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CONFISCATION ORDERS AND ABUSE OF PROCESS:

Discretion to prevent “double whammy” under the Proceeds of Crime

Act 2002

Abstract

In *R (on the prosecution of BERR) v Baden Lowe*¹, the Court of Appeal upheld the making of a confiscation order in relation to a former company director who had pleaded guilty to an offence under section 206 (1) (b) of the Insolvency Act 1986, the offence relating to a transfer of property belonging to a company after a winding up petition had been presented. The court was required to make the order under section 6 of the Proceeds of Crime Act 2002 even though the relevant property had already been recovered by the liquidator and there was a surplus on completion of the liquidation. The Court of Appeal recognised, however, that in circumstances in which the making of a confiscation order is mandatory, should the prosecution apply for one under section 6 of the Proceeds of Crime Act 2002, the court still possesses discretion to grant a stay of proceedings upon the basis that the application amounts to an abuse of process. Case law both prior and subsequent to the decision of the Court of Appeal in Barden Lowe has considered the nature of those exceptional circumstances in which the making of an application for a confiscation order may amount to an abuse of process. The category of cases in which the making of such an application may be abusive is not closed, but the court’s jurisdiction to stay confiscation proceedings must be exercised with great caution.

Introduction

In *R (on the prosecution of BERR) v Baden Lowe*², the Court of Appeal was, inter alia, required to consider whether the bringing of confiscation proceedings against a defendant who had been a company director at the time when the offence of which he was subsequently convicted was committed was an abuse of process. The purpose of this article is neither to conduct a detailed examination of the legislation which governs the making of confiscation orders nor to conduct a general survey of the case

¹ [2009] EWCA Crim 194.

² [2009] EWCA Crim 194.

law relating to confiscation proceedings. Rather, its aim is the narrower one of considering the nature of those circumstances in which the decision of a prosecuting authority to commence confiscation proceedings against a defendant entitles the court to grant a stay of proceedings on the basis that the institution of such proceedings is an abuse of process.

The facts of *Baden Lowe*

Commercial Property Service (Midlands) Ltd (CPSM) was the subject of a winding up petition, brought by HMRC, on 6th January 2005. The company, which carried on a freight and cargo carrying business, had been in financial difficulty since the end of 2004 and owed HMRC around £40,000. The company's other creditors were owed in the region of £100,000.

In November 2002, CPSM had purchased some land, upon which planning permission was subsequently granted, more than doubling the value of the land. This land represented the company's only significant asset at the time of the winding up petition.

After the winding up petition had been presented, but before the winding up order had been made, Baden Lowe, a director of CPSM, transferred the land owned by the company to another company (Penwood), of which he and a Mr Lloyd, who was also one of the creditors of CPSM, were directors. The land was transferred for no consideration and Baden Lowe subsequently pleaded guilty to an offence under section 206 (1) (b) of the Insolvency Act 1986 in June 2007. This section applies where a company has been ordered to be wound up and, within the 12 months preceding the winding up order, an officer of the company has fraudulently removed any part of the company's property to the value of £500 or more. The offence is punishable by a fine, imprisonment or both.³ Baden Lowe was committed to the Crown Court for sentence and was sentenced to 4 months in prison for this offence.

The liquidator of CPSM had in fact managed to recover the land transferred to Penwood in early 2006. Under section 127 Insolvency Act 1986, any disposition of the company's property made after commencement of the winding up is void unless the court orders otherwise⁴. The liquidator having commenced proceedings against Penwood, the land was eventually transferred back to the liquidator of CPSM under an agreement between the liquidator and Mr Lloyd on behalf of Penwood, which was embodied in a court order and was sold in January 2007 for over £200,000. The recovery of the land meant that, on completion of the liquidation, there was a small surplus.

In December 2007, confiscation proceedings were brought against Baden Lowe under section 6 of the Proceeds of Crime Act 2002.⁵ The court must proceed under section 6

³ Section 206 (6) Insolvency Act 1986

⁴ The winding up of a company by the court is deemed to commence at the time of the presentation of the petition for winding up (s.129(2), Insolvency Act 1986).

