Trinity Term

[2014] UKSC 36

On appeal from: [2012] EWCA Crim 391; [2013] EWCA Crim 2042

JUDGMENT

R (Appellant) v Ahmad and another (Respondents)

R (Respondent) v Fields and others (Appellants)

before

Lord Neuberger, President

Lord Sumption

Lord Reed

Lord Hughes

Lord Toulson

JUDGMENT GIVEN ON

18 June 2014

Heard on 10 and 11 February 2014

Appellant	Respondents (Ahmad)
Simon Farrell QC	Andrew Mitchell QC
William Hays	Kennedy Talbot
(Instructed by CPS Appeals Unit)	(Instructed by Bivonas LLP)
Appellants (Fields)	Respondent
Tim Owen QC	Simon Farrell QC
Andrew Bodnar	William Hays
(Instructed by Morgan Rose)	(Instructed by CPS Appeals Unit)

Intervener (Secretary of State for the Home Department)

James Eadie QC

Mathew Gullick

(Instructed by the Treasury Solicitor)

LORD NEUBERGER, LORD HUGHES AND LORD TOULSON (with whom Lord Sumption and Lord Reed agree)

Introductory

1.
Since 1986, there has been legislation in this country to meet the perceived need for an effective confiscation process to deter criminal activity, especially large scale fraud and drugs-related activities, which are often of a cross-border nature. This concern has, unsurprisingly, not been limited to this country, as is evidenced by Conventions such as the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990.

2.
The aim of such legislation is to introduce a robust process of “asset recovery” into the legal system of the United Kingdom. The first statute in England and Wales with this aim was the Drug Trafficking Offences Act 1986 (which was replaced by the Drug Trafficking Act 1994), which was shortly followed by the more broadly targeted Part VI of the Criminal Justice Act 1988, which in turn was amended by the Proceeds of Crime Act 1995. The provisions of Part VI of the 1988 Act (as amended by the 1995 Act) and the 1994 Act were repealed and replaced by the fuller provisions of the Proceeds of Crime Act 2002, although the 1988 Act (like the 1994 Act) still applies to crimes committed before the 2002 Act came into force. These appeals are concerned only with post-conviction confiscation orders. Different provisions apply to civil recovery independent of any criminal prosecution.

3.
The two instant appeals concern the proper approach for the court to adopt, and the proper orders for the court to make, in confiscation proceedings where a number of criminals (some of whom may not be before the court) have between them acquired property or money as a result of committing an offence for which all or only some of them have been convicted in the trial which led to the proceedings.

An outline of the post-conviction confiscation legislation

4.
The statutory exercise of asset recovery often starts before a defendant is convicted, through the medium of an order freezing all or some of his assets, but it is only after conviction that the extent of a defendant’s liability is finally assessed by the court. The role of the court at that point is to determine the “recoverable amount” from a convicted defendant and to make an order requiring him to pay it. The extent of a defendant’s liability for this sum is based on the value of the property which he obtained “as a result of or in connection with” the conduct which gave rise to the offence or offences of which he was convicted – section 71(4) of the 1988 Act and section 76(4) and (7) of the 2002 Act.

5.
The 2002 Act has widened the potential liability of a defendant who has a “criminal lifestyle”. Such a defendant can be made liable for a recoverable amount which is based on the proceeds not merely of the criminal activity of which he has been convicted, but on the proceeds of his “general criminal conduct” – see section 6(4) of the 2002 Act. A defendant has a “criminal lifestyle” if he falls within section 75 and Schedule 2. The conditions there set out include conviction of certain specified offences, such as money laundering and drugs or arms trafficking, conviction of a minimum number of other offences, and conviction of one or more offences committed over a specified period. In a case where a defendant has a “criminal lifestyle”, certain rebuttable assumptions are specifically required to be made against the defendant (eg as to the source of his wealth) by section 10 of the 2002 Act when assessing the recoverable amount. Seven years before the passing of the 2002 Act, a new

provision, section 72AA, was added to the 1988 Act which had a rather similar purpose albeit a narrower scope.

6.
In order to determine the recoverable amount, the judge first has to assess the "value of the property obtained" by the defendant through the criminal activity in question. That figure is the greater of (a) the value of that property when it was obtained, adjusted for subsequent inflation, and (b) the current value of that property or of any property which has been substituted for it – see sections 71(4) and 74(5) of the 1988 Act and sections 76(2) and 80(2) of the 2002 Act. Having arrived at that figure, the judge must assess the recoverable amount at that figure, save that sections 7(1), (2) and 9(1) of the 2002 Act provide that, if the defendant can show that it is more than the total value of his assets, the judge should assess the recoverable amount as that total value. The 1988 Act had similar provisions in sections 71(6) and 74(1)-(3).

7.
Confiscation hearings can take a long time. In one of the two cases before us, the confiscation hearing lasted over four weeks. Article 6.1 of the European Convention on Human Rights ("the Convention") applies to all aspects of such a hearing. However, article 6.2 of the Convention does not, as the hearing is treated as part of the sentencing process rather than part of the criminal trial – see Phillips v United Kingdom [2001] Crim LR 817, (2001) 11 BHRC 280, paras 34-36. In that case, the Strasbourg court rejected the contention that a mandatory statutory assumption that payments received by a convicted drug dealer were derived from drug trafficking infringed the Convention, and referred to confiscation as "a weapon in the fight against the scourge of drug trafficking" – para 52. In the subsequent case of Grayson v United Kingdom [2009] Crim LR 200, (2008) 48 EHRR 722, the Strasbourg court held that imposing a reverse burden of proof on a convicted defendant in relation to certain issues at the confiscation hearing also did not infringe the Convention – see especially para 49.

8.
In R v Silcock and Levin [2004] EWCA Crim 408; [2004] 2 Cr App R (S) 61, para 60 and R v Clipston [2011] EWCA Crim 446; [2011] 2 Cr App R (S) 101, paras 57-60, the Court of Appeal, Criminal Division explained that the character of a confiscation hearing was more civil than criminal. Thus, the judge can decide issues on the balance of probabilities, compel the defendant to disclose documents, draw adverse inferences from the absence of evidence, and rely on hearsay evidence. In our view, this is plainly right, both as a matter of principle and in the light of section 71(7A) of the 1988 Act and section 6(7) of the 2002 Act.

