in the circumstances already noted.

24. Section 76(7) of the 2002 Act simply provides that if a person benefits from conduct his benefit is the value of the property obtained. This simplicity is, however, to some extent deceptive, since sections 79-80 contain detailed rules, which need not for present purposes be summarised, for assessing the value of property obtained.

25. It is unsurprising, given the severity of the potential consequences, that the answering of this second question has given rise to many problems, some of detail which do not call for mention here, and some of principle which do. In R v Dickens [1990] 2 QB 102 the Court of Appeal (per Lord Lane CJ) explained the operation of the confiscation regime under the 1986 Act (although his observations on the standard of proof were later reversed by statute) and the reliance that might be placed on the statutory assumptions.

26. In several cases the court has been called upon to evaluate the benefit accruing to a defendant who had obtained a mortgage loan by making a fraudulent misstatement. In Re K (unreported, 6 July 1990, McCullough J), in the context of an order applied for under the 1988 Act to restrain the defendant from disposing of his assets in anticipation of a confiscation order, the judge rejected the defendant's submission that the benefit he had obtained was the equity of redemption in the house he had bought rather than the house itself. That decision was followed by the Court of Appeal in R v Layode (unreported, 12 March 1993, per Macpherson J), another decision under the unamended 1988 Act. It must, however, be appreciated that section 71(4) called for an essentially factual enquiry: what is the value of the property the defendant obtained? If (say) a defendant applies 10,000 of tainted money as a down-payment on a 250,000 house, legitimately borrowing the remainder, it cannot plausibly be said that he has obtained the house as a result of or in connection with the commission of his offence. This was the conclusion correctly reached by the Court of Appeal in R v Walls [2002] EWCA Crim 2456, [2003] 1 WLR 731. That was a case under the 1994, not the 1988, Act, but in distinguishing the earlier decisions the court relied not on the differences between the two confiscation regimes (see para 27) but on the considered reasoning of Neill LJ in the earlier Court of Appeal decision in R v Johnson [1991] 2 QB 249, which had not been cited in the earlier cases.

27. In R v Porter [1990] 1 WLR 1260 the defendant and a co-defendant pleaded guilty to drug offences. At a hearing to determine to what extent they had benefited from their drug trafficking the trial judge found as a fact that the two had jointly benefited in accordance with section 1(2) of the 1986 Act, that the extent of that benefit was 9,600 and that they should jointly and severally be ordered to pay that sum. The issue before the Court of Appeal (p 1262) was whether the confiscation order could properly be joint and several, or whether it should be several, with each of them being required to pay 4,800. It was held (p 1263) that the Act did not contemplate joint penalties, that the court must, as between co-defendants, determine their respective shares of any joint benefit that they might have received as a result of their drug trafficking, and that in the absence of any evidence the court was entitled to assume that they were sharing equally. So the orders were quashed and several orders for 4,800 substituted in each case. This might, as

later authorities show, have been a proper disposal had there in fact been no evidence of the parties’ shares in the proceeds. But the judge’s finding, not challenged on appeal, was that the proceeds had been received jointly. That being so each had received a payment or other reward in the full sum of 9,600 and orders in that sum should have been made against each of them severally.

28. R v Rees (unreported, 19 July 1990, Auld J) was a first instance decision under the 1988 Act. The defendant had pleaded guilty to offences of obtaining property by deception, contrary to section 15 of the Theft Act 1968 which contains its own expanded definition of obtaining. In the course of his ruling the judge said that

“The fact that he may not have personally received all or some of the money in relation to any of those offences is immaterial for the initial purpose of determining the total benefit ...".

That may indeed be so for purposes of section 15, but for purposes of section 71(4) of the 1988 Act, with which the judge was dealing, it is of course necessary that the defendant himself should have obtained property as a result of his offending, even if jointly or through a third party at his behest, and his benefit is the value of the property so obtained. That is the view that the judge took, holding the defendant responsible for all the proceeds of the offence, a responsibility he could not normally shed because his accomplices had got away with their respective shares (although under the legislation as it then stood the court had a discretion to mitigate the effect of its conclusion).