⁵ It should be noted that a number of the confiscation cases that are considered in the present article were decided under provisions of the Criminal Justice Act 1988 (as amended by the Proceeds of Crime Act 1995) rather than under the provisions of the 2002 Act. For the purposes of the present article the

where a defendant has been committed to the Crown Court for sentence and the prosecutor asks the court to proceed under section 6 or the court believes it is appropriate for it to do so.⁶ The court must decide whether the defendant has a criminal lifestyle, and if so whether he has benefited from his general criminal conduct, or, if the court decides that the defendant does not have a criminal lifestyle, it must decide whether the defendant has benefited from his particular criminal conduct.⁷ If the court decides, in either case, that the defendant has benefited from criminal conduct it must decide the recoverable amount and make an order accordingly.⁸ However, under section 6(6), the duty in subsection (5) becomes a power if the court believes that any victim of the conduct has started or intends to start proceedings against the defendant in respect of loss or damage sustained in connection with the conduct.

Counsel for Baden Lowe argued both that if a confiscation order was made this would amount to the imposition of a double penalty and that the interaction of sections 6(6) and 7(3) of the Proceeds of Crime Act 2002 meant that, in this case, a confiscation order should not be made. Section 7(3) provides that, if section 6(6) applies, then the court can fix the recoverable amount to such amount as it considers just, subject to the proviso that this cannot exceed the maximum amount that the court could otherwise order. At first instance this argument was unsuccessful and a confiscation order was made in the sum of £41,920 (Barden Lowe's benefit from the crime was agreed to be £191,337 but his realisable assets only amounted to £41,920), however, an application for leave to appeal was allowed.

On appeal, the Court of Appeal dismissed the latter of the two arguments set out above on the grounds that no claim had been, or was going to be, brought against Baden Lowe personally in connection with the transfer of the property from CPM to Penwood. The application of section 127 Insolvency Act 1986 made the transfer void unless the court ordered otherwise, therefore being no need for the liquidator to bring proceedings for recovery of the land against Baden Lowe. Even if the circumstances had been different and the transfer had not been void, any proceedings would have been taken against Penwood and not against the appellant personally, probably under the section 238 Insolvency Act 1986 undervalue transactions provisions.

The basis upon which the Court of Appeal in *Baden Lowe* dismissed the former of the two arguments referred to above, which their Lordships categorised as an abuse of process argument, is considered below.

When will the bringing of confiscation proceedings amount to an abuse of process (cases referred to in *Barden Lowe*)?

differences between the 1988 legislation (as amended) and the 2002 legislation are not significant and, consequently, it is not intended to conduct an examination of the differences between the 2002 legislation and the 1988 legislation (as amended in 1995) that preceded it.

⁶ Section 6 (2) and (3) Proceeds of Crime Act 2002

⁷ Section 6 (4) Proceeds of Crime Act 2002

⁸ Section 6 (5) Proceeds of Crime Act 2002

In *Baden Lowe* the Court of Appeal referred to several earlier Court of Appeal decisions in the context of considering whether the confiscation proceedings that *Baden Lowe* concerned had been abusive.

In *R v Mahmood and Shahin*⁹, the Court of Appeal accepted (in the context of confiscation proceedings that had been brought¹⁰ against two defendants who had pleaded guilty to laundering money stolen by their brother, a Post Office employee) that a judge possesses discretion to stay confiscation proceedings as an abuse of process.¹¹ Their Lordships recognised that encouraging defendants to make full restitution as quickly as possible without the need for confiscation proceedings is in the interests of justice. Consequently, their Lordships recognised that it would be in the interests of justice to protect a defendant who has made full restitution in circumstances in which the Crown, unjustly, sought to go behind an agreement, understanding or representation which had been made with full disclosure. Their Lordships provided the hypothetical example of circumstances in which confiscation proceedings were instituted subsequent to the making of restitution by the defendant in compliance with an agreement between the defendant and the Crown which had been made following full disclosure. Upon the facts of the case before it, however, the Court of Appeal held that the defendants had not discharged the burden of establishing circumstances which would have entitled the judge to order a stay of proceedings (i.e. they had failed to establish that there had been an agreement with the Crown to the effect that confiscation proceedings would not be brought against the two defendants in consequence of their contribution to a repayment of the stolen money made by their brother to the Royal Mail). Moreover, in the course of reaching their decision, their Lordships indicated that the mere fact that the Crown may recover more than the victim has lost does not amount to a ground for alleging that confiscation proceedings are abusive (their Lordships recognising that the benefit that the defendant derived from the proceeds of his crime may exceed the sum that the victim lost in consequence of that crime).

