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THE ASSESSMENT OF BENEFIT UNDER PART 2 OF THE PROCEEDS OF CRIME ACT 2002: A SLEDGEHAMMER TO CRACK A NUT?

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Abstract

This article provides an analysis of the application of Part 2 of the Proceeds of Crime Act 2002 which provides for the making of confiscation orders following conviction in criminal cases. It examines the policy reasons behind the Act and traces the legislative development which commenced following the House of Lords ruling in *R v Cuthbertson and Others* that it had no jurisdiction to make an order for the defendants involved in, at the time, the biggest drug ring in the United Kingdom to forfeit their proceeds. This article considers the defendant's 'benefit' from crime which may be assessed at a much higher amount than that which has passed through his hands. It focuses on three problem areas: cases involving joint defendants, the operation of statutory 'assumptions', and the discretion afforded to the court in confiscation proceedings.

Keywords: Benefit from criminal conduct, Confiscation orders, Proportionality

Introduction

On 3 September 1999, the then Prime Minister, Tony Blair, announced a project tasking the Cabinet Office's Performance and Innovation Unit (PIU) with enquiring into the recovery of the proceeds of crime:

We want to ensure that crime doesn't pay. Seizing criminal assets deprives criminals and criminal organisations of their financial lifeblood. The challenge for law enforcement will become even greater as new technologies hide the money trail more effectively. We must ensure that law enforcement is ready to meet the challenges.²

¹ Amy is photographed after receiving the Gard & Co. Solicitors Prize for the Best Law Graduate 2012 with David Wheeler, Dean of the Plymouth Business School, and Steven Hudson senior and managing partner of Gard & Co.. She is currently undertaking the the Legal Practice Course at Plymouth University and has secured a Training Contract at Bright Solicitors starting in September 2013.

² Performance and Innovation Unit, *Recovering the Proceeds of Crime*, (June 2000, Cabinet Office), p.13.

As Ryder asserts, the PIU report, 'Recovering the Proceeds of Crime', was the driver of a reform process.³ However, Davies argues that the report lacked any criminological evidence to support its assertions and that despite reassurance by the Prime Minister, the legislative response to the report - the Proceeds of Crime Act 2002 (hereafter POCA 2002) - 'has undermined a whole series of traditional civil liberties'.⁴ The legislation is described as 'draconian' by both the judiciary and academic commentators yet has been consistently held to be a proportionate response to the policy concerns.⁵ This article is directed at the application of the legislation, specifically Part 2 which provides for confiscation following conviction. The tabloid press seeks to satisfy the public appetite for criminals to be deprived of their Rolls Royces,⁶ but also carries stories of hardworking fishermen labelled as 'criminals' by the Act.⁷ This article examines how the latter, arguably 'disproportionate' confiscation orders may arise and considers the approach of the courts in their application of the legislation.

1 The Statutory Framework for the Recovery of the Proceeds of Crime

1.1 'Operation Julie'

In *R v Cuthbertson and Others*,⁸ the 'Operation Julie' case, the three defendants were convicted of conspiracy to produce Lysergic Acid Diethylamide (LSD) and of conspiracy to supply the same, contrary to s.4 Misuse of Drugs Act (MDA) 1971. Under s.27(1) the Court was permitted to 'order anything shown to... relate to the offence, to be forfeited and either destroyed or dealt with'. In the House of Lords, Lord Diplock began his judgment as follows: 'My Lords, it is with considerable regret that I find myself compelled to allow these consolidated appeals'.⁹ Commenting on this, Alldrige stated, 'it is [a] rare [way] indeed for a judgment to begin'.¹⁰ Their Lordships held that the proceeds of the offence were beyond the ambit of s.27(1) and

³ Ryder, N., *Financial Crime in the 21st Century: Law and Policy* (2011, Edward Elgar), p.197.

⁴ Davies-Bosworth, R., 'Money laundering – chapter three' (2007) 10(1) *Journal of Money Laundering Control*, p.56.

⁵ See Lawrence, I., 'Draconian and manifestly unjust: how the confiscation regime has developed' (2008) 76 *Amicus Curiae*, pp.22-24 and Young, D., et al., *Abuse of Process in Criminal Proceedings (3rd Ed.)* (2009, Tottel Publishing), Para. 11.12.

⁶ Thornhill, T., 'Nice car, shame about the missing tax disc: £300,000 Rolls Royce towed away in Knightsbridge', *The Daily Mail*, 11 November 2011.

⁷ Page, R., 'To me Mick is a hero. But the EU says he's a criminal - because he won't dump dead fish in the sea', *The Daily Mail*, 6 September 2008.

⁸ [1981] AC 470

⁹ *Ibid.*, p.479

¹⁰ Alldrige, P., *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime*, (2003, Hart), p.74.

that to extend the provision 'would involve... a strained construction'.¹¹ Lord Diplock stated clearly that 'section 27 can never have been intended by Parliament to serve a means of stripping the drug traffickers of the total profits of their unlawful enterprises'.¹² As Marshall observes there was justifiable 'public outrage at the decision'.¹³ Cribb argues that 'surely it was Parliament's intention to strip offenders of the... profits of their crime'.¹⁴ Nevertheless, *Cuthbertson* was a turning point in the development of asset recovery law in the United Kingdom.

1.2 The Legislative Response

In 1980 the Hodgson Committee was established to review 'the vacuum created by the law' as highlighted in *Cuthbertson*.¹⁵ Its 1984 report, 'The Profits of Crime and their Recovery' recommended the imposition of a power, upon conviction, to order confiscation.¹⁶ The standpoint of the Committee was such that confiscation should 'restore the status quo before the offence',¹⁷ and warned that confiscation following convictions for minor offences could in some cases be unjust.¹⁸ The Drug Trafficking Offences Act (DTOA) 1986 'marked the beginning of the Government's campaign to deprive criminals of the fruits of their crime'.¹⁹ However its ambit was confined to confiscation of the proceeds of drug trafficking offences, and whilst 'draconian' its powers were considered 'justified... by the serious and special nature of the crimes...concerned'.²⁰ During the passage of the legislation, use of the provisions 'as a benchmark... to justify a relativistic approach in the context of other offences' was strongly opposed.²¹

Following recognition by Parliament of the limitation of this early legislation in its ability to confiscate only proceeds of drug trafficking, the Criminal Justice Act 1988 (hereafter CJA 1988) introduced confiscation in non-drug trafficking cases. The

¹¹ *R v Cuthbertson* [1981], p.483.

¹² *Ibid.*, p.485. However, although the appeals were allowed, the House of Lords refused to make an order for the return of the property in the UK which was seized from the defendants.

¹³ Marshall, P., 'Risk and legal uncertainty under the Proceeds of Crime Act 2002' (2004) 25(12) *Company Lawyer*, p.354.

¹⁴ Cribb, N., 'Tracing and confiscating the proceeds of crime,' (2003) 11(2) *Journal of Financial Crime*, p.169.

¹⁵ *Ibid.*, p.173.

¹⁶ Hodgson Committee, *The Profits of Crime and their Recovery* (1984, London Heinemann), pp.71 and 151 in Alldridge, *Money Laundering Law* (2003), p.76.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Hancock, M., 'Legislative comment – Money Laundering in England and Wales' (1994) 2(3) *Journal of Financial Crime*, p.195.