9.
Once the recoverable amount is determined, the judge should make an order requiring the defendant to pay it within a period which (under section 75(1) of the 1988 Act) would be the same as for a fine, or (under section 11 of the 2002 Act) must be specified by the court but cannot exceed twelve months. If and to the extent that the recoverable amount is not paid, the defendant must serve a term of imprisonment in default, fixed by the judge by reference to section 139(4) of the Powers of the Criminal Courts (Sentencing) Act 2000 – see section 75(2) of the 1988 Act and sections 35-39 of the 2002 Act. Serving that default term does not, however, remove the liability to pay – see section 75(5A) of the 1988 Act and section 38(5) of the 2002 Act.

10.
Confiscation hearings may take place before sentencing, or can be - and often are - postponed, but the postponement should not be for a period of more than six months (under the 1988 Act) or two years

(under the 2002 Act) from the date of the conviction unless there are “exceptional circumstances” – see section 72A of the 1988 Act and section 14 of the 2002 Act.

The facts giving rise to these two appeals

11.
In the first appeal, the appellants, Shakeel Ahmad and Syed Ahmed (“the Ahmad defendants”) were convicted by a jury of fraud and sentenced by His Honour Judge Alexander QC to seven years in prison. The fraud was a so-called carousel fraud, which involves criminally misusing the collection system of Value Added Tax (“VAT”) to extract money from the revenue authorities. The Ahmad defendants had been the sole directors and shareholders of a company known as MST, which dealt in computer central processing units (“CPUs”), which were zero rated for VAT purposes on import to the United Kingdom. The fraud involved five companies in Ireland, which, in a total of 32 transactions during April 2002, purported to export large quantities of CPUs to five companies in the UK, each of whom was either a registered company which went “missing” or a genuine company the identity of which was hijacked by the fraudsters. The missing trader then ostensibly sold the goods to a company known as GW224, which then sold the goods on to MST.

12.
GW224 was a company interposed to make it more difficult for the authorities to identify the fraud. On paper, the missing trader sold the goods to GW224 at a loss enabling everyone else in the supply chain ostensibly to sell on at a profit. The missing trader issued a VAT invoice to GW224 enabling it to deduct the amount shown as input tax from the amount due from GW224 to HM Revenue and Customs (“HMRC”) in respect of output tax on the onwards sale to MST. MST then sold the goods on to an exporting company, for an amount which included VAT. The exporting company then exported the goods back to the company in Ireland which had originally sold the goods. In many cases the whole chain of transactions took place on the same day.

13.
No VAT was payable on the export. The exporting company however then reclaimed the VAT which it had paid to MST. The amount of the VAT which was fraudulently reclaimed by the exporting company was about £12.6m, which represented HMRC’s loss as a result of the fraud. If the transactions had been genuine and there had been no missing trader then there would have been no loss to HMRC.

14.
After the Ahmad defendants had been convicted, there was a confiscation hearing, pursuant to the 1988 Act, which lasted some thirty days before Flaux J. In a full and careful judgment, he concluded that MST made

a.
Payments directly to one of the Irish companies, including the first payment made in order to “prime the pump” for the fraud;

b.
Payments to GW224 to prime the pump; and

c.
Payments to “cashing-up accounts”: entities which allowed their (genuine) accounts to be used for converting the proceeds of the fraud into cash or to buy gold bullion.

15.

None of the cash or gold bullion could be traced. The judge found that the vast majority of MST's trading over the relevant period was fraudulent and that the Ahmad defendants had used MST for the purpose of crime. He also held that they controlled its property, and that as between themselves they held everything in its name jointly and equally. There was no evidence as to the means by which the Ahmad defendants had extracted their gains from the fraud, nor was there any evidence as to the number of other participants in the fraud. The judge said that nothing which either of the Ahmad defendants said could be relied upon to be truthful. They had deliberately flouted the restraint order by disposing of frozen assets. They had advanced repeated false allegations against their own lawyers, which the judge described as "outrageous". They had abused the proceedings by deliberate time wasting and irrelevance. Both Ahmad defendants, Flaux J said, were "unscrupulous and deeply mendacious".

16.
The Ahmad defendants contended that they had obtained no benefit at all and that MST had merely acted as an intermediary for others. The judge rejected that evidence. He concluded that, for the purposes of the 1988 Act, the benefit obtained by MST was the benefit obtained by the Ahmad defendants jointly. He assessed that benefit at a very large figure for which the Crown no longer contends. The Court of Appeal determined that benefit to be the loss suffered by HMRC, namely £12.6m, which translated to £16.1m when adjusted for inflation. The judge rejected the defendants' evidence that the available amount was less, and that was the recoverable amount specified payable by each of them in the confiscation orders made by the Court of Appeal. As Hooper LJ put it, in reliance on what Lord Bingham said in R v May [2008] UKHL 28; [2008] AC 1028, para 43, "where a benefit is obtained jointly, each of the joint beneficiaries has obtained the whole of the benefit and may properly be ordered to pay a sum equivalent to the whole of it", unless the circumstances were such that such a decision would infringe article 1 of the first protocol to the Convention ("A1P1") – see [2012] EWCA Crim 391, [2012] 1 WLR 2335, para 21. The default prison terms set by the judge were upheld at ten years in each case.

17.
In the second appeal, the three appellants, Michael Fields, Mitesh Sanghani and Karamjit Sagoo ("the Fields defendants"), and a fourth man, Wasim Rajput, were found guilty by a jury of conspiracy to defraud over a period between January and June 2005. The Fields defendants were each sentenced to five years in prison, and Mr Rajput was imprisoned for thirty months.

18.
The fraud was said by the prosecution to involve two other men who were acquitted, and one other man as to whose guilt the jury was unable to agree. The Fields defendants were described by the trial judge, His Honour Judge Carr, as being "at the heart of the fraud", and that it was "a joint operation between them", whereas Mr Rajput's position was accepted by the judge as being more peripheral.