In *R v Nield*¹², the defendant, a company accountant, was convicted of a number of offences, including false accounting, relating to his use of funds belonging to the company for the purpose of paying his personal expenses. The Court of Appeal held that confiscation proceedings that had subsequently been brought against the defendant¹³ had not amounted to an abuse of process, and this was so even though, by the time when he was sentenced, the defendant had already repaid the money to which the charges against him related to the company. The judge had not been asked to make a finding as to the existence of an agreement between the defendant and the Crown such as that to which the Court of Appeal in *Mahmood and Shahin* had referred in its hypothetical example, the Crown had never conceded that confiscation proceedings would not be brought against the defendant and had never conceded that they had given such an undertaking or assurance to the defendant. Moreover, the Court of Appeal in *Nield* regarded *Mahmood and Shahin* as confirming that

⁹ [2006] 1 Cr App R (S) 96.

¹⁰ Under section 71 of the Criminal Justice Act 1988.

¹¹ As authority for the existence of discretion to stay proceedings as an abuse of process their Lordships in Farquhar referred to the Judgment of the Privy Council in *Hui Chi-Ming v R* [1992] AC 34 which, itself, referred to the speech of Lord Reid in *Connelly v DPP* [1964] AC 34.

¹² [2007] EWCA Crim 993.

¹³ Under section 6 of the Proceeds of Crime Act 2002.

confiscation proceedings that will result in the recovery of more than the amount stolen are not automatically abusive. Their Lordships recognised that the court would have possessed a power to make a confiscation order, rather than having been under a duty to do so, if the victim had started, or intended to start, proceedings against the defendant in respect of the loss, but¹⁴ thought that the reason why the court possessed a power in such circumstances was that this enabled the court to ensure that the victim would be able to obtain the compensation that he claimed.

In *R v Hockey*¹⁵ (in which the court did not identify any abuse of process in the prosecution's decision to apply for a confiscation order) the Court of Appeal¹⁶ accepted that the court may intervene in the context of abuse of power on the part of the prosecuting authorities but also¹⁷ recognised that the decision whether or not to prosecute is a decision for the prosecuting authorities.

In *R v Farquhar*¹⁸, a confiscation order was made¹⁹ against the defendant, who had been convicted of making false statements to obtain benefits (i.e. Job Seekers' Allowance, Income Support and council tax benefit) even though the defendant had voluntarily repaid the total sum to which the charges related prior to being sentenced. If the defendant had not made a voluntary repayment and civil proceedings had been or were to be issued against him, the court would have possessed the power to make a confiscation order, rather than being under a duty to make such an order. The Court of Appeal recognised that the mere fact that a defendant may be required to pay the amount lost twice is not an abuse of process, the purpose of a confiscation order being to penalise the defendant not to compensate the victim. Their Lordships (encouraging early, voluntary, payments, with reference to *Mahmood and Shahin* and recognising that there is scope for good sense and compromise in this context) also recognised, however, that the exercise of discretion to stay the proceedings as an abuse of process might have been relevant if the Crown had sought to renege upon an agreement with the defendant relating to the voluntary payment, but upon the facts of the case this was not so. Further, their Lordships indicated that even if the court had possessed a power, rather than being under a duty, to make a confiscation order, such discretion would not necessarily have been exercised in favour of the defendant (their Lordships recognising that if the defendant, having lived off the benefits that he had falsely obtained and, thus, having been able to invest his savings) had merely repaid the sum to which the charges against him related, the effect would have been that the sum that the defendant had falsely obtained would have amounted to an interest free loan.²⁰

¹⁴ Recognising (with reference to the decision of the House of Lords in *R v Cademan-Smith* [2002] 2 Cr App R (S) 37) that confiscation is “punitive in nature” and that it does not merely have the purpose of depriving the defendant of the proceeds of his crimes but also has the purpose of punishing the defendant so as to deter him from re-offending and reducing the funds available to fund future crimes.

¹⁵ [2008] 1 Cr App R (S) 50.

¹⁶ With reference to the decisions of the House of Lords in *Connelly v DPP* [1964] AC 1254 and *DPP v Humphrys* [1977] AC 1.

¹⁷ Again with reference to the decisions of the House of Lords in *Connelly* and *Humphrys*.

¹⁸ [2008] 2 Cr App R (S) 104.

¹⁹ Under section 71 of the Criminal Justice Act 1988.