²⁰ HC Deb, Vol. 90, col.255, 21 January 1986.

²¹ *Ibid.*

'robust' powers in the drug trafficking legislation were the basis of the POCA 1995 which further amended the CJA 1988.²² However it is clear that at this time a statutory distinction was drawn between confiscation in drug and non-drug trafficking cases. As Pieth observes, the legislative development resulted in 'a patchwork of powers spread over a number of statutes'.²³ Furthermore, in 1995 Levi and Osofsky identified that few 'Mr Bigs' had been convicted and were consequently unavailable to have their assets confiscated.²⁴ The research illustrated the difficulties in confiscating proceeds of crime, attributing this to confiscation orders as 'alien grafts upon the criminal justice system' which prosecutors and the judiciary were reluctant to pursue.²⁵

1.3 The Proposals for Reform

The conclusion in the Third Report of the Home Office Working Group on Confiscation that 'the United Kingdom's criminal confiscation scheme... had not been as successful as originally anticipated' provoked the overhaul of the legislation by the newly-elected Labour Government.²⁶ The PIU report recognised legislative anomalies in the United Kingdom's powers to recover the proceeds of crime and particularly the distinction between drugs and non-drugs crime.²⁷ The report attributed this to the 'focus on tackling drugs crime by governments' and the rhetoric of the debates is such that the application of wider powers to drug trafficking offences was necessary to tackle this crime considered as serious and special in its nature.²⁸ The PIU concluded that the 'pursuit and recovery of criminal assets in the UK is failing to deliver the intended attack on the proceeds of crime'.²⁹

2 Confiscation under Part 2 Proceeds of Crime Act 2002

The POCA 2002 replaces the separate legislation for drug trafficking and non drug-trafficking offences. Part 2 consolidates and updates the statutory provisions for the

²² Home Office Working Group on Confiscation, *Criminal Assets (Third Report)* (November 1998, HMSO)

²³ Pieth, M., *Recovering Stolen Assets*, (2008, Verlag Peter Lang), p.147.

²⁴ Levi, M., Osofsky, L., *Investigating, seizing and confiscating the proceeds of crime* (May 1995, Home Office Police Research Group, Crime Detection & Prevention Series Paper 61), p.vi.

²⁵ *Ibid.*

²⁶ Home Office Working Group, *Criminal Assets* (1998), Para. 4.1.

²⁷ PIU, *Recovering the Proceeds* (2000), p.64.

²⁸ *Ibid.*, p.65

²⁹ *Ibid.*, p.5

imposition of confiscation orders following conviction,³⁰ and applies only to offences committed on or after 24 March 2003; however, decisions under the previous legislation form a body of relevant case law.³¹ Under s.6(1), the Crown Court must begin confiscation proceedings if two conditions are satisfied. First, under s.6(2) the defendant must have been convicted of an offence or offences in the Crown Court, or committed to the Crown Court for sentence or with a view to a confiscation order being considered.³² Second, under s.6(3) the prosecutor must ask the court to proceed, or the court must believe that it is appropriate for it to do so.

Once the court has been asked to proceed, it must then decide whether the defendant has a 'criminal lifestyle' under s.6(4)(a) which will depend on the nature of the offence of which he has been convicted. If the court finds the defendant has a 'criminal lifestyle', it must decide whether he has benefited from 'his *general* criminal conduct' under s.6(4)(b) invoking the application of statutory assumptions. If it decides the defendant does not have a criminal lifestyle, it must decide whether he has benefited 'from his *particular* criminal conduct' – defined under s.6(4)(c) as the offence or offences of which he was convicted or which the court will take into consideration in deciding his sentence.³³ Once it is established that the defendant has benefited from his criminal conduct, the judge must assess the amount of benefit termed the 'recoverable amount', and make a confiscation order in this amount. Where it is determined the defendant has a 'criminal lifestyle', the court must apply statutory assumptions in assessing his benefit from 'general criminal conduct'. The court must make a confiscation order for this 'recoverable amount' unless the defendant can prove that the 'available amount' is less.³⁴ If he successfully proves this, the 'recoverable amount' will be the 'available amount'.

³⁰ The POCA 2002 also provides for the new mechanism of 'civil recovery'; the ability to confiscate the proceeds of crime without a criminal conviction. However, analysis of this mechanism is beyond the scope of this article.

³¹ Ulph, J., 'Confiscation orders, human rights and penal measures' (2010) 126 (Apr) *Law Quarterly Review*, p.7.

³² s.70 Proceeds of Crime Act 2002. Committal is under s.97 Serious Organised Crime and Police Act 2005

³³ *Ibid.*, s.76(3)

³⁴ Under s.9 POCA 2002 the 'available amount' is the total value of the defendant's free property minus the total amount payable in pursuable obligations such as court fines, and the total of all the values of tainted gifts.

2.1 The Assessment of the Defendant's Benefit

The House of Lords' decision in *R v May*³⁵ is considered the most important review of confiscation principles.³⁶

The judgment set out three questions the court must address before making a confiscation order:

- (1) Has the defendant (D) benefited from the relevant criminal conduct?
- (2) If so, what is the value of the benefit D has so obtained?
- (3) What sum is recoverable from D?³⁷

In ascertaining whether the defendant has 'benefited' from the relevant criminal conduct, s.76(4) POCA 2002 provides that a person benefits 'if he obtains property as a result of or in connection with the conduct'. In assessing the value of this benefit s.76(7) provides that it is the value of the property obtained. In *Jennings v Crown Prosecution Service*,³⁸ decided simultaneously with *May*, the House of Lords considered the interpretation of 'obtains' under s.71(4) CJA 1988; it thus follows that the decision applies to the 2002 Act.

Laws LJ in the Court of Appeal held that 'obtains' should be interpreted as where the defendant's acts 'contributed, to a non-trivial...extent, to the getting of the property'.³⁹ However, the House of Lords did not find this formulation 'helpful or entirely accurate', stating that 'obtains' must be read as meaning 'obtained by him'.⁴⁰ Thus Laws LJ's interpretation was inaccurate as a person's act may contribute significantly to the property being obtained without his obtaining it. Observing that 'the rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent,' the House of Lords took the view that it would be an unsatisfactory position where the defendant is deprived of property he has never obtained but merely made a trivial contribution towards obtaining.⁴¹ This would operate as a fine running contrary to the legislative objective: 'to deprive the defendant of the product of his crime'.⁴² The House of Lords held that a person 'obtains' property if 'he has obtained property so as to own it...alone or jointly, which will ordinarily connote a

³⁵ [2008] UKHL 28

³⁶ Rees, E., et al., *Blackstone's Guide to the Proceeds of Crime Act 2002 (4th Ed.)* (2011, OUP), p.25.

³⁷ *R v May* [2008], Paras. [8] and [48] per Lord Bingham, affirming *R v Johnson* [1991] 2 QB 249, pp.252–255 and *R v Dickens* [1990] 2 QB 102, pp.105–106.

³⁸ [2008] UKHL 29

³⁹ *Jennings v Crown Prosecution Service* [2005] EWCA Civ 746, Para. [38] per Laws LJ

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, Para. [13] per Lord Bingham.