29. 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. The husband having absconded, the appellant wife contended on appeal to the Court of Appeal that the proceeds of her and her husband’s drug trafficking should be apportioned equally between them, as had been done in R v Porter, above. The court rejected that submission, and substantially upheld the order, although in a reduced sum. On the assumption that the payments had been jointly received, this was the correct decision although, in reaching it, the court fell into the trap of eliding the second

and third questions instead of treating them as distinct, as it should have done.

30. In R v Simpson (David) [1998] 2 Cr App R (S) 111 the Court of Appeal, citing R v Banks [1997] 2 Cr App R (S) 110, applied the principles laid down in cases of repeated drug supply as equally applicable (p 118) to the laundering of drug money.

31. In 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. 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. These submissions were rightly rejected. The discretion which the court had originally enjoyed under the Act had been removed by the 1995 Act. 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). The accomplice was not before the court and his position was not discussed. It is, however, clear that if he had not obtained the full sum jointly with the defendant, he would have been subject to a finding that he had benefited to the extent of the payment he had received.

32. In R v Gibbons [2002] EWCA Crim 3161, [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. This equal division was criticised in argument in the Court of Appeal, but was 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.

33. A somewhat different problem arose in R v Houareau [2005] EWCA Crim 2106, [2006] 1 Cr App R (S) 509. The defendant pleaded guilty to fraudulent evasion of import duty on cigarettes smuggled into the country, and the trial judge assessed his benefit at one third of the total duty evaded, there being two other defendants (para 9), and based his confiscation order on that sum. On appeal the judge's order was challenged, and it was argued that the defendant was merely an intermediary, a middleman, not the importer; there was said to be no evidence that he had been beneficially interested in the cigarettes. The Court of Appeal rejected this argument: it had been open to the judge (para 18) to infer that the defendant had had a beneficial interest in the goods in the absence of evidence demonstrating the contrary. It was a question of fact whether a pecuniary advantage had been derived and it had been open to the judge (para 20) to draw robust inferences when those were properly open to him. The attribution of a one-third interest to the defendant if, contrary to counsel's submission, he had derived a pecuniary advantage at all, was not criticised, and the Court of Appeal accepted it, distinguishing (para 21) the case of a very minor contributor to the import, rewarded by a specific fee and having no interest in the goods or the proceeds of sale.

34. The defendant in the recent case of R v Sharma [2006] EWCA Crim 16, [2006] 2 Cr App R (S) 416 was convicted of conspiracy to defraud. The fraud in which he was engaged obtained about 179,000, paid into a company account of which the defendant was the sole signatory. A confiscation order was made against him in the sum of 179,000. It was argued on appeal (paras 2(1) and 14) that this figure should have been reduced to take account of sums paid out by the defendant to his fellow conspirators. This argument was rejected. It was rightly held (para 19), applying general principles of law, that a person who receives money into his bank account obtains it from the source from which it is derived and, where he is the sole signatory on the account, he obtains the money and has possession of it for his own benefit. Where (ibid) the defendants have not jointly obtained the benefit,

but there has been a disposal by one member of a criminal enterprise to another who knowingly receives it, each is treated as the recipient of a benefit to the extent of the value of the money which has come into the possession of each of them. The amount of the benefit a defendant obtains (para 25) is not affected by the amount which might be obtained by others to whom he transfers any part of the benefit.

The third question: the recoverable amount

35. From the 1986 Act onwards, the courts have been required to reinforce confiscation orders by the imposition of a term of imprisonment to be served in default of payment. But it has been recognised that a defendant may lack the means to pay a sum equal to the aggregate of the payments or rewards he has received, or the value of the property or pecuniary advantages he has obtained. It has also been recognised that it would be unjust to imprison a defendant for failure to pay a sum which he cannot pay. Thus provision has been made for assessing the means available to a defendant and, if that yields a figure smaller than that of his aggregate benefit, making a confiscation order in the former, not the latter, sum.