19.
The fraudulent conspiracy involved the use of a company called Mercury Distributions Ltd ("MDL"), whose published accounts for the years 2002/3 and 2003/4 falsely recorded that it had over £1m in fixed assets. It was appreciated that potential customers of MDL would be likely to check the accounts before committing themselves to doing business with it and granting credit. Premises were obtained by Mr Sagoo in February 2005, with the assistance of false trade references.

20.

From then on, MDL engaged in fraudulent trading, applying to buy goods or obtain services on credit, which resulted in credit checks which indicated that it was financially healthy. As a result, credit agreements were approved, and goods and services were supplied by around 35 businesses, but no payments were ever made and, at least for the most part, the goods disappeared. The Fields defendants were each instrumental in this fraudulent activity. Mr Rajput was much less closely involved.

21.
In the subsequent confiscation proceedings, which were described by Davis LJ as “protracted”, it appears that the evidence on behalf of the Fields defendants was attenuated and misleading. The judge found that the total benefit, in the form of goods and services supplied, arising from the conspiracy was about £1.4m, which had been acquired jointly by the Fields defendants. Having adjusted that figure upwards to about £1.6m to allow for inflation, the judge rejected the contention that this was more than “the available amount”, and decided (subject to an irrelevant point) that confiscation orders under the 2002 Act should be made against each of the Fields defendants for the whole of this amount (with a default period of imprisonment of seven years). As to Mr Rajput, he was found to have received £12,000 for his involvement, but only a nominal order was made against him because he established that he had no assets.

22.
The Court of Appeal upheld the confiscation orders made against the Fields defendants. In his judgment, Davis LJ rejected the contention that the defendants had “beneficial interests” limited to one third each of the £1.6m and held that it was right that each should be individually liable for the whole of that sum. He did so in the light of (i) authority, in particular the decision of the House of Lords in May, and (ii) on the grounds of “strong policy objections” to the court recognising beneficial interests inter se amongst those who had jointly obtained the whole of the relevant property. The court held that “[s]ection 79(3) of the 2002 Act is to be taken as, generally speaking, extending to making allowance for lawfully subsisting prior interests of other persons: not to the asserted ‘beneficial interests’ of co-conspirators whose very criminality has caused the relevant property to be obtained jointly in the first place.” – see [2013] EWCA Crim 2042, [2014] 2 WLR 233, paras 36-46.

The issues in these appeals

23.
In neither appeal do the appellant defendants challenge the quantification of the aggregate recoverable amount, (£16.1m in the case of the Ahmad defendants and £1.6m in the case of the Fields defendants) or the finding that they obtained that amount jointly. What they do challenge is the decision of the Court of Appeal that each of the appellants should be separately liable for the whole of that amount. They contend that such an outcome is arbitrary and oppressive. However, the preferred approach of the two groups of appellants was different.

24.
For the Ahmad defendants, Mr Mitchell QC accepted that it was appropriate for each of the two appellants to be liable for £16.1m, but contended that their liability should be treated as joint and several in accordance with normal common law principles, so that they should be required to pay that sum between them. In other words, if, for instance, Mr Ahmad paid £12.6m, then both he and Mr Ahmed would then continue to be liable, but only for £3.5m, and if one or both (between them) then paid the £3.5m, there would be no further liability on either of them.

25.

Mr Owen QC, for the Fields defendants, raised a more fundamental challenge to the approach adopted by the Court of Appeal, and said that it was wrong for each of the Fields defendants to be liable for £1.6m. He argued that the courts below ought to have apportioned the benefit between the three Fields defendants, and therefore assessed their individual liability accordingly. Thus, subject to any liability being attributed to other persons, and subject to any reason to think that they should not be equally liable, the Fields defendants should each be liable for £533,333.

26.
The issue raised by these appeals can be encapsulated in the question: when a number of people (all or only some of whom are before the court) have been involved in the commission of a crime which resulted in property being acquired by them together, what is the proper approach for the court to adopt, and the proper orders for the court to make, in confiscation hearings?

27.
The resolution of the issue must depend on the interpretation of the relevant legislation, taking into account (i) previous case law (including a number of decisions, more than one at the highest level, which support the approach adopted by the Court of Appeal in the instant two cases), and (ii) the practical difficulties faced by any judge carrying out a confiscation hearing.

The centrally relevant statutory provisions

28.
Although the language of the 1988 and 2002 Acts is not identical, there is no material difference between them for present purposes and it is convenient to consider that issue in the context of the 2002 Act, which now applies to the great majority of cases which come before the courts. The central provisions are sections 6 (making an order), 7 (recoverable amount), 9 (available amount), 76 (conduct and benefit), 79 and 80 (value) and 84 (property).

29.
Section 6(5) of the 2002 Act requires the court to decide on the recoverable amount, and to make a confiscation order in that sum. Section 7(1) provides that the recoverable amount is “the defendant’s benefit from the conduct concerned”. Section 7(2) states if the defendant shows that that benefit is more than the available amount, then the recoverable amount is the available amount. Section 9(1) explains that the available amount is the aggregate of all the free property available to the defendant at the time of the confiscation order, subject to any obligations which have priority (and property is “free” if it is not subject to certain forfeiture or deprivation orders – sections 82-83).

30.
Section 76(4) of the 2002 Act provides that “[a] person benefits from conduct if he obtains property as a result of or in connection with the conduct”, and section 76(7) states that in such a case the person’s “benefit is the value of the property obtained”. Section 79(1) provides that the value of any property “held by a person” at any time is to be determined in accordance with section 79(2), which states that that value is to be “the market value at that time”. Section 79(3) provides that “if at that time another person holds an interest in the property its value, in relation to the person mentioned in subsection (1), is the market value of his interest at that time”.

31.
Section 80(1) of the 2002 Act provides that the value of property obtained for the purpose of a confiscation order is its value at the time the court makes its decision, and section 80(2) provides that that value is to be the greater of (a) “the value of the property (at the time the person obtained it)”,

adjusted for inflation, and (b) the current value of the property. Section 80(4) states that the references to “the value” in section 80(2) “are to the value found in accordance with section 79”.