²⁰ Their Lordships also held that a human rights challenge that the defendant has raised was “doomed to fail”. This was so both because the House of Lords in *R v Benjafield* [2003] 1 AC 1099 had previously held that the relevant provisions of the Criminal Justice Act 1988 were compatible with the Convention and because it was not true to say that there was no judicial discretion in the context of confiscation proceedings since the court did possess discretion to stay such proceedings as an abuse of process.

*R v Morgan and Bygrave*²¹ concerned two appeals which raised two common questions. First, whether the making of a confiscation order is mandatory where such an order is sought by the Crown in circumstances in which it is unnecessary for the victim to make a civil claim against the defendant to recover his loss because the defendant has either repaid the victim or has offered so to do. Secondly, to what extent is the power of the Crown to decide to seek a confiscation order a limited power. Their Lordships (with reference to *Mahmood and Shahin* and to *Farquhar*) accepted that it is in the public interest to encourage defendants to make voluntary repayments but held that the relevant statutory provisions could not be construed so as to confer a discretion to make a confiscation order rather than as imposing a duty to make such an order in the context of the making of a voluntary repayment by the defendant. Thus, their Lordships recognised that where the defendant does not make a voluntary repayment and does not indicate a willingness to do so and, consequently, the victim either sues the defendant in order to recover his losses or indicates that he intends to do so, the legislation²² gives the court discretion to make a confiscation order rather than imposing a duty on the court so to do. Their Lordships also recognised, however, that where the defendant voluntarily repays the victim's loss or is willing to do so, the effect of the legislation is that if the prosecution applies for a confiscation order the court will be required to make such an order (i.e. potentially requiring the defendant to pay double, or even more than double, the benefit that he obtained from the crime). Their Lordships further recognised, however, that the making of a confiscation order is not an automatic process but, rather, that in circumstances in which the making of a confiscation order would be mandatory if the Crown applied for such an order, the Crown might decide not to apply for such an order or, having applied for such an order, might decide to discontinue the confiscation proceedings.

In relation to the decision by the Crown to bring and, if brought, to discontinue confiscation proceedings, their Lordships (with reference to *Mahmood and Shahin*, *Nield* and *Farquhar*) recognised that the court possesses jurisdiction to stay confiscation proceedings as an abuse of process in circumstances in which seeking a confiscation order would be oppressive. Their Lordships recognised that the form of abuse of process that had been considered (but not established) in the earlier cases related to the giving of an undertaking or the making of an agreement by the Crown to the effect that a confiscation order would not be sought if a repayment was made. Whilst their Lordships accepted that an abuse of process might arise in such circumstances their Lordships indicated that the reneged upon agreement was not the only potential source of abuse of process in the context of confiscation proceedings.

Their Lordships made clear that (as had been recognised in *Mahmood and Shahin*) the mere fact that a confiscation order will extract a sum from the defendant which exceeds the amount by which the defendant profited from the crime will not be sufficient to establish that it would be oppressive (i.e. abusive) to seek a confiscation order. Their Lordships indicated, however, that it may be oppressive (i.e. that it may amount to an abuse of process) to seek a confiscation order in circumstances in which the defendant's crimes caused loss to an identifiable loser or identifiable losers, the

²¹ [2009] 1 Cr App R (S) 60.

²² Section 6(6) of the 2002 Act or, previously, section 71(1C) of the 1988 Act.

defendant's benefit was limited to those crimes, the loser does not intend to bring civil proceedings to recover the loss against the defendant and the defendant has either repaid the full amount to the loser or is ready, willing and able to do so. Their Lordships indicated that whether an application for a confiscation order is oppressive in such circumstances will depend on the facts of the specific case before the court and that the judge may either exercise the jurisdiction to grant a stay of proceedings prior to a confiscation hearing or may exercise that jurisdiction during the hearing itself. Their Lordships provided examples of circumstances in which the seeking of a confiscation order was unlikely to be oppressive, namely, where the benefit obtained by the defendant exceeds the loss incurred by the victim and where the defendant offers to make a full repayment but it is uncertain whether the defendant will be able to accomplish this. With reference to *Farquhar*, their Lordships indicated that give and take is desirable in this context and that the Crown should normally be able to respond if the defendant asks whether the Crown will seek a confiscation order if the defendant makes a specified payment by a specified time. Their Lordships also indicated, however, that they did not wish to routine applications for stays of proceedings, that if an application for a stay is not made before the Crown Court it is unlikely that, in the absence of an investigation in the Crown Court, there will be a proper foundation for appellate grounds and that applications for judicial review of the decision to make a confiscation order are inappropriate, the appropriate route for challenging such a decision being that of applying for a stay of proceedings.