36. Effect was first given to this rule by sections 1(4) and 4(3) of the 1986 Act by which, if the court was satisfied that the amount that might be realised at the time the confiscation order was made was less than the amount the court assessed to be the value of his proceeds of drug trafficking, the amount to be recovered in the defendant’s case under the confiscation order was to be the amount appearing to the court to be the amount that might be realised. There followed, in section 5, provisions governing the meaning of “realisable property". A procedure was laid down in section 14 for revising downwards the amount to be recovered if the realisable property proved inadequate to meet an order.

37. Section 71(6) of the 1988 Act provided that the sum which an offender should be ordered to pay should not exceed whichever was the less of the benefit in respect of which it was made and the amount appearing to the court to be the amount that might be realised at the time the order was made. Section 74 governed the meaning of realisable property, and section 83 provided for the

revision downwards of the amount to be recovered if the realisable property proved to be inadequate for payment of the order.

38. Section 16 of the 1990 Act provided for the revision upwards of the amount to be recovered under the 1986 Act where the realisable property proved to be greater than had previously been assessed, but it was not to exceed the amount assessed to be the value of the defendant's proceeds of drug trafficking.

39. Section 5(3) of the 1994 Act was similar in effect to section 4(3) of the 1986 Act, but sections 6 and 7 defined the "amount that might be realised" and "realisable property" and contained provisions for valuing property. Provision was made in sections 13-17 for initiating confiscation proceedings where there had been none, for re-opening proceedings where no benefit had been found, for revising assessments of the proceeds of drug trafficking and for revising upwards or downwards estimates of what could be realised. Sections 5-7 of the 1995 Act made parallel amendments to the 1988 Act.

40. By section 7(1) of the 2002 Act, the recoverable amount for purposes of section 6(5) (by which the prima facie sum of a confiscation order is to be the recoverable amount) is an amount equal to the defendant's benefit from the conduct concerned. But if (section 7(2)) the defendant shows that the available amount is less than that benefit the recoverable amount is the available amount, or a nominal amount if the available amount is nil. The "available amount" is defined in section 9(1) for purposes of deciding the recoverable amount as the aggregate of (a) the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and (b) the total of the values (at that time) of all tainted gifts. Definitions of certain of the terms used are found in sections 77-84 of the Act. As in the 1994 Act, provision is made for initiating confiscation proceedings where there have been none (section 19), for reopening proceedings where no benefit has been found (section 20), for revising the assessment of benefit (section 21), for reconsidering the available amount (section 22), for revising downwards the confiscation order (section 23) and for discharging it (section 24).

41. The answering of this third question is a very important stage in the procedure for making confiscation orders since, however great the payments a defendant may have received or the property he may have obtained, he cannot be ordered to pay a sum which it is beyond his means to pay. In many cases the assessment of the realisable amount poses complex and difficult problems for the trial judge, often exacerbated by lack of information, as illustrated by cases such as R v Dickens [1990] 2 QB 102, R v Comiskey (1990) 12 Cr App R (S) 562, R v Chrastny (No 2) [1991] 1 WLR 1385, R v Ahmed [2005] 1 WLR 122, and the recent case of R v Glatt [2006] EWCA Crim 605. But the statutory provisions governing the assessment are detailed, and the problems which arise are not, in the main, questions of principle. It is not in doubt that assets legitimately acquired may be included within the realisable amount, provided of course that the defendant's total benefit from the relevant criminal conduct is not exceeded. The question whether assets legitimately acquired by the defendant after the date of the confiscation order may be included within the recoverable amount, as held by the Court of Appeal in R v Tivnan [1999] 1 Cr App R (S) 92, is not one raised in any of these appeals, and should be considered in a case where the issue arises.