32.
Section 84(1) of the 2002 Act defines “property” in very wide terms, and it includes “real or personal property”, money, and “intangible or incorporeal property”. Section 84(2) contains some “rules”, which include in para (a) that, “property is held by a person if he holds an interest in it”, and in para (b) that “property is obtained by a person if he obtains an interest in it”.

33.
The only arguably relevant difference between the 1988 and 2002 Acts relates to the treatment of the definition of property. Whereas section 80(4) of the 2002 Act specifically applies to property when obtained as well as to property when held, section 74(4) of the 1988 Act only applies to property when held. However, particularly as property is “held” the moment it is “obtained”, it seems clear that, at least in relation to the issues raised on these appeals, the outcome is the same whichever statute applies. Accordingly, it is sensible simply to concentrate on the 2002 Act when discussing these appeals, but the observations which follow apply equally to the 1988 Act.

Preliminary observations

34.
As Lord Bingham pointed out in May, para 8, a court considering an application for a confiscation order must address and answer three questions. The first question is whether a defendant has benefited from the relevant criminal conduct; the second question concerns the value, or quantification, of that benefit; and the third question is what sum is recoverable from the defendant. These are separate questions, and, although a degree of consistency of approach is required to all three questions and the answer to an earlier question will affect the answer to a subsequent question, the questions themselves should not be elided. When answering each question, the court must, of course, be guided by the 2002 Act.

35.
The 2002 Act has often been described as having been poorly drafted. That is a fair criticism, as can be illustrated by the problems which have had to be faced by the courts in a number of cases, some of which are referred to below. However, it is only fair to the drafters of the statute to record that the problems are partly explained by the difficulties inherent in the process of recovering the proceeds of crime from those convicted of offences. Those difficulties are at least threefold and are particularly acute when it comes to sophisticated crimes, such as large-scale financial frauds, substantial illegal drug importing operations, and people trafficking, which involve many people, often in different countries.

36.
First, there are the practical impediments in the way of identifying, locating and recovering assets actually obtained through crime and then held by the criminals. The defendants will often, indeed normally, be as misleading and uninformative as they can, and the sophistications and occasional corruptions in the international financial community are such as to render the task of locating the proceeds of crime very hard, often impossible. Secondly, again owing to the reticence and dishonesty of the defendants, there will often be considerable, or even complete, uncertainty as to (i) the number, identity and role of the conspirators involved in the crime, and (ii) the quantum of the total proceeds of the crime, or how, when, and pursuant to what understanding or arrangement, the proceeds were, or were to be, distributed between the various conspirators. Thirdly, there will be obvious difficulties

in applying established legal principles to the allocation of liability under the 2002 Act, as the rules relating to matters such as acquisition, joint and several ownership, and valuation of property and interests in property, and the rights and liabilities of owners, both as against the world and inter se, have been developed by the courts over centuries by reference to assets which were lawfully acquired and owned.

37.
The present appeals provide good examples of these problems. That is particularly true of the first appeal which, not least thanks to the full judgment of Flaux J, graphically illustrates all three difficulties, as may be appreciated from the summary in paras 11-17 above.

38.
When faced with an issue of interpretation of the 2002 Act, the court must, of course, arrive at a conclusion based both on the words of the statute and on legal principles, but it is also very important to bear in mind the overall aim of the statute, the need for practicality, and Convention rights. The overall aim of the statute is to recover assets acquired through criminal activity, both because it is wrong for criminals to retain the proceeds of crime and in order to show that crime does not pay. Practicality involves ensuring that, so far as is consistent with the wording of the statute and other legal principles, the recovery process, both in terms of any hearing and in terms of physically locating and confiscating the assets in question, is as simple, as predictable, and as effective, as possible. Defendants are entitled to their Convention rights, in particular to a fair trial under article 6 and are only to be deprived of assets in accordance with A1P1.

39.
It is also important to bear in mind that the issues raised on these appeals have been considered by the House of Lords, the Supreme Court, and the Court of Appeal on a number of occasions. In a trio of decisions, Lord Bingham, with whom the other Law Lords agreed, gave general guidance as to the application of the 1988 Act and confiscation provisions of the Drug Trafficking Act 1994 - see May, Jennings v Crown Prosecution Service [2008] UKHL 29; [2008] AC 1046 and R v Green [2008] UKHL 30; [2008] AC 1053. Also, in R v Waya [2012] UKHL 51; [2013] 1 AC 294, Lord Walker and Hughes LJ, speaking for the majority of the Supreme Court, considered aspects of the 2002 Act in some detail, and approved some decisions of the Court of Appeal concerned with valuation of obtained property, in particular R v Rose [2008] 1 WLR 2113; [2008] EWCA Crim 239; and R v Ascroft [2003] EWCA Crim 2365; [2004] 1 Cr App R (S) 326. R v Mackle [2014] UKSC 5; [2014] 2 WLR 267 was another decision of this Court concerned with the 2002 Act, and in the course of his judgment, Lord Kerr, with whom the other Justices agreed, approved the approach adopted by the Court of Appeal in cases which had provided further guidance to judges hearing confiscation claims, including R v Sivaraman [2008] EWCA Crim 1736; [2009] 1 Cr App R (S) 464 and R v Allpress [2009] EWCA Crim 8; [2009] 2 Cr App R (S) 399.

40.
It would be wrong to depart from the guidance given in these cases unless it was shown that they were plainly wrong or unless it was established that they had led to problems for courts making confiscation orders. Adherence to previous guidance from this court is mandated by the need to ensure that the law is clear and predictable as well as by the doctrine of precedent. These factors are particularly appropriate in the present circumstances, because, as mentioned, the 2002 Act and its statutory predecessors have given rise to considerable difficulties in terms of both hearings and subsequent enforcement. It has not been suggested that those difficulties have been caused or aggravated by the guidance given in the cases referred to in the preceding paragraph, and there is

therefore a real risk that any departure from that guidance would serve to confuse an already inherently difficult procedure.

The first question: has the defendant benefited?