In relation to *Bygrave*'s appeal, the defendant, an accounts clerk, had pleaded guilty to stealing £12,768.17 from her employers, had offered to repay the full amount on the basis of a loan secured on her home and the Crown had sought both a compensation order²³ for £12,768.17 and a confiscation order²⁴ for £12,768.17. The Crown did not make clear to the judge that if the judge made a compensation order and a confiscation order but believed that the defendant did not have the means to fully satisfy both orders, the judge would be required, under section 13(6) of the 2002 Act, to direct that the amount of the compensation order that would not be recoverable be paid out of the sums recovered under the confiscation order. Whilst the defence told the judge that the defendant could not pay two times £12,768.17, the defence did not raise the possibility of the making of an order under section 13(6). The judge made a confiscation order but declined to make a compensation order. The employers subsequently indicated that they intended to bring a civil claim against the defendant, following which the defendant, alleging abuse of process, sought to appeal the confiscation order. The Court of Appeal, upholding the appeal, directed, under section 13(6), that the employers be paid the sum of £12,768.17 out of the confiscation order, it thus being unnecessary for their Lordships to consider the abuse of process argument.

In relation to *Morgan*'s appeal, the defendant was a police officer who, having obtained £279,872.02 from an old lady, had (after an adjustment was made for inflation) derived a benefit of £306,913.93 from the offence of dishonesty of which he was convicted. By the time of the confiscation hearing²⁵ the defendant had already repaid all but £51,967.83 (he had repaid £170,000 immediately after being interviewed by the police and had subsequently transferred the flat in which the

²³ Under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000.

²⁴ Under section 6 of the Proceeds of Crime Act 2002.

²⁵ Under section 71 of the Criminal Justice Act 1988.

victim lived to her) and indicated that he was ready to repay the outstanding sum. The defendant's realisable assets were £106,259.46 and the judge made a confiscation order for this sum but directed under section 72(7) of the Criminal Justice Act 1988 (the predecessor to section 13(6) of the 2002 Act) that the victim be paid £51,967.83 out of this sum. The defendant did not apply to the Crown Court judge for a stay. The Court of Appeal indicated that because there had been no investigation of whether the application was oppressive before the Crown Court, their Lordships could only quash the confiscation order if, in the absence of such an investigation and of relevant evidence, the application had clearly been oppressive. Their Lordships not being satisfied that the defendant had been in a position to make an immediate repayment of the £51,967.83 (it appeared that his ability to do so depended on the sale of the matrimonial home in the context of a pending divorce) found it impossible to say that the Crown's application for a confiscation order had been oppressive and dismissed the defendant's appeal.

In *R v Shabir*²⁶, following the defendant's conviction for six counts relating to claims to the Prescription Pricing Authority concerning the cost of prescriptions which the defendant, a pharmacist, had inflated by a few hundred pounds in total, the Crown had obtained a confiscation order²⁷ for £212,464.17 against the defendant (the total sum paid to the defendant by the health service was £179,731.97 and the defendant had not been able to displace one of the statutory assumptions concerning his lifestyle²⁸, resulting in the figure of £212,464.17, but the defendant had been entitled to almost all of the £179,731.97). Their Lordships held that the judge had correctly ruled that the sum obtained had been £179,731.97 but, being certain that the judge would have granted a stay had the defence applied for one, quashed the confiscation order and replaced it with a compensation order for £464. Their Lordships held that the Crown's application for the confiscation order had been oppressive, and, thus, had been an abuse of process, because the Crown had relied on the form of the counts with which the defendant was charged²⁹ both so as to bring the criminal lifestyle provisions of the 2002 Act into play (as was indicated at note 20, above, they did not apply below a £5,000 threshold) and so as to contend that the defendant has benefited by £179,731.97 rather than by a few hundred pounds. Indeed, their Lordships indicated that, upon the facts of *Shabir*, the criminal lifestyle provisions were irrelevant because they could not have been brought into play in the absence of oppression.

²⁶ [2009] 1 Cr App R (S) 84.

²⁷ Under section 6 of the Proceeds of Crime Act 2002.