⁴² *Ibid.*

power of disposition or control.⁴³ This approach creates a higher threshold than that required by the Court of Appeal which had not required 'control'. However, as Alldrige observes, 'there is no necessary degree of permanence and no requirement for retention, in "obtaining"'.⁴⁴ Nevertheless, the Court in *May* asserted that the object of the legislation is 'to deprive defendants of the benefit... gained from relevant criminal conduct, whether or not they have *retained* such benefit'.⁴⁵

3 The 'Proceeds' of Crime

The Court in *May* stated that the benefit gained is 'the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or amounts payable to co-conspirators'.⁴⁶ Therefore, the regime confiscates the defendant's proceeds not the profit from crime. As Gallant observes, 'the distinction... is more than mere semantics'.⁴⁷ Alldrige argues that a confiscation regime targeting *profits* is justified ensuring the defendant does not improve his economic position on the basis of crime. However, he raises the concern that by targeting *proceeds*, confiscation is used to 'compensate for the fact that profits of all crimes cannot, practically, be seized' and that this brings into question the defendant's property rights.⁴⁸

Confiscation beyond profits creates a punitive regime which Alldrige argues is unjustifiable.⁴⁹ This approach is contrary to the recommendation by the Hodgson Committee that the objective should be to restore the *status quo*. However Ulph argues that by targeting profits the law would fail to act as a deterrent and subsequently meet its policy objectives.⁵⁰ Furthermore, the 2002 Act consolidates previous legislation which did not focus on profits as illustrated in *R v Smith (David Cadman)*.⁵¹ In *Smith*, Lord Rodger stated in *obiter* that, in the context of drug trafficking legislation, the courts had consistently held that payments received in connection with drug trafficking meant gross payments rather than the defendant's net profit. His Lordship stated that, whilst draconian, it may be appropriate when

⁴³ *Ibid.*

⁴⁴ Alldrige, P., 'The Limits of Confiscation' (2011) 11 *Criminal Law Review*, p.836.

⁴⁵ *May* [2008], Para. [48] *per* Lord Bingham.

⁴⁶ *Ibid.*, Paras. [8] and [48] *per* Lord Bingham

⁴⁷ Gallant, M., *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (2005, Edward Elgar), p.2.

⁴⁸ Alldrige, 'Limits' (2011), p.834.

⁴⁹ Alldrige, *Money Laundering Law* (2003), p.134.

⁵⁰ Ulph, 'Confiscation orders' (2010), p.267.

⁵¹ [2001] UKHL 68

stripping criminals of their benefit from crime and that this 'is a matter of judgment for the legislature'.⁵²

3.1 Proportionality

The confiscation of proceeds of crime invokes Article 1 of the First Protocol of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which provides that 'every natural or legal person is entitled to peaceful enjoyment of his possessions'. However, deprivation of possessions is permitted in the public interest and the right does not 'impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest to secure the payment of penalties'. Ulph has noted that a person might legitimately pursue on the basis of Article 1, should their property be confiscated.⁵³ In *Phillips v United Kingdom*, the European Court of Human Rights (ECtHR) considered a confiscation order in the sum of £91,400 imposed following the applicant's conviction for a drug trafficking offence.⁵⁴ The sum was deemed a 'possession' invoking Article 1 and the order to pay this amount coupled with a term of imprisonment in default of payment amounted to an interference with his peaceful enjoyment. The Court noted the qualification that permits 'Contracting States to control the use of property to secure payment of penalties'. However, it stated that this must be construed in light of the necessary proportionality 'between the means employed and the aim sought to be realised'.⁵⁵ The Court emphasized the aim of the legislation; the use of confiscation in the fight against drug trafficking to deter, deprive the offender of profits, and remove proceeds from future drug trafficking operations.⁵⁶ It was unanimously held that, owing to the importance of this aim, there was no disproportionate interference thus the confiscation order did not contravene Article 1.

Shortly after the decision in *Phillips*, the House of Lords considered confiscation under the CJA 1988 and the Drug Trafficking Act 1994 (hereafter DTA 1994) in *R v Benjafield* and *R v Rezvi*.⁵⁷ The Court unanimously held that 'the legislation was a precise, fair and proportionate response to the important need to protect the public'.⁵⁸ The interference with the right to property guaranteed by Article 1 was justified as already decided by the ECtHR in *Phillips*. The question of whether the

⁵² *Ibid.*, Para. [23].

⁵³ Ulph, 'Confiscation Orders' (2010), p.267.

⁵⁴ App No. (41087/98), [2001] Crim LR 817.

⁵⁵ *Ibid.*, Para. [51].

⁵⁶ *Ibid.*, Para. [53].

⁵⁷ [2002] UKHL 2; [2002] UKHL 1.

⁵⁸ *Ibid.*, Para. [17] *per* Lord Steyn.

confiscation regime is a proportionate response to the policy concerns cited by the PIU appears to have been closed by the decisions in *Phillips* and in *Benjafield* and *Rezvi*. However as Rees et al. note, the decisions 'do not go so far as to accept that confiscation of property is proportionate in every situation'.⁵⁹ Lawrence argues that it is the way in which the defendant's benefit is assessed that operates to create a 'manifestly unjust' confiscation regime.⁶⁰ This article does not attempt a complete analysis of the regime but focuses on the three issues specified above. Thus, it provides an analysis of whether these features create an assessment of benefit disproportionate to the defendant's actual involvement in the criminal activity. This concern is prevalent; on 22 February 2012, in a House of Commons debate on its use, several MPs alleged that the POCA 2002 is 'the proverbial sledgehammer to crack a nut'.⁶¹

4 Cases involving Joint Defendants

The focus on the concept of 'obtaining' rather than 'retention' of property in assessing the defendant's benefit 'permits multiple recovery of the same sum from a succession of bailees'.⁶² The House of Lords in *May* considered whether this creates an 'oppressive and disproportionate' result and thus is contrary to Article 1. The appellant argued in favour of an 'apportionment' approach relying on the decision in *R v Porter*.⁶³ The House of Lords in *May* cited with approval the judgment of Glidewell LJ in the Court of Appeal who had noted that in *Porter* the court 'had not apparently been asked to apply its mind to the propriety of several orders... for the full joint benefit, nor was there analysis of why apportionment was more appropriate'.⁶⁴ Lord Bingham stated that the sum which the appellant had obtained jointly with his co-defendants was considered, in law, as much his as if he had acted alone. It was held that the confiscation order, less than his realisable assets, did not create a disproportionate result. His Lordship asserted that '*Porter* was not authority that the court has power to apportion liability between parties jointly liable; this would be contrary to principle and unauthorised by statute'.⁶⁵ It was held that a defendant with joint control will have 'obtained' property under s.76(4)

⁵⁹ Rees, *Blackstone's* (2011), p.15.

⁶⁰ Lawrence, 'Draconian and manifestly unjust' (2008).

⁶¹ HC Deb, Vol.540, 22 February 2012, Col.309.

⁶² *R v Simpson (David)* [1998] 2 Cr App R (S) 111, p.117 per Dyson J.

⁶³ [1990] 1 WLR 1260.