41.
Section 76(4) of the 2002 Act provides that a person benefits from conduct "if he obtains property as a result of or in connection with the conduct." In Jennings, para 12, Lord Bingham agreed with Laws LJ in the Court of Appeal that the essence of benefit in that phrase is given by the word "obtains". Thus, one is concerned with what the particular defendant obtained, which is by no means necessarily the same as the totality of what was obtained by the criminal enterprise of which he was a party. Lord Bingham explained that "obtain" in this context must ordinarily mean that a defendant "has obtained property so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else" – see Jennings, para 13 and May, para 48(6).

42.
At least in a technical, legal, sense, there are two problems with this analysis. The first involves a generally applicable point; the second applies in cases such as the present ones, where the facts are complex and there are several conspirators involved. Whilst a criminal may sometimes become the owner of property obtained through crime, in many cases he does not do so. When a person "obtains" a chattel, money, a credit balance or land through criminal dishonesty, he does not acquire title to, or ownership of, the item in question, although he does acquire control over it. As was pointed out by Lord Walker and Hughes LJ in Waya, para 68 a person who dishonestly obtains property has "at most a possessory interest good against third parties, and thus of no significant value". When Lord Bingham spoke of obtaining something "so as to own it" he was doing so in the context of contrasting the position of someone who unlawfully assumes the rights of an owner (ie "a power of disposition or control") with the position of a mere courier or custodian of stolen property – see May at para 48(6). In Allpress at para 64 the Court of Appeal helpfully interpolated the words "assumes the rights of an owner" to make this clear.

43.
Unless a joint obtaining is understood in this sense, then the concept of "joint" ownership is difficult to marry up with the facts of most cases of financial fraud or drug importation, involving many conspirators. Lawful joint owners enjoy "unity of possession", which means that each co-owner is entitled to possession of the whole of the asset, "unity of interest", which means that each co-owner is entitled to an equal interest as against the other co-owners, and "unity of time", which means that each co-owner acquired his interest at the same time. Joint ownership is a legal fiction. Bracton fo 430 (ed Woodbine, vol 4, 336) states that each joint owner totum tenet et nihil tenet (holds everything and holds nothing). More recently, Lord Nicholls of Birkenhead referred to the notion of each joint owner owning the whole asset as "an esoteric concept … remote from the realities of modern life" – Burton v Camden London Borough Council [2000] 2 AC 399, 404. In addition to joint ownership, the law also recognises ownership in common. Owners in common also enjoy unity of possession, but do not need to have unity of interest or of time, so they can have different interests, as between each other. Such considerations are inapposite in relation to criminals with no rights of ownership in the property obtained.

44.

Insofar as technical English property law concepts are concerned, it may be more accurate to refer to several conspirators acquiring possession in common of any asset or money, rather than jointly owning the asset or money. However, rather than invoking English property law concepts, it is more appropriate to treat such conspirators as obtaining the asset or money together, which has the same meaning as “jointly”, provided that the latter word is understood in its ordinary English, and not its technical, legal sense. “Obtain” is the statutory word, and “joint” reflects the criminal enterprise. While some aspects of English property law in connection with ownership may be esoteric, there is nothing remote from daily life about two burglars jointly (ie together) obtaining a television. The burglars do not become the owners of the television, and the argument about them being “joint owners” or “owners in common” proceeds on a wrong premise. Each burglar has usurped the rights of the owner.

45.
The basic point made by Lord Bingham, and discussed in paras 41-42 above, therefore appears to us to be, to put it at its lowest, sustainable, given the statutory language, which is not concerned with ownership but with obtaining. As just demonstrated, it is perfectly acceptable, as a matter of ordinary language, to describe the people involved in a criminal joint enterprise which results in the obtaining of a chattel, cash, a credit balance or land, as having jointly obtained the item concerned, in the sense of having obtained it between them. The fact that the item may have been physically taken or acquired by, or held in the name of, one of them does not undermine the conclusion that they jointly obtained it. The word “obtain” should be given a broad, normal meaning, and the non-statutory word “joint”, referred to by Lord Bingham in May, paras 17 and 27-34, should be understood in the same non-technical way.

46.
Accordingly, where property is obtained as a result of a joint criminal enterprise, it will often be appropriate for a court to hold that each of the conspirators “obtained” the whole of that property. That is the view expressed in May, para 48(6), first sentence (although the word “owns” is probably inappropriate), in Green, para 15, and in Allpress, para 31 (as quoted and approved in Mackle, para 65). However, that will by no means be the correct conclusion in every such case.

47.
As was said in Sivaraman, para 12 (6) and in Allpress, paras 30-31 (and approved in Mackle, paras 64-65), when a defendant has been convicted of an offence which involved several conspirators, and resulted in the obtaining of property, the court has to decide on the basis of the evidence, often relying on common sense inferences, whether the defendant in question obtained the property in the sense of assuming the rights of an owner over it, either because he received it or because he was to have some sort of share in it or its proceeds, and, in that connection, “the role of a particular conspirator may be relevant as a matter of fact, but that is a purely evidential matter”.

48.
In some cases, one or more of the conspirators may be able to show that he was only involved to a limited extent, so that he did not in any way obtain the property which was obtained as a result of the crime. Examples include acting as a paid hand in the enterprise – eg an intermediary, a courier or a drugs “mule” (as considered in May, paras 15 and 17, and in Allpress, paras 80-82) or a latecomer to a conspiracy in which nothing was obtained after his arrival (as discussed in May, para 19).

49.

It is clear from May at paragraph 34 that the amount of the benefit which a defendant obtains is not affected by the amount which might be obtained by others to whom he transfers any part of it (any more than it can be affected by his payment out of the expenses of his criminal venture). However, there could be other cases where the court may be satisfied on the evidence that individual defendants obtained (ie assumed the rights of an owner over) only a specific part or share of the property which had been acquired as a result of the criminal activity. An example might be several obtainings by different criminals using a common form of deception which they have agreed to use, but several obtainings are not limited to such a case. Lord Bingham recognised in May at para 32 that there could be such cases, albeit that R v Gibbons [2002] EWCA Crim 3161; [2003] 2 Cr App R (S) 169 (there referred to) was in fact a case in which the Court of Appeal did no more than uphold an order for £18,000, much less than an equal share of the whole, on the basis that the defendant could not have obtained less.