The argument

42. The submissions attractively advanced by Mr Campbell-Tiech QC for the appellant were in essence simple. Parliament intended to establish a confiscation regime which was effective but fair. It intended to strip wrongdoers of their ill-gotten gains but not to deprive them of that which they had never had, to permit recovery of the same sum against different defendants or to permit recovery of a sum exceeding what the victim had lost. Such results were oppressive and disproportionate, inconsistent with article 1 of the First Protocol to the European Convention on Human Rights and also (because of the defendant's liability to imprisonment in default of payment) article 5. The present case, counsel contended, illustrated the vice of the Crown's contention, upheld in the courts below. For there were 16 conspirators named in the indictment: had each been found to have shared jointly in the proceeds of the fraud and made liable (assuming they had realisable assets of the required value) for the full sum ordered against the appellant, the same sum would have been recovered 16 times

over and the state would have gained more than HM Customs and Excise had lost. The solution in such a case, counsel urged, was to apportion the overall loss among those held to be jointly liable as was done in R v Porter [1990] 1 WLR 1260 on which strong reliance was placed.

43. The answer of Mr Sells QC for the Crown was also simple and direct. The confiscation regime serves an important, internationally recognised, social purpose. It is penal in intention and effect, as accepted by the European Court of Human Rights in Welch v United Kingdom (1995) 20 EHRR 247, para 30, and Phillips v United Kingdom (2001) 11 BHRC 280, paras 51-52. The legislation lays down a mandatory regime, and the court has no surviving discretion save as to application of the statutory assumptions. Lord Steyn's reference in R v Rezvi [2002] UKHL 1, [2003] 1 AC 1099, para 15, to "standing back and deciding whether there is or might be a risk of serious or real injustice" if an order were to be made was not to be otherwise understood, as R v Ahmed [2005] 1 WLR 122, para 10 and R v Neuberg [2007] EWCA Crim 1994, paras 29-30, explained. The legislation is not oppressive or disproportionate since (a) it does not target anyone who is not shown to have benefited financially from wrongdoing, (b) it imposes no liability beyond what the defendant is shown to have received or obtained as a result of the relevant wrongdoing, and (c) where the defendant's benefit exceeds the sum he is able to pay, his liability is limited to the latter sum. There is no warrant in any of the statutes for apportioning liability to pay among those who have benefited jointly, and R v Porter, above, is not authority supporting such a principle. Where a benefit is obtained jointly each of the joint beneficiaries has obtained the whole of the benefit and may properly be ordered to pay a sum equivalent to the whole of it.

The judgment of the Court of Appeal

44. The committee is grateful for the lucid judgment of Keene LJ in the Court of Appeal [2005] 1 WLR 2902. The judge had decided that where several defendants were jointly responsible for a fraud, and the property thus obtained was jointly held by them, each benefited in the amount jointly held and there was no requirement to apportion that amount between them. That proposition was challenged in the

Court of Appeal, as in the House, and reliance was placed on R v Porter, above, and other authorities. But Keene LJ observed (para 31) that the court in R v Porter had not apparently been asked to apply its mind to the propriety of several orders being made for the full joint benefit, nor was there any analysis of why apportionment was more appropriate than such an order. In contrast (para 32), R v Chrastny (No 2) [1991] 1 WLR 1385 showed that someone with joint control of the property representing the benefit could be made liable for the total. Attention was also drawn to the Court of Appeal's acceptance in R v Simpson (David) [1998] 2 Cr App R (S) 111, 117-118, that there could be multiple recovery where the same sums passed through several hands. There were cases, such as R v McKechnie [2002] EWCA Crim 3161 in which the total proceeds of a fraud had been divided up among those responsible but that was not a case (para 34) in which the court had had to decide whether a defendant in that conspiracy might be liable for the total amount of the fraud.