⁶⁴ *May* [2005]

⁶⁵ *Ibid.*

POCA 2002 and that it is not unjust to treat it as his benefit even where this amounts to more than his individual profit. However it was noted that:

There might be circumstances in which orders for the full amount against several defendants might be disproportionate and contrary to Article 1... in such cases an apportionment approach might be adopted.⁶⁶

The Court of Appeal in Northern Ireland applied this statement in *R v Leslie & Mooney*, holding that apportionment should be adopted where the confiscation order amounts to double the amount of goods stolen.⁶⁷ The position has recently been affirmed by the Court of Appeal in *R v Lambert*.⁶⁸ Pill LJ highlighted the importance of confiscation 'as a weapon in the fight against... drug trafficking'. An apportionment approach was rejected; relying on the decision in *May*, the Court held that:

It is legitimate that the entire realisable assets of a person who embarks on a joint drug dealing venture should be put at risk, up to the sum of the joint benefit obtained... not merely his assets... to the limit of his share... while the present statutory scheme is in place, the refusal to apportion is a legitimate part of it.⁶⁹

Pill LJ expressed doubt with regard to the approach in *Mooney* as the Court had merely relied on a summary by the House of Lords in *May* of the Court of Appeal decision. His Lordship identified that the House had not *expressly* stated its own view.

It is arguable that the assessment of benefit under the POCA 2002 is disproportionate in relation to multiple defendants. The House of Lords in *Jennings* made it clear that confiscation should not operate as a fine, however in cases involving multiple defendants this appears to be the result of the application of the decision in *May*. Each defendant is subject to a confiscation order disproportionately large in comparison with the amount that may have actually passed through his hands. However the House of Lords in *May* added a judicial gloss to the concept of 'obtaining':

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.⁷⁰

⁶⁶ *Ibid.*, Para. [45].

⁶⁷ [2008] NICA 28.

⁶⁸ [2012] EWCA Crim 421.

⁶⁹ *Ibid.*, Para. [41].

⁷⁰ *May* [2008], Paras. [8] and [48] *per* Lord Bingham.

The first application of this 'judicial gloss' followed in *R v Sivaraman*.⁷¹ The Court of Appeal acknowledged that the decision in *May* would determine the defendant's benefit as the total proceeds rather than his profit. The Court held that the defendant's benefit is a question of fact and thus it is critical to ascertain the capacity in which he acts. In *Sivaraman*, the appellant had been acting as a mere employee, not a joint purchaser who would gain a pecuniary advantage. The Court quashed a confiscation order for the total benefit, substituting it with an order reflecting the defendant's benefit in fact. As Williams and Chegwidden observe, this 'common sense' interpretation represents an approach which seeks to reconcile the balance of interests.⁷² The decision provides an argument that the defendant is acting in a subordinate capacity thus restricting the potentially disproportionate scope of confiscation against joint defendants. However, Williams and Chegwidden identify a risk that the decision has 'inadvertently created a ready-made defence by which criminal conspirators can avoid the thrust of the confiscation regime'.⁷³ This would clearly defeat the policy objectives, as Ulph states 'these accessories have been convicted of crimes...they are not innocent...[a] large number of crimes could not be carried out if there were not "smaller fish" ready to aid the ringleaders.'⁷⁴

5 Money Laundering

In *R v Allpress*, the Court of Appeal considered the consolidated appeals of five defendants against confiscation orders in light of the decision in *May*.⁷⁵ The defendant had pleaded guilty to 'assisting another to retain the benefit of drug trafficking' under the DTA 1994.⁷⁶ It was submitted on behalf of the Crown that the Court of Appeal in *Sivaraman* had erred in stating that it was necessary to consider the capacity in which a conspirator received property.⁷⁷ This argument was rejected by Toulson LJ who affirmed the distinction between criminal liability and benefit, stating that 'in confiscation proceedings the focus of the inquiry is on the benefit gained by the

⁷¹ [2008] EWCA Crim 1736.

⁷² Williams, M., Chegwidden, J., "Be That As It May": *R v Sivaraman* and the Court of Appeal's Approach to Benefit in Confiscation Orders' (2008) 2 *Proceeds of Crime Review*, p.14.

⁷³ *Ibid.*, p.15.

⁷⁴ Ulph, 'Confiscation Orders' (2010), p.259.

⁷⁵ [2009] EWCA Crim 8.

⁷⁶ S.50(1)(a).

⁷⁷ *R v Allpress* [2009] EWCA Crim 8, Para. [30] *per* Toulson LJ.

relevant defendant'.⁷⁸ It was further submitted that the defendant holding cash 'had a power of disposition or control over it... different from that of a bailee of tangible property'.⁷⁹ However the Court of Appeal rejected this approach, affirming the distinction between custody and control of property:

If [the defendant's] only role in relation to property connected with his criminal conduct... was to act as a courier on behalf of another, such property does not amount to property obtained by him.⁸⁰

Therefore Allpress' appeal and those of three other defendants acting as drug trafficking couriers were allowed; the confiscation orders reduced to the payment they had received. It was argued that this approach should be applied to the final appellant who had laundered the money. However, the Court took a different approach on the basis that the relevant bank account was in his name; 'payment of money into the account gave rise to a thing in action in [his] favour... jointly with his partners'.⁸¹

The Court applied the decision in *R v Sharma*,⁸² in which the Court of Appeal held that 'a person who receives money into his bank account... where he is the sole signatory... obtains the money and has possession... for his own benefit'.⁸³ The Court had also considered the question of proportionality, stating that:

So long as... benefit... is correctly calculated, it cannot be disproportionate for him to be made accountable for what he obtained... the amount... is not affected by the amount... obtained by others to whom he transfers any part of the benefit.⁸⁴

The Court in *Allpress* identified that whilst the final appellant had occupied a role in which he assisted another, he had had 'legal ownership and practical control' of the proceeds of the criminal activity.⁸⁵ The confiscation order was upheld on the basis that he had 'obtained' the value of the money received into the account controlled by him. Most pertinent is the affirmation of a common sense assessment of benefit in cases involving joint defendants as in *Sivaraman*. Alltridge states that a common sense approach 'is to be welcomed',⁸⁶ and Millington supports this 'more realistic'

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, Para. [45].

⁸⁰ *Ibid.*, Para. [80].

⁸¹ *Ibid.*, Para. [85].

⁸² [2006] EWCA Crim 16.

⁸³ *Ibid.*, Para. [19] *per* Newman J.

⁸⁴ *Ibid.*, Para. [25].

⁸⁵ *Allpress* [2009], Para. [86] *per* Toulson LJ.

⁸⁶ Alltridge, 'Limits' (2011), p.838.

view.⁸⁷ However, *Allpress* has also acted to provide limitation to the ‘common sense’ approach, as where money is laundered, ‘judges are more keen to confiscate to the full rigour of the law’. Alldridge argues that the justification for the distinction created between the defendant who receives a fee for his part in the criminal activity and where this money is paid into a bank account is unclear, stating that it is an irrational response ‘generated by... the glamour of the word “laundering”’.⁸⁸

It is clear that application of Part 2 POCA 2002, following *May*, can result in a disproportionate assessment of the benefit obtained by defendants in joint cases. The legislation appears to create a fine, contrary to the recommendation of the Hodgson Committee and the courts have offered mitigation by taking a common sense view of the capacity in which the defendant has acted. Nevertheless, the moral panic surrounding money laundering has resulted in the disproportionate application of the legislation to those paying proceeds into a bank account.