50.
There has sometimes been a tendency to equiparate joint involvement in the crime with joint ownership of the fruits of the crime. But the fact that the defendants were jointly responsible for the crime in question does not automatically justify a conclusion that they jointly obtained the resulting property, a point well made by the Court of Appeal in Allpress, para 31.

51.
The tendency to conclude that property is jointly obtained by criminals may also be attributable to the fact that it is often difficult to determine how the asset(s) obtained has, or have, been distributed between the defendants. Judges in confiscation proceedings should be ready to investigate and make findings as to whether there were separate obtainings. Sometimes of course this is too difficult or impossible. In many cases the court will not have before it all the conspirators for a variety of reasons. The indictment may well name other conspirators (as well as including the usual phrase “and other persons unknown”). A court should never make a finding that there has been joint obtaining from convenience, or worse from laziness. Where the evidence supports a finding that the asset acquired from a crime was obtained effectively on a several basis, the judge should make it, but there are cases in which a finding of joint obtaining is the proper, indeed the only available finding, especially but not only where an inference or presumption that the defendants before the court were the only joint obtainers would be contrary to the probabilities.

52.
In the two cases before the Court, all that is known with any degree of confidence is that there was a fraud, the defendants played a major part in it, and the fraud resulted in a sum of money being obtained. Certainly in the first appeal, there were others closely involved in the crime, but it is not clear how many or who they were. There is no reliable evidence as to whether any particular person involved in the fraud received any particular portion of, or had any particular interest in or share of, the money obtained by the fraud. In these circumstances, it was fully open to Flaux J to decide that the proceeds of the criminal activity, the property, had been obtained by the conspirators, or at least all the principal conspirators, who included the defendants before him. Indeed, on the basis of the primary facts as we understand them, in each case, it is hard to see how he could have come to any other conclusion.

53.
Although the argument of Mr Owen QC does not overtly challenge the finding that the Fields defendants jointly obtained property to the value of £1.4m, it comes close to doing so and thus it applies to the first question, as well as to the second question, which is the question to which it

principally applies. The argument is best examined by reference to the Ahmad defendants, in the light of the fact that Flaux J gave a much fuller judgment in the confiscation proceedings involving the Ahmad defendants than was given in the proceedings involving the Fields defendants. The argument can be analysed as amounting to a contention that Flaux J should have apportioned the £12.6m equally between the two Ahmad defendants, to justify the conclusion that the property each of them obtained under the 2002 Act was half the total sum acquired. The argument has its attractions. It can be said to accord with the presumption that, where two people lawfully own property jointly "the beneficial interest belongs to the[m] in equal shares" – per Lord Diplock in Gissing v Gissing [1971] AC 886, 908. It also would avoid the risk of double recovery or unfair recovery. However, we would reject the argument.

54.
First, to accept that argument would involve a reversal of the law as laid down by the House of Lords six years ago, and affirmed by this Court recently. In Green the question certified by the Court of Appeal was:

"Where any payment or other reward in connection with drug trafficking is received jointly by two or more persons acting as principals to a drug trafficking offence …does the value of each person's proceeds of drug trafficking…include the whole of the value of such payment or reward ?"

The House of Lords held that the correct answer was 'yes'. In his judgment Lord Bingham expressly approved at para 15 a passage in the judgment of Court of Appeal in which David Clarke J said:

"…we consider that where money or property is received by one defendant on behalf of several defendants jointly, each defendant is to be regarded as having received the whole of it for the purposes of section 2(2) of the Act [Drug Trafficking Act 1994]. It does not matter that proceeds of sale may have been received by one conspirator who retains his share before passing on the remainder; what matters is the capacity in which he received them."

The provisions of the statute there in question were similar to section 79(2) and (3) of the 2002 Act. Mr Owen's argument in this case is essentially a re-run of his argument in that case, which the House rejected.

55.
Secondly, as we have sought to explain, cases under the 2002 Act involve "obtaining" not "ownership", and, even if they did, we are doubtful whether the ownership would be technically joint. Thirdly, Mr Owen's approach would render the prospect of full recovery even more unlikely than it already is. That is because, in many multi-party sophisticated crimes, it is unusual to have all the conspirators before the court, the defendants who are before the court will say that the other conspirators received all the property, and frequently many of those other conspirators will never be apprehended. Fourthly, for similar reasons, it would render the task of a judge at a confiscation hearing more difficult than it already is, and would make it correspondingly easier for an unscrupulous defendant (and most defendants in these cases appear, unsurprisingly, to be unscrupulous) to seek to avoid, or at least to minimise, his liability.

56.
In many cases it is often completely unclear how many people were involved in the crime, what their roles were, and where the money went. As a result, if the court could not proceed on the basis that the conspirators should be treated as having acquired the proceeds of the crime together, so that each of them "obtained" the "property", it would often be impossible to decide what part of the proceeds

had been “obtained” by any or all of the defendants. There is obvious cause for concern about having to inquire into the financial dealings between criminals who have together obtained property, especially given that the ringleaders are often not even before the court. It is one thing for the court to have to decide whether a defendant obtained any property, which the 2002 Act requires. It is another thing for the court to have to adjudicate on the respective shares of benefit jointly obtained, which the Act does not appear to require.

57.
The first appeal provides a good example of the problems which a court would face if Mr Owen’s approach was adopted. It is possible that the whole profit of £12.6m had passed through the hands of the two Ahmad defendants. That is unlikely, for it was paid out by HMRC to the exporting company, which could be expected to retain at least something. However, even if the whole of the £12.6m did pass through the Ahmad defendants’ hands, it is much more likely than not that some of it was distributed to the others who were involved, who may have been either few or numerous. The assumption that the two Ahmad defendants retained the whole of the gains between them is therefore rebutted on the balance of probabilities. But there is no material on which to judge how much was either retained by others en route to them, or distributed to others by them. Nor is there any material on which to judge whether some or all of the others were “fee-paid” assistants (as in Allpress), or full accomplices sharing in the profits, and if the latter, in what proportions. An assumption that accomplices shared the profits equally is of no help if one cannot know how many of them there were. Thus, unless the judge could treat each of the Ahmad defendants as having obtained the whole of the £12.6m, he would either have had to make findings which have no proper basis in evidence, or he would have been unable to attribute the obtaining of any specific sum to either defendant.