²⁸ Under section 75 of the Proceeds of Crime Act 2002, if the defendant has benefitted from three or more offences and the benefit equals or exceeds £5,000 then the defendant has a "criminal lifestyle", the effect of this being that, under section 10 of the 2002 Act, the court is required to make four assumptions in deciding whether the defendant has benefitted from his general criminal conduct and in determining the amount of the benefit, though the court should not make a required assumption in relation to property or expenditure either if the assumption is shown to be incorrect or the making of the assumption would result in a serious risk of injustice. Their Lordships in *Shabir* recognised that it may be "perfectly proper" for the amount of a confiscation order to greatly exceed the amount by which the defendant benefitted from the offences of which he was convicted in circumstances in which the criminal lifestyle provisions and, thus, the section 10 assumptions are applicable, the purpose of those provisions being to extend the ambit of confiscation orders beyond those offences.

²⁹ For example, one of the six counts against the defendant had alleged, in the particulars of offence, that the defendant had dishonestly obtained £28,333.34 by deception whereas it appears that the amount by which the six counts had been inflated as a whole was only about £464 and, consequently, the charges against the defendant had not reflected the fact that the extent of the defendant's fraud as a whole fell well within the £5,000 threshold below which the lifestyle assumptions did not operate.

Whilst the defendant had not applied to the judge for a stay, the facts had been agreed before the Court of Appeal and thus the fact that no findings had been made by the judge did not prevent the matter from being raised before their Lordships. In reaching their decision their Lordships indicated, however, that the court must exercise its jurisdiction to grant a stay of proceedings in the context of an application for a confiscation order sparingly, with considerable caution and only where there is true oppression. In particular, their Lordships indicated that the mere fact that a confiscation order will require the defendant to pay a sum which exceeds the amount by which the defendant profited from the crime will not be sufficient to establish that the application is abusive and that whilst an enormous disparity between the sum that the defendant will be required to pay and the amount by which he profited from his crime gives rise to a real likelihood that a confiscation order is oppressive, such disparity will not, by itself, inherently establish that an application is oppressive as where the criminal lifestyle provisions legitimately apply it may be proper for the sum that the order requires the defendant to pay to massively exceed the amount by which the defendant profited from the crime. Moreover, it should be noted that their Lordships, whilst quashing the confiscation order, regarded the facts of *Shabir*'s case as facts that were "very unusual and exceptional".

Why were the confiscation proceedings that *Baden Lowe* concerned held not to be abusive?

In relation to the argument that the making of the confiscation order in *Baden Lowe* had amounted to the imposition of a double penalty, the Court of Appeal, dismissing Baden Lowe's appeal, held (with reference to the cases examined in the preceding section of this article) that in the circumstances of *Baden Lowe*'s case there was not even a remote suggestion of abuse of process. This was so because Baden Lowe had not made any offer to restore the property (which would have been restored under the provisions of the Insolvency Act 1986 if Mr Lloyd had not entered into the agreement with the liquidator), the criminal conduct had been to the detriment of all of the creditors of Baden Lowe's company rather than having been limited to one or more identifiable losers and the decision on the part of the Department for Business, Enterprise and Regulatory Reform to seek a confiscation order simply amounted to carrying out a decision that Parliament had made, there being no suggestion of abuse of process or of oppression. Whilst the policy of the Customs and Revenue was not to seek a confiscation order in similar circumstances, this³⁰ did not prevent the Department for Business, Enterprise and Regulatory Reform from deciding not to relax the statutory scheme in circumstances in which directors who had set up small companies sought to strip out their assets.

In the course of reaching their decision, their Lordships, whilst recognising that *Morgan and Bygrave* had made clear that the ambit of potential abuse of process in the context of confiscation proceedings was not limited to those circumstances to which the Court of Appeal had referred in *Mahmood, Nield and Farquhar* (i.e. circumstances in which the Crown seeks to renege on an agreement with the

³⁰ As the Court of Appeal had also indicated in *Farquhar*.

defendant), indicated both that there was extremely limited scope for identifying abuse of process in the *Morgan and Bygrave* sense and that whilst the Court of Appeal in *Shabir* had held that the confiscation proceedings that *Shabir* concerned had been abusive, their Lordships in *Shabir* had also recognised that the facts of the case before them were “unusual and exceptional”. Thus, their Lordships suggested that the likelihood is that those cases in which confiscation proceedings are held to be abusive will be extremely rare and that they may be non-existent if the prosecution take *Morgan and Bygrave* into account.