6 The Statutory Assumptions

6.1 A ‘Criminal Lifestyle’

Under s.6(4)(a) POCA 2002 the court must decide whether the defendant has a ‘criminal lifestyle’. Section 75 stipulates those offences constituting a ‘criminal lifestyle’. First, those specified in Schedule 2 which include drug trafficking, money laundering, counterfeiting and intellectual property offences. Second, an offence which constitutes conduct forming part of a ‘course of criminal activity’, defined as where the defendant has been convicted of at least four offences in the same proceedings from each of which he has benefited or where the defendant has been convicted of two offences within six years of the start of the proceedings from each of which he has benefited.⁸⁹ Third, an offence committed over a period of at least six months.⁹⁰

⁸⁷ Millington, T., ‘Assessing benefit from criminal conduct – the latest case law’ in Millington, T., et. al., (eds.), ‘Proceeds of Crime Review’ (2010) 4 *Journal of Asset Forfeiture and Money Laundering*, p.14.

⁸⁸ *Ibid.*, p.17.

⁸⁹ S.75(3) Proceeds of Crime Act 2002

⁹⁰ *Ibid.*, s.75(2)(c). The benefit must be over £5,000 for the second and third categories to apply.

As asserted by Briggs, the determination of a criminal lifestyle is a 'highly controversial lynchpin of the Act'.⁹¹ If the court decides that the defendant does not have a criminal lifestyle, it must decide whether he has benefited 'from his *particular* criminal conduct'.⁹² This will restrict the assessment of benefit to the offence of which he has been convicted and those offences taken into consideration in sentencing.⁹³ However, if the court finds that the defendant *does* have a criminal lifestyle, it must then decide whether he has benefited from 'his *general* criminal conduct'.⁹⁴ This will invoke the application of statutory assumptions which provide that the court must assume that any property transferred to or held by the defendant, or any expenditure incurred, in the six years prior to confiscation proceedings derived from 'general criminal conduct'.⁹⁵

6.2 Application of Statutory Assumptions

The serious offences listed in Schedule 2 arguably warrant the application of the assumptions; as Ulph argues, these types of criminal activity are 'easily repeated, lucrative and with a low rate of detection'.⁹⁶ However Schedule 2 also encompasses offences which may arise from a minor conviction, such as those who illegally copy a DVD and distribute to friends for a small sum.⁹⁷ As Liberty notes, the statutory assumptions apply at a 'lower and more trivial qualifying threshold of offending' than under previous legislation.⁹⁸ Furthermore, where a defendant has committed two offences in a six year period he will be considered as having a 'criminal lifestyle' regardless of the nature of these offences.⁹⁹ As Ulph argues, a first-time offender involved in a dishonest scheme exposing him to a number of charges will be deemed to have a 'criminal lifestyle'.¹⁰⁰

6.3 The Burden of Proof

The Court of Appeal decision in *R v Whittington* illustrates the process and requisite burden of proof when applying the assumptions.¹⁰¹ Moses LJ stated that the court must first consider whether the defendant has a criminal lifestyle. The court then has

⁹¹ Biggs, S., et al., *The Proceeds of Crime Act 2002* (2002, Butterworths), p.80.

⁹² S.6(4)(c) Proceeds of Crime Act 2002

⁹³ *Ibid.*, s.76(3).

⁹⁴ *Ibid.*, s.6(4)(b).

⁹⁵ *Ibid.*, ss.10(1)-(6).

⁹⁶ Ulph, 'Confiscation Orders' (2010), p.272.

⁹⁷ HL Deb, Vol. 636, col. 1214, 25 June 2002.

⁹⁸ Liberty, *Proceeds of Crime* (May 2001, Consultation on Draft Legislation), Para. [3.1].

⁹⁹ S.75(3) Proceeds of Crime Act 2002.

¹⁰⁰ Ulph, 'Confiscation Orders' (2010), p.272.

¹⁰¹ [2009] EWCA Crim 1641.

to determine whether the defendant had benefited from *general* criminal conduct, thus whether he had *obtained* property as a result of or in connection with his general criminal conduct. On the requisite burden of proof, the court stated that ‘it is for the prosecution to prove that the defendant has obtained the property in issue’.¹⁰² The prosecution is required to prove that the defendant has obtained the property on the balance of probabilities and may do so by proving that property has been transferred to him or that he has held it.¹⁰³ Once the prosecution has established that the defendant has obtained the property, the question as to its source will then arise.¹⁰⁴

As Thomas observes, ‘the decision emphasizes that proof of [the existence of the property in issue] is the responsibility of the prosecution’.¹⁰⁵ The purpose of the statutory assumptions is to assist in proving the *source* of the property once the prosecution has proven its existence. Once possession is proven, the court must assume that the source is his ‘general criminal conduct’. Section 10(6)(a) provides that the court must not make the relevant assumption if it is shown to be incorrect. The burden of proof is therefore placed upon the defendant to prove that the source was not criminal activity. In *Whittington*, it was held that the sentencing judge had misdirected himself as to the burden of proof in requiring the defendant to disprove the existence of the property rather than show that the assumption in relation to the property was incorrect.¹⁰⁶

6.4 Justification for the Reverse Burden of Proof

As Alldridge argues, without shifting the burden upon the defendant, ‘there is little chance... the confiscation procedures will... yield sufficient money to make them worthwhile’.¹⁰⁷ Furthermore, it is arguable that the defendant is best placed to know how he has acquired his assets and thus it is his responsibility to account for them.¹⁰⁸ However this can be contrasted with Liberty’s argument that it is not fair to place such a burden upon the defendant as ‘the system is predicated upon a model of rational economic behaviour, which cannot be safely assumed by society on a case-by-case

¹⁰² *Ibid.*, Para. [13] *per* Moses LJ.

¹⁰³ SS.10(2), 10(3) and 10(4) Proceeds of Crime Act 2002.

¹⁰⁴ *R v Whittington* [2009] EWCA Crim 1641, Para. [14] *per* Moses LJ. However, the Court noted the exception established in *R v Briggs-Price* [2009] UKHL 19, that the prosecution must prove to the criminal standard where it is alleged that the defendant has obtained property in the past through the commission of criminal offences other than those charged.

¹⁰⁵ Thomas, D., ‘R. v Whittington: confiscation order – criminal lifestyle – assumptions’ (2010) 1 *Criminal Law Review*, p.68.

¹⁰⁶ *Whittington* [2009], Para. [32].

¹⁰⁷ Alldridge, *Money Laundering* (2003), p.145.

¹⁰⁸ HL Deb, Vol.634, col.66, 22 April 2002.

basis'.¹⁰⁹ Liberty contrasts the United Kingdom system of confiscation with those of other jurisdictions, submitting that the absence of a threshold for application of statutory assumptions 'has the capacity to lead to arbitrary and irrational results'.¹¹⁰ However as Alldridge argues, 'this sort of risk is one legislators are eager to bear'.¹¹¹

In *Grayson v United Kingdom*, the ECtHR considered the compatibility of the assumptions with the ECHR.¹¹² The Court took the view that sufficient safeguards exist to protect the defendant's rights observing that the assumption could be rebutted. Furthermore, the judge had discretion not to apply the assumptions if it would give rise to 'a serious risk of injustice'.¹¹³ Applying *Phillips*, the Court rejected the argument that the requirement to pay money under a confiscation order constituted a disproportionate interference with the applicant's right to peaceful enjoyment of his possessions under Article 1, Protocol 1. As Ulph argues, 'the effect of... *Grayson* is such that any legal challenge to the... assumptions would have little hope of success'.¹¹⁴ However it is clear the decisions in both *Phillips* and *Grayson* place great importance on safeguards provided to the defendant and yet their adequacy in successfully protecting the defendant from a disproportionate assessment of his benefit is questionable. As Lawrence argues, the defendant may not be in a position to rebut the burden... shifted upon him.¹¹⁵ Furthermore, as confiscation follows conviction, the court will have a preconceived view of the defendant thus affecting the weight given to his evidence.¹¹⁶

6.5 A Serious Risk of Injustice?

Under s.10(6)(b) POCA 2002 the court must not make a particular assumption if 'there would be a serious risk of injustice if [it] were made'. Lord Steyn in *Benjafield* relied on this safeguard in holding that the assumptions were proportionate.¹¹⁷ A 'serious risk of injustice' was further defined by his Lordship as 'any real as opposed

¹⁰⁹ Liberty, *Proceeds of Crime* (2001), Para. [5.2.2].