58.
Fifthly, as for the risk of double recovery, it can be avoided for the reasons given in this judgment, when considering the third question. Sixthly, and more specifically to the first appeal, it would be logically incoherent to hold the two Ahmad defendants each liable for half of the “property” simply on the basis that it would be oppressive for each to be liable for the whole. If an argument based on oppression were right, then no order could be made unless the number of participants and the role of every participant in the fraud could be ascertained.

59.
Finally, it may be that, if the Ahmad defendants had been frank rather than dishonest in their evidence, they could have shown that the facts justified a conclusion that the property which MST obtained was limited to the share of the £12.6m which it actually received, and/or that their individual liabilities should each be held to be for a sum equal to half the property obtained by MST. (It is only right to add that it may well be that, even if they had been honest with the court, the facts would not have justified such a conclusion.) As it was, given the complete absence of any assistance from the Ahmad defendants (indeed, what they said was positively misleading), the judge had no alternative to falling back on the natural conclusion that, through the vehicle of MST, they had been major participants in the carousel fraud, and had therefore obtained the whole £12.6m, albeit together with the other participants (only some of whom could be identified).

The second question: what is the value of the benefit?

60.
In a case such as the present ones, where the court has concluded that a defendant has obtained property together with others, the question which arises is how to value the property which he has

obtained. It is clear from section 79(1) and (2) that it has to be the market value. The argument for apportioned valuation is that, although section 84(2)(b) contains an injunction to assume that each defendant has obtained the whole property, section 79(3) requires the valuation of the property to take into account the interests of accomplices. This is essentially the same argument, which we have rejected above when addressing the question of what has been obtained.

61.
The argument misunderstands the purpose and effect of section 79(3). A defendant who steals property or obtains it by deception does not, as explained above, acquire ownership of that property. In answering the second question, in such a case (ie putting a figure on the benefit which the thief has obtained) the court takes the market value of the goods, but not because this represents the value of the thief's legal interest in the goods, which would be nil. As explained in Rose, approved in Waya, the court takes the market value of the property because that is the value of what the thief has misappropriated, viz what it would cost anyone to acquire it on the open market. (If the 2002 Act required the court to value the thief's "interest" in the misappropriated property, section 79(3) would require it to take into account any other person's interest, which would include the owner, but that was precisely the argument which the court rejected because it would make a nonsense of the statute.) Likewise if two defendants jointly misappropriate property, neither of them obtains a legal interest in it and neither has an "interest" for the purpose of section 79(3). In relation to each of them, the value is the value of what they have taken, viz the market value of the misappropriated property. Thus, once a defendant has obtained the property, whether solely or jointly, that market value is the value of what he has obtained.

62.
The current effect of the authorities is that the interests of accomplices are not to be taken into account for the purposes of section 79(3) – ie that they are not to be treated as "interest[s]" for this purpose. That is clear from Lord Bingham's judgment in May, and in particular his critique of earlier cases in paras 27-29 and 31, his conclusion in para 46, and his concluding remark in para 48(6), as well as from the actual decision in Green – especially paras 15 and 16. It is also part of the reasoning of this Court in Waya, (unanimous on this point) where Lord Walker and Hughes LJ, having discussed section 84(2)(b), went on to say, at para 68, that the effect of section 79(3) is that "lawfully co-existing interests in property are to be valued individually". In the light of that observation, it seems clear that the "interests" of a defendant's co-conspirators are not to be taken into account when valuing the property for the purpose of assessing the value of the property which the defendant "obtained". Furthermore, as explained in paras 47-50 above, when one is valuing the property which a conspirator, including a defendant, has "obtained", one is not normally valuing an "interest" at all.

63.
Even more recently, the Supreme Court effectively confirmed the correctness of this approach when, in Mackle, paras 64-65, Lord Kerr approved the Court of Appeal's decision in Allpress to follow its earlier decision in Sivaraman, where the decision and reasoning of the House of Lords in Green had been correctly analysed and applied.

64.
This approach is soundly based in principle. At the first question stage (what has been obtained) it may be necessary to examine the dealings of the criminals inter se, to the extent of determining whether a particular defendant has obtained anything at all (Allpress) or to decide whether any obtainings were joint or several. However, once it has been determined that a particular defendant obtained property, whether alone or jointly, the answer to the second question is that the value of that

property is its market value. The court should not be called upon to investigate unlawful claims (which do not amount to “rights”) as between accomplices.

65.
Accordingly, it seems to us that, at least on the basis of the approach adopted by the House of Lords in May and Green and by this Court in Waya, there is force in the view that “recognis[ing] a trust in these criminal circumstances … would tend to run entirely counter to the statutory aim”, as Davis LJ put it in his judgment in the Fields case – [2013] EWCA Crim 2042, [2014] 2 WLR 233, para 36, reflecting comments from other judges in earlier cases. This point is reinforced by the view expressed in Waya, para 21, where Lord Walker and Hughes LJ described the confiscation system as “a severe regime” which was intended to “have a deterrent effect on at least some would-be criminals”, although they added that the legislation’s “deterrent qualities … are, no doubt, an incident of it, but they are not its essence”.

66.
Although, in paras 53-59 above, we have considered Mr Owen’s argument in relation to the first question, it truly belongs in the second question. Having determined that each of the Ahmad defendants obtained the whole of the £12.6m, the argument is that the valuation exercise requires each of the appellants to be treated as having acquired an interest equal in value to half the £12.6m. As in relation to the first question, that argument has the attraction of being consistent with the ordinary cases of beneficial joint ownership, but it would have to be very persuasive before we were justified in departing from this clear and consistent approach in relation to the second question.

67.
Essentially for the reasons given above, we would reject Mr Owen’s argument in relation to the second question. The inappropriateness of adopting an approach which a court would consider appropriate for the rights and obligations of joint creditors and debtors is reinforced when one considers the so-called Highwayman’s Case of 1725, Everet v Williams, noted at (1893) 9 LQR 106. That case shows that the court’s powers cannot be invoked in connection with a criminal exercise - in that case to accord discovery, an account and other relief in connection with a partnership between two highwaymen. The position of joint obtainers under the 2002 Act inter se is very different from that of two lawful joint owners or joint debtors, and it is unsurprising if their rights and obligations under the 2002 Act do not follow those of such owners and debtors.