45. The Court of Appeal here attached importance (para 37) to the finding that the companies defrauding HM Customs and Excise of VAT were jointly controlled by a group of people including this appellant. Once the corporate veil was pierced, as it was accepted it could be (a step endorsed by the Court of Appeal in R v Dimsey [2000] QB 744) the property in question was to be regarded as the joint property of those controlling the company. It was analogous to the situation where conspirators had put the proceeds of the fraud straight into their joint bank account. Each is then entitled to the full amount in the account. Each individual, in the statutory language, "obtains" the property jointly held. The law was accurately summarised (para 38) in Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime, vol 1, paras 5.026 - 5.027. Someone who has joint control of property has "obtained" that property within the meaning of section 71(4) (para 39), which bites when the property is obtained or the pecuniary advantage is derived. The court did not consider it more unjust (para 40) for the whole of property jointly controlled to be treated as the individual defendant's benefit than for money which had passed through a defendant's hands to be treated as his benefit, even though that money was a much greater amount than his personal profit. Yet the latter result was accepted as well-established by the authorities. There might be circumstances in which orders for the full amount against several

defendants might be disproportionate and contrary to article 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. The judge's order against the appellant was accordingly upheld.

CONCLUSION

46. The sum which the appellant, jointly with others, was found to have fraudulently obtained from HM Customs and Excise was, in law, as much his as if he had acted alone. That conclusion leads ineluctably to the further conclusions that he benefited from his offending, and benefited to an extent substantially greater than the confiscation order made against him (because of the deduction erroneously made by the judge as recorded in para 6 above). The order made was less than his realisable assets. It is entirely consistent with the legitimate objects of the legislation, and it requires, that he be ordered to pay such sum, which involves no injustice or lack of proportionality. The legislation is, as Lord Steyn described it in R v Rezvi [2003] 1 AC 1099, para 17, "a precise, fair and proportionate response to the important need to protect the public". R v Porter [1990] 1 WLR 1260 is not authority that the court has power to apportion liability between parties jointly liable, a procedure which would be contrary to principle and unauthorised by statute. No error was shown in the reasoning of Keene LJ, with which the committee generally agrees, while stressing that in any given case the statutory questions must be answered by applying the statutory language, shorn of judicial glosses and paraphrases, to the facts of that case.

47. The appeal must be dismissed. Written submissions on costs are invited within 14 days.

Endnote

48. The committee would conclude by drawing attention to the current importance of the power to make confiscation orders. In the period April 2007 - February 2008 the courts in England and Wales made 4504 such orders in sums totalling 225.87 million. In recent years the number of orders and the sums confiscated have

steadily risen. Recognition of the importance and difficulty of this jurisdiction prompts the committee to emphasise the broad principles to be followed by those called upon to exercise it:

(1) The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of fine. The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators.

(2) The court should proceed by asking the three questions posed above: (i) Has the defendant (D) benefited from relevant criminal conduct? (ii) If so, what is the value of the benefit D has so obtained? (iii) What sum is recoverable from D? Where issues of criminal life style arise the questions must be modified. These are separate questions calling for separate answers, and the questions and answers must not be elided.

(3) In addressing these questions the court must first establish the facts as best it can on the material available, relying as appropriate on the statutory assumptions. In very many cases the factual findings made will be decisive.

(4) In addressing the questions the court should focus very closely on the language of the statutory provision in question in the context of the statute and in the light of any statutory definition. The language used is not arcane or obscure and any judicial gloss or exegesis should be viewed with caution. Guidance should ordinarily be sought in the statutory language rather than in the proliferating case law.

(5) In determining, under the 2002 Act, whether D has obtained property or a pecuniary advantage and, if so, the value of any property or advantage so obtained, the court should (subject to any relevant statutory definition) apply ordinary common law principles to the facts as found. The exercise of this jurisdiction involves no departure from familiar rules governing entitlement and

ownership. While the answering of the third question calls for inquiry into the financial resources of D at the date of the determination, the answering of the first two questions plainly calls for a historical inquiry into past transactions.

(6) D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. 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.