¹¹⁰ *Ibid.*, Para. [1.2].

¹¹¹ Alldridge, *Money Laundering* (2003), p.146.

¹¹² App Nos. (19955/05) and (15085/06) (2008) 48 EHRR 722.

¹¹³ *Ibid.*, Para. [45]. The Court also noted that the assessment was carried out by a court with a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence. Furthermore, he was represented by counsel of his choice.

¹¹⁴ Ulph, 'Confiscation Orders' (2010), p.274.

¹¹⁵ Lawrence, 'Draconian and manifestly unjust' (2008), p.23.

¹¹⁶ *Ibid.*

¹¹⁷ *R v Benjafield; Rezvi* [2002], Para. [87]. Lord Steyn was referring to s.4(4) Drug Trafficking Act 1994; however the provision is identical to s.10(6)(b) Proceeds of Crime Act 2002.

to fanciful risk of injustice'.¹¹⁸ However, as Rees argues, this safeguard is 'deceptively narrow'.¹¹⁹ In *R v Jones*, Latham LJ stated that it is only when considering the assumptions that s.10(6) will apply.¹²⁰ The provision ensures 'that [the] assumptions made... are not so unrealistic or unjust... moderating the ultimate calculation of benefit'.¹²¹ His Lordship stated that the concept of a 'serious risk of injustice' is not intended to moderate the potential hardship of a confiscation order but the operation of the assumptions in assessing benefit.¹²² This is illustrated by the decision of the Court of Appeal in *R v Lunn*, in which the defendant appealed against a confiscation order imposed under the DTOA 1986.¹²³ The sentencing judge had relied on the assumptions and held that there was nothing to displace those them. It was submitted on behalf of the appellant that 'if the judge had... made an assessment as required, he would have been bound to take into account... that [the] appellant had no previous involvement with drug trafficking'.¹²⁴ Eady J stated that the 'serious risk of injustice' provision under the DTA 1986,¹²⁵ materially identical to s.10(6) POCA 2002, is of 'fundamental importance' as it is this that renders the reverse burden of proof compatible with the ECHR.¹²⁶ As the Crown had accepted that the appellant had no prior involvement in drug trafficking the Court held there would be an injustice if the assumption was made. The court's discretion not to apply the assumptions if it would lead to a 'serious risk of injustice' is therefore qualified. As Latham LJ stated in *Jones*:

What is contemplated is some unjust contradiction in the process of assumption [such as] double counting of income and expenditure, or between an assumption and an agreed factual basis for sentence.¹²⁷

The court is not provided with discretion to determine that confiscation would unfairly impact upon the defendant but whether the assessment of benefit would produce an unjust figure. The introduction of assumptions to assist the prosecution in proving the source of the defendant's property was justified during the passage of the DTOA 1986 on the basis of their applicability to crimes of a 'serious and special

¹¹⁸ *Ibid.*, Para. [41].

¹¹⁹ Rees, *Blackstone's Guide* (2011), p.38.

¹²⁰ [2006] EWCA Crim 2061.

¹²¹ *Ibid.*, Para. [13].

¹²² *Ibid.*, Para. [14].

¹²³ [2004] EWCA Crim 1125.

¹²⁴ *Ibid.*, Para. [14] *per* Eady J.

¹²⁵ S.4(4)

¹²⁶ *Lunn* [2004], Para. [18].

¹²⁷ *Jones* [2006], Para. [14].

nature'.¹²⁸ However the 2002 Act provides a much lower threshold than a conviction for the 'appalling evil' of drug trafficking the assumptions were originally intended to counter. Nevertheless, as Young et al. argue 'the courts cannot be criticised for applying the law, even if that law is draconian – it is meant to be'.¹²⁹ The provision of discretion to the courts does provide some mitigation of a potentially disproportionate assessment of benefit. However this does not go far enough, particularly where the defendant is a first time offender.

7 Judicial Discretion

Under s.6 POCA 2002 the Crown Court *must* proceed to make a confiscation order if the prosecution has asked the court to proceed. Thus no discretion is afforded to the court to refuse to do so. This is illustrated by *R v Brack*, in which the Court of Appeal considered the decision by the sentencing judge not to make a confiscation order.¹³⁰ The trial judge had dismissed the application, stating that the Act 'should... be used for the "BMW's and yachts... of class A drug dealers"'.¹³¹ However the Court of Appeal held that the judge must comply with the statute and 'it was not enough... simply to say that the prosecution should not have made the application'.¹³² During the passage of the legislation, the House of Lords expressed concern that the absence of judicial discretion may risk injustice by denying defendants a safeguard against the possibility of abuse of power by the prosecution.¹³³ An amendment to provide the courts with discretion to refuse to make a confiscation order in exceptional circumstances was defeated when the Bill returned to the House of Commons. A mandatory procedure was determined necessary to strengthen the legislation against the increasing problem of organised crime.¹³⁴ The Government argued that the prosecution is 'under a duty to act reasonably and will not mount hearings for inappropriate cases'.¹³⁵

The legislation does provide some mitigation of the strict duty to confiscate by virtue of s.6(6), which provides that the duty becomes a power if the court:

¹²⁸ HC Deb, Vol. 90, col.255, 21 January 1986.

¹²⁹ Young, *Abuse of Process* (2009), p.408.

¹³⁰ [2007] EWCA Crim 1205

¹³¹ *Ibid.*, Para. [9] *per* Tuckey LJ

¹³² *Ibid.*, Para. [13].

¹³³ HC Deb, Vol.389, col.490, 18 Jul 2002.

¹³⁴ *Ibid.*

¹³⁵ HC Deb, Vol. 389, col. 501, 18 July 2002.