68.
Mr Owen pointed out that the valuation provisions of the 2002 Act apply both to the assessment of the value of the benefit obtained (the second question) and the assessment of the available amount (the third question), and suggested that it could not be right that the same sum in respect of the same property should be included in the amount assessed as available to each of two (or more) defendants because the same amount could not be realised from each of them. Accordingly, he said, the same sum could not be attributed to the value of benefit obtained by two defendants in relation the second question. We do not accept that the same amount may not be available to each of them at the time when the court is deciding the third question. If money is held in a joint bank account on which each defendant has a mandate to draw, it is at that stage available to each of them. A new situation will arise if and when one of them draws the money to meet the confiscation order, but that raises a different point.

69.

For those reasons, on the second question, we would reject the argument of Mr Owen and would adhere to the principles established in May, Green, Waya and Mackle, and the decisions of the Court of Appeal which they approved.

70.
In the first appeal, it therefore follows that the Court of Appeal was right to conclude that each of the Ahmad defendants “obtained” £16.1m (after adjusting for inflation) as “property”, and that that was the value of their benefit. In the second appeal, as Davis LJ noted, there was no appeal against the judge’s finding that the Fields defendants jointly obtained a benefit worth £1.6m (after adjusting for inflation), and in those circumstances, it follows from the above discussion, that he was right to hold that the benefit to be valued in respect of each defendant was the whole amount of the property obtained. Reflecting what is said in paras 50-51 above, it may be that this was a case where the court concluded too readily that there has been a joint obtaining where the better view may have been that the defendants have obtained different property. However, that question does not arise on these appeals.

The third question: what is the sum payable?

71.
Mr Mitchell, on behalf of the Ahmad defendants, did not challenge the propriety of the finding that they had each benefited in the amount of the property jointly obtained by them, but he submitted, in reliance on A1P1, that any payment of an amount under the confiscation order by one of them should reduce or extinguish the amount payable by the other, and that the order should contain a proviso to that effect. The argument in support of his submission is simple. It is true, as has been said many times, that the legislation is directed towards the proceeds and not the profits of crime, but it would not serve the legitimate aim of the legislation and would be disproportionate for the state to take the same proceeds twice over.

72.
This Court has considered the provisions of A1P1 in the context of the 2002 Act in two recent cases: Waya and in Barnes v Eastenders Cash & Carry plc [2014] UKSC 26, [2014] 2 WLR 1269. In Waya, paras 11-13, Lord Walker and Hughes LJ summarised the requirements of A1P1 and section 3 of the Human Rights Act 1998. In Barnes, paras 53ff, Lord Toulson reviewed the Strasbourg jurisprudence. It is unnecessary to repeat the summary or the analysis in this case; the general principles are well understood. In our view Mr Mitchell’s argument is as compelling as it is simple. To take the same proceeds twice over would not serve the legitimate aim of the legislation and, even if that were not so, it would be disproportionate. The violation of A1P1 would occur at the time when the state sought to enforce an order for the confiscation of proceeds of crime which have already been paid to the state. The appropriate way of avoiding such a violation would be, as Mr Mitchell has submitted, for the confiscation order made against each defendant to be subject to a condition which would prevent that occurrence.

73.
This approach may appear to risk producing inequity between criminal conspirators, on the basis that some of them may well obtain a “windfall” because the amount of the confiscation order will be paid by another. However, that is an inherent feature of joint criminality. If the victim of a fraud were to sue the conspirators and to obtain judgments against them, he would be entitled to enforce against whichever defendant he most easily could. The losses must lie where they fall, and there is nothing surprising, let alone wrong, in the criminal courts adopting that approach.

74.
Accordingly, where a finding of joint obtaining is made, whether against a single defendant or more than one, the confiscation order should be made for the whole value of the benefit thus obtained, but should provide that it is not to be enforced to the extent that a sum has been recovered by way of satisfaction of another confiscation order made in relation to the same joint benefit. A subsequent confiscation order made against a later-tried defendant in relation to the same benefit may well be such an order. In theory a court might therefore need to consider whether to stay the enforcement of a confiscation order made against one or more defendants to await the outcome of a later criminal trial against other defendants in respect of the same criminal conspiracy. However, except perhaps when a second trial is imminent this would not normally be appropriate bearing in mind the purpose of the 2002 Act and the statutory stipulation for a speedy hearing (see para 10 above). Orders made on the basis of lifestyle assumptions will require special consideration on their facts.

75.
This conclusion is in line with the outcome in the case of R v Gangar [2012] EWCA Crim 1378; [2013] 1 WLR 147, although it is based on slightly different reasoning. In that case, the Court of Appeal held that, when assessing the “available amount” the court must recognise that the same asset cannot be sold and converted to cash twice. Once the solution now propounded is adopted, the confiscation order will be for the full amount obtained by the conspirators against each defendant, but its enforcement more than once will be prevented.

76.
Unlike the arguments raised by Mr Owen on behalf of the Fields defendants, this argument raised by Mr Mitchell on behalf of the Ahmad defendants does not involve calling into question any decision made or guidance given by the House of Lords or the Supreme Court. It simply involves qualifying the effect of the orders which would follow from those decisions in a way which, while not contemplated in any of the judgments, is not inconsistent with anything said in them, and on a basis which was not considered, let alone rejected, in them.

77.
We should mention that, before this judgment was handed down, our attention was drawn to the recent judgment of the Strasbourg court in Paulet v United Kingdom (Application No 6219/08) (unreported) 13 May 2014, where a violation of A1P1 was found in relation to a confiscation order. Nothing in that judgment causes us to reconsider our conclusion in these cases.

Conclusion

78.
In these circumstances, we would allow the appeals by both the Ahmad defendants and by the Fields defendants, but only to the extent of directing that the confiscation order in respect of each defendant be amended along the lines indicated in the first sentence of para 74 above.