Their Lordships also indicated (with reference to *Morgan and Bygrave*) that, in future, it will be rare for the Court of Appeal to permit abuse of process arguments to be raised before it unless an application for a stay had previously been made to the judge.

When will the bringing of confiscation proceedings amount to an abuse of process (Developments subsequent to *Barden Lowe*)?

Subsequent to the decision of the Court of Appeal in *Barden Lowe*, the Court of Appeal in *R v Didier Paulet*³¹ was required to consider whether confiscation proceedings had amounted to an abuse of process. The defendant in relation to whom a confiscation order for £21,949.60 was made³² had pleaded guilty to three counts of obtaining a pecuniary advantage by deception. Whilst living in the United Kingdom unlawfully, the defendant had obtained employment by means of the use of false documents. He had received an amount approaching £75,000 in wages from employers who would not have employed him had they known that he was not entitled to work in the United Kingdom. He had made this money in the ordinary course of employment and had paid tax and national insurance. After his arrest, he was found to have £21,649.60 in his bank accounts.

On appeal to the Court of Appeal the defendant asserted that the application by the prosecution for a confiscation order had been oppressive and, thus, had amounted to an abuse of process. Conversely, the prosecution asserted that the application had not been oppressive and that the defendant had profited from employment which he was not entitled to and had prevented persons who were entitled to work in the United Kingdom from obtaining that employment.

The Court of Appeal indicated that the exceptional cases in which the seeking of a confiscation order by the prosecution could be oppressive included cases in which voluntary repayment has taken place, cases in which the defendant has received a minimal benefit and the confiscation order would be “truly disproportionate”, cases in which the confiscation proceedings had not been brought within a reasonable time³³

³¹ [2009] EWCA Crim 288.

³² Under section 6 of the Proceeds of Crime Act 2002.

³³ The Court of Appeal in *Paulet* did not cite any authorities in relation to abuse of process (and, indeed, as the Court of Appeal had recognised in *Baden Lowe*, the House of Lords in *R v May* [2008] UKHL 28 indicated that too many authorities are cited in court), but for a recent authority concerning delay in the context of the enforcement of confiscation proceedings *Minshall v Marylebone Magistrates' Court* [2009] 2 All ER 806.

and cases in which the bringing of the confiscation proceedings was contrary to an earlier undertaking. Moreover, their Lordships indicated that this was not a closed list of cases and, as an example, declined to exclude the possibility that confiscation proceedings might be abusive where such proceedings related to an employee who was entitled to work in the United Kingdom and who had “given every satisfaction to his employers”, having obtained employment long ago via a false application.

Their Lordships indicated that the nature of those circumstances in which the bringing of confiscation proceedings might amount to an abuse of process was becoming increasingly problematic and suggested that the solution might be for the Director of Public Prosecutions to issue guidance to prosecutors under section 10 of the Prosecution of Offences Act 1985. Their Lordships were of the view that, in the absence of bad faith, a decision to bring confiscation proceedings would not be judicially reviewable but that the court would retain its jurisdiction to stay confiscation proceedings as an abuse of process, though their Lordship recognised that the latter jurisdiction must be “exercised with great circumspection” and must not be allowed to undermine the relevant statutory provisions by preventing the prosecution from enforcing those provisions. Thus, their Lordships adjourned *Paulet*’s appeal until the Director of Public Prosecutions either issued a policy or indicated that he did not intend to do so, their Lordships indicating that any other relevant appeals would be listed at the same time.

Subsequent to the adjourned hearing in *Didier Paulet*, the Crown Prosecution Service produced guidance for Crown Prosecutors concerning the instigation of confiscation proceedings³⁴, following which the appeal which *Didier Paulet* had concerned reappeared before the Court of Appeal in *CPS (Durham) v N; CPS (Nottingham) v P; R v D*.³⁵ Whilst welcoming the CPS guidance and regarding this guidance as “a useful working document” and as a “fair analysis” of the effect of appellate decisions, their Lordships (recognising that the guidance was not formal guidance under section 10 of the 1985 Act or section 2A of the 2002 Act) neither made it part of their judgment nor suggested that the guidance could supplement, alter or amend the 2002 Act itself. Rather, their Lordships indicated that abuse of process arguments must have their basis in “abuse of process principles, as defined and explained in the authorities”, suggested that the guidance would be amended in the light of experience and future appellate decisions and, indeed, suggested that the guidance should be reconsidered in the light of observations made by their Lordships in the instant case.