Believes that any victim of the conduct has at any time started or intends to start proceedings against the defendant in respect of loss, injury or damage sustained in connection with the conduct.¹³⁶

However, the statute creates an anomaly; where the victim has not threatened civil proceedings and the defendant has repaid the victim or indicated an intention to do so, s.6(6) will not apply.¹³⁷ In *R v Morgan and Bygrave*, the Court of Appeal considered conjoined appeals against confiscation orders imposed where the appellants had repaid or intended to repay the victims. Hughes LJ observed that 'the decision to invoke... confiscation... [is] a critical one' owing to its mandatory nature; it will not be appropriate to seek confiscation in every case.¹³⁸ However, their Lordships observed that, whilst the making of a confiscation order is mandatory once the Crown requests it, 'the court retains the jurisdiction to stay an application... where it amounts to an abuse of...process'.¹³⁹

Thus, while the court does not have an explicit discretion, it possesses discretion 'as part of [its] inherent powers which may be exercised to prevent a truly oppressive decision'.¹⁴⁰ Hughes LJ observed that this argument had been accepted in *R v Mahmood and Shahin*, but that abuse of process was not established.¹⁴¹ The nature of the oppression considered in *Mahmood* was an application for confiscation where 'the Crown had given some form of undertaking or agreement not to seek it if repayment were made'.¹⁴² The Court of Appeal affirmed that this is an appropriate situation in which to stay confiscation proceedings; however, their Lordships identified that abuse is not limited to an agreement reneged upon. In *Morgan and Bygrave*, the Court of Appeal recognised a further situation and held that it may amount to an abuse of process where:

The defendant's crimes caused loss to an identifiable loser or... losers, the defendant's benefit was limited to those crimes, the loser does not

¹³⁶ Affirmed in *R v Silvester* [2009] EWCA Crim 2182.

¹³⁷ This was the argument raised by the prosecution in *Morgan and Bygrave* [2008] EWCA Crim 1323.

¹³⁸ *Ibid.*, Para. [26].

¹³⁹ *Ibid.*, Para. [27].

¹⁴⁰ Ulph, 'Confiscation orders' (2010), p.275.

¹⁴¹ [2005] EWCA Crim 2168. The argument had also been accepted in *R v Hockey* [2007] EWCA Crim 1577, *R v Nield* [2007] EWCA Crim 993 and *R v Farquhar* [2008] EWCA Crim 806.

¹⁴² *Morgan and Bygrave* [2008], Para. [28] *per* Hughes LJ.

intend to bring civil proceedings... and the defendant has either repaid the full amount... or is ready, willing and able to do so.¹⁴³

Abuse of process may therefore operate as a safeguard where the defendant has voluntarily repaid the victim; however, as Thomas observes, 'the scope for an application to stay as identified in [*Morgan and Bygrave*] is extremely narrow'.¹⁴⁴ Their Lordships expressly stated that the decision is limited to the particular category of cases outlined above and only 'recognises that it *may* amount to an abuse of process'.¹⁴⁵

Contrary to the Government's reassurance, the prosecution has sought confiscation in cases where it is unjust or oppressive to do so.¹⁴⁶ In *R v Shabir*, the defendant, a pharmacist, had dishonestly inflated monthly prescription claims and been convicted on six counts of obtaining a money transfer by deception and therefore deemed as having a 'criminal lifestyle'.¹⁴⁷ The total amount of illicit proceeds obtained was £464 however the total sums paid to the defendant amounted to £179,731.97. For the purpose of the legislation his benefit was considered to be the total amount and once the 'criminal lifestyle' assumptions were applied, an order was imposed for £212,464.

In *Shabir*, Hughes LJ asserted that the courts should exercise caution in relying on the abuse of process doctrine and that its use should be confined to cases of true oppression.¹⁴⁸ It was held that 'the enormous disparity between the amount of the defendant's gain and the order raised a real likelihood that the order was oppressive'.¹⁴⁹ This alone did not establish oppression as the court expressed wariness of instances in which the assumptions may be legitimately applied. In *Shabir* the prosecution had relied on a charge of obtaining a money transfer by deception representing that the defendant had benefited by £179,000. Therefore the assumptions were brought into operation and it was this element that rendered the decision as oppressive; the Court quashed the confiscation order on the grounds of abuse of process.

¹⁴³ *Ibid.*, Para. [29]. It was unnecessary to invoke the abuse of process argument raised by Bygrave as the Court of Appeal directed that, under s.13(6), the £12,768.17 compensation should be paid out of the confiscation order.

¹⁴⁴ Thomas, 'Case Comment' (2008), p.812.

¹⁴⁵ *Ibid.*

¹⁴⁶ Alldridge, *Money Laundering Law* (2003), p.1053

¹⁴⁷ [2008] EWCA Crim 1809

¹⁴⁸ *Ibid.*, Para. [24].

¹⁴⁹ *Ibid.*, Para. [27].

Shabir appears to be the first time the courts have quashed a confiscation order on the ground of abuse of process. However, as Thomas asserts, 'once the concept... has been accepted as relevant... it becomes... difficult to know when it is applicable'.¹⁵⁰ Despite the widening of its applicability, the Court of Appeal has taken a cautious approach. In *R v Baden Lowe*, the Court reviewed both *Morgan and Bygrave* and *Shabir*.¹⁵¹ The judgment emphasized the 'narrow scope for successful... applications in this context'.¹⁵² Thomas LJ sought to allay the concern raised by Thomas that it will be difficult to ascertain when the doctrine is applicable, asserting that 'it is likely to be... very rare'.¹⁵³ Their Lordships regarded the facts of *Shabir* as 'unusual and exceptional', affirming that it is not an abuse of process where the prosecution seeks to recover more than a defendant has profited from his crime.¹⁵⁴ Ulph argues that 'it would be inappropriate for courts to stay proceedings where the legislation is being applied properly'.¹⁵⁵ Thomas supports this view, stating that the intention of Parliament would clearly be defeated if the jurisdiction were to be exercised more widely.¹⁵⁶

Five months after the judgment in *Baden Lowe*, the Court of Appeal in *CPS v Nelson, Pathak, and R v Paulet*,¹⁵⁷ expressed concern that orders staying confiscation proceedings using abuse of process were 'perhaps too readily being made'.¹⁵⁸ Their Lordships reiterated the necessity of a restrictive approach considering that a 'just' result would be produced by proper application of the legislation.¹⁵⁹ The case by case development of the applicability of the abuse of process jurisdiction arguably undermines the statutory provisions and thus the intention of Parliament. The Court of Appeal had expressed disquiet, stating that 'it is not easy to conclude that it is an abuse of process for those responsible for enforcing legislation to see that it is indeed properly enforced'.¹⁶⁰ However, the Court balanced this view with the recognition of the need to avoid 'orders for confiscation... utterly disproportionate to the... criminal activity or... benefits from crime'.¹⁶¹ It was therefore strongly suggested that the

¹⁵⁰ Thomas, 'Case Comment' (2008), p.995

¹⁵¹ [2009] EWCA Crim 194

¹⁵² Thomas, D., 'Case Comment – Sentencing: confiscation order – fraudulent transfer of land subject to insolvency proceedings' (2009) 6 *Criminal Law Review*, p.455.

¹⁵³ *Baden Lowe* [2009], Para. [16].

¹⁵⁴ *Ibid.*, Para. [15].

¹⁵⁵ Ulph, 'Confiscation orders' (2010), p.276.

¹⁵⁶ Thomas, 'Confiscation order' (2009), p.454.

¹⁵⁷ [2009] EWCA Crim 1573.

¹⁵⁸ *Ibid.*, Para. [34] *per* Lord Judge CJ.

¹⁵⁹ *Ibid.*, Para. [35].

¹⁶⁰ *Ibid.*, Para. [23] *per* Lord Judge CJ.

¹⁶¹ *Ibid.*, Para. [22].

Director of Public Prosecution should issue guidance.¹⁶² Their Lordships adjourned the appeal by the appellant in *Paulet*, and at their suggestion the Crown Prosecution Service (CPS) produced a document entitled 'Guidance for Crown Prosecutors on the Discretion to Instigate Confiscation Proceedings'. As stated by Thomas, the guidance 'appears to be aimed at securing some consistency in the use by prosecutors of the discretion given to them by the confiscation statutes'.¹⁶³ However, this guidance does not appear to have been published widely beyond the CPS and therefore the consistency it is able to establish in the use of prosecutorial discretion is questionable.

The Court of Appeal in *Nelson* was somewhat disparaging towards use of the guidance. Their Lordships stated that it would not 'add, alter or amend the statute'.¹⁶⁴ The guidance is not formal guidance within s.2A POCA 2002, thus the prosecution is not compelled to pay it regard. It is therefore arguably of little effectiveness in ensuring a consistent approach and providing support to the doctrine as a safeguard against disproportionate orders sought by the prosecution. The recognition by the Court of Appeal that the guidance to prosecutors 'may and no doubt will be amended in the light of experience [and] any later decisions in this Court'¹⁶⁵ supports the view that the Courts are prepared to prevent truly oppressive decisions.¹⁶⁶ However, the continued adamancy that 'the jurisdiction must be exercised with considerable caution, indeed sparingly'¹⁶⁷ means that 'there is no risk that courts could use the power... to undercut the statutory scheme in a substantial way'.¹⁶⁸ The use of the jurisdiction to stay confiscation proceedings is not on a parallel with judicial discretion and requires the defendant to surmount the high threshold of *true oppression*; thus, 'it cannot be used to provide... some form of general protection'.¹⁶⁹ Confiscation proceedings may be challenged, however this is unlikely to be solely on the basis of 'an enormous disparity' between the amount that has actually passed through the defendant's hands and the amount assessed as his benefit from crime. However, as

¹⁶² *Ibid.*

¹⁶³ Thomas, D., 'Case Comment – CPS v Nelson, CPS v Pathal, R v Paulet: sentencing – confiscation orders – abuse of process' (2009) 11 *Criminal Law Review*, p.816.

¹⁶⁴ *Nelson* [2009], Para. [38] *per* Lord Judge CJ.

¹⁶⁵ *Ibid.*, Para. [38] *per* Lord Judge CJ.

¹⁶⁶ Ulph, 'Confiscation orders' (2010), p. 274.

¹⁶⁷ *Shabir* [2008], Para. [24] *per* Hughes LJ and affirmed in *Baden Lowe* [2009], Para. [15] *per* Thomas LJ.

¹⁶⁸ Ulph 'Confiscation orders' (2010), p.276.

¹⁶⁹ *Ibid.*, p.276.

Esprit notes, 'there may still be scope for challenge' where this 'enormous disparity' is coupled with other factors.¹⁷⁰

Conclusion

The question as to whether the assessment of benefit is a 'sledgehammer to crack a nut' may be easily answered in the negative by reference to decisions in the domestic courts and the ECtHR that confiscation is 'a precise, fair and proportionate response to the important need to protect the public'. However, these decisions were an approval of the general compatibility of the confiscation regime under the law prior to the POCA 2002 and it is arguable that this does not determine as proportionate the very specific consideration of the literal application of Part 2 of the Act. The House of Lords ruling in *May* that each defendant in a conspiracy will have obtained property and thus benefited to the full amount of its value paves the way for confiscation orders to be made grossly disproportionate to the amount actually retained by each defendant. However, the judicial gloss added to the concept of 'obtaining' which takes into account the defendant's capacity in joint benefit cases offers a convincing mitigation of the disproportionate orders that may arise. However some academics question whether this is appropriate in its creation of a 'ready-made defence'. It is submitted that this is an acceptable risk; the prime movers within a conspiracy are subject to orders for the full amount and thus the legislation operates according to its 'reparative' intention. Surely the recovery of an additional amount is gratuitous and the recovery of a sum more representative of a co-conspirator's actual benefit not objectionable?

It is submitted that reliance on judicial mitigation of the disproportionate orders arising in cases involving joint defendants is insufficient owing to the inconsistency created. The House of Lords did not define precise instances in which an apportionment approach would be appropriate. It is submitted that apportionment is required to remedy the disproportionate orders arising in cases where the benefit is shown to be jointly obtained; however, the courts are clear that they are not prepared to adopt such an approach. The rationale is that it would be contrary to Parliament's intentions; yet, the statute does not expressly prohibit the apportionment of benefit. The definition of 'criminal lifestyle' is drawn widely and is arguably disproportionate in

¹⁷⁰ Esprit, S., 'Case Commentary: Abuse of Process – The Latest Cases' in Millington, T., et. al., (eds.), 'Proceeds of Crime Review' (2010) 4 *Journal of Asset Forfeiture and Money Laundering*, p.47.

itself as the Act may be used against those whom it was not originally intended to target. More pertinent is the application of assumptions to such defendants. This power was introduced to permit the court to assume that property held by the defendant had been derived from criminal offences from which 'peculiarly high profits' could be gained. In cases far removed from these it is arguable that the application of assumptions creates a disproportionate assessment of benefit. Academics widely accept that the reverse burden of proof enhances the ability of the state to recover the proceeds of crime despite allowing an assessment of wealth that the defendant simply did not have. The risk of error involved and a potential to create miscarriages of justice is more concerning than the risk that the State may be prevented from confiscating large amounts of money from defendants.

The decision in *Phillips* was that the assumptions under both the CJA 1988 and DTA 1994 were compatible with Article 1 of the First Protocol of the ECHR. However, the defendant's ability to rebut these is limited and it is an insufficient safeguard. Law states that the 'serious risk of injustice' test 'appears to give the Court back the discretion seemingly taken away by the assumptions'.¹⁷¹ However this is questionable given the assertion by the Court of Appeal that the provision does not provide a 'general discretion'. These 'safeguarding' provisions are limited and the specific reliance on them in holding that the legislation is proportionate arguably invites reconsideration. The absence of judicial discretion further enhances the potential for disproportionate orders. A mandatory confiscation regime was originally justified on the basis of the 'appalling evil' of drug trafficking and later to combat 'organised crime'. However confiscation has been sought in the case of a pharmacist inflating prescription claims. It is not submitted that this is inappropriate; the defendant had profited from crime and thus should be liable to confiscation. However, it is the mandatory nature of the regime coupled with other provisions, notably the assumptions, which amounts to an assessment of benefit, at times, grossly disproportionate to his criminal activity or actual benefit.

The increasing recognition of abuse of process acts to mitigate such orders, however reliance on a reactive mechanism is insufficient. The prosecution as a partial party may continue to mount hearings in inappropriate cases to test the limits of the jurisdiction and are encouraged by targets set under the Criminal Justice System

¹⁷¹ Law, J., 'Who's Afraid of the Assumptions? A Practical Guide' in Millington, T., et. al., (eds.), 'Proceeds of Crime Review' (2010) 4 *Journal of Asset Forfeiture and Money Laundering*, p.39.

Business Plan.¹⁷² The question as to whether the assessment of benefit under Part 2 POCA 2002 is a 'sledgehammer to crack a nut' may be answered with a resounding yes. The primary factors considered here contribute towards creating orders that are both disproportionate to the defendant's criminal activity and the actual benefit that he has obtained from crime.

¹⁷² Crown Prosecution Service, *Business Plan 2007-2008* (Crown Prosecution Service).