The guidance provides four non-exhaustive examples of circumstances in which the instigation of confiscation proceedings might be inappropriate (or in which, when such proceedings had been instigated before the true facts became clear, it might be appropriate for the prosecution to discontinue the proceedings). The four examples so identified essentially comprise circumstances in which: first, the prosecution would be reneging on an agreement not to apply for a confiscation order; secondly, the accused, in a simple benefit cases, has made a full voluntary repayment (or is able and willing

³⁴ “Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings”

http://www.cps.gov.uk/news/assets/uploads/files/prosecutors_discretion_280509.pdf

³⁵ [2009] EWCA Crim 1573.

so to do immediately) and has not otherwise profited from the crime³⁶; thirdly, the court might be required to treat as benefit property that the accused had mostly obtained legitimately and to which the accused would have been entitled had he not committed the crime; and, finally, the accused obtained employment via a false representation and the link between the crime and the receipt of wages is too remote (e.g. because a minor conviction is discovered after years of employment or because the employment would have continued if the representation had been corrected).

In relation to the facts of the appeal that had been adjourned in *Didier Paulet*, the Court of Appeal (whilst accepting that where an employee's work is satisfactory, he pays tax and National Insurance and his deception either lacks significant public interest or has ceased to have a meaningful effect on the decision to continue his employment the position may be different), held that there was no basis for interfering with the confiscation order because there was a wider public interest, namely, the deliberate circumvention of the prohibition against seeking employment in the U.K. Their Lordships suggested that reconsideration of the CPS guidance in relation to their observations concerning this appeal was appropriate.

In relation to the other two appeals before the Court of Appeal, namely, *CPS (Durham) v N* and *CPS (Nottingham) v P*, their Lordships (suggesting that Crown Courts might be granting stays too readily, recognising that staying confiscation proceedings that have properly been taken under the 2002 Act amounts to the assertion of a judicial power to dispense with the 2002 Act and reiterating a point that it had made in *Didier Paulet*, namely, that the jurisdiction to stay confiscation proceedings must "be exercised with great circumspection"), held that, contrary to the decision of the recorder in *N* and to that of the Judge in *P*, the confiscation proceedings that those cases concerned had not been abusive.

Conclusion

In what circumstances may confiscation proceedings be stayed as amounting to an abuse of process?

The basic position appears to be that it will be exceptional for confiscation proceedings to be regarded as an abuse of process as if the courts exercise their jurisdiction to stay proceedings as abusive too generously in the context of confiscation proceedings this will prevent the prosecuting authorities from enforcing the legislation relating to confiscation proceedings that Parliament has enacted. That having been said, it also seems that there are exceptional circumstances in which the bringing of confiscation proceedings may be abusive, and that there is no closed category of cases in which confiscation proceedings may be abusive.

Thus, for example, it appears that confiscation proceedings may be abusive if the defendant agrees to make a voluntary repayment in the context of an undertaking

³⁶ It should be noted that whilst the Court of Appeal endorsed the guidance re the making of voluntary payments in simple benefit cases, their Lordships also indicated that section 6(6) of the 2002 Act does not confer upon the court a broad discretion to disapply the statutory scheme, the court being required to exercise the power which section 6(6) confers upon it in the context of the statutory purpose of depriving the accused of the benefit of his crime.

made by the prosecuting authority to the effect that confiscation proceedings will not be brought against him and the prosecuting authority subsequently attempts to renege on the agreement with the defendant by bringing confiscation proceedings against him. Equally, it appears that confiscation proceedings may be oppressive, and thus an abuse of process, in circumstances in which the defendant's crimes caused loss to an identifiable loser or identifiable losers, the defendant's benefit was limited to those crimes, the loser does not intend to bring civil proceedings to recover the loss against the defendant and the defendant has either repaid the full amount to the loser or is ready, willing and able to do so. Similarly, it appears that confiscation proceedings may be oppressive, and, thus, abusive, if there is a huge disparity between the large sum that the defendant will be required to pay under a confiscation order and the much smaller amount by which he profited from his crime. Again, it may be that confiscation proceedings may be oppressive, and, thus, abusive, in circumstances in which the deception on the part of an employee who obtained his employment via the use of false information no longer has a meaningful effect on the decision to continue to employ him, unless the instigation of confiscation proceedings serves a wider public interest.

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