

**GUIDANCE FOR PROSECUTORS ON THE DISCRETION TO INSTIGATE  
CONFISCATION PROCEEDINGS**

**Introduction**

This document provides guidance to prosecutors in order to assist them in deciding whether or not to instigate confiscation proceedings against a defendant. Although following a request by a prosecutor, the courts no longer hold a discretion whether or not to make a confiscation order against a defendant who falls within the statutory regime, the courts retain a jurisdiction to stay confiscation proceedings as an abuse of process. This jurisdiction may be invoked in order to halt proceedings which ought not to have been instigated by the prosecutor. The jurisdiction will only be exercised with “considerable caution” and is ordinarily confined to cases of “true oppression” (*R v Shabir* [2008] EWCA Crim 1809). It is important to note that if the prosecutor correctly identifies the relevant statutory regime and has properly addressed the three questions posed by the House of Lords in *R v May* [2008] 1 AC 1028, as set out in the guidance below, the question of abuse of process will rarely, if ever, arise. The guidance is divided into four sections:

- (i) The principles to be applied when determining whether a defendant’s case properly falls within the relevant statutory regime for confiscation.
- (ii) Two examples of how the principles apply to particular sets of facts.
- (iii) The exercise of the prosecutor’s discretion.
- (iv) Some examples of when it may be inappropriate for prosecutors to decide to instigate confiscation proceedings.

**The principles to be applied when determining whether a defendant’s case properly falls within the relevant statutory regime for confiscation.**

The possibility of an application for a confiscation order being made should be considered at the earliest opportunity, so that appropriate court orders (such as restraint orders) can be obtained and evidence gathered by financial investigators.

Before deciding whether to instigate confiscation proceedings, prosecutors should first examine the facts of the case closely in order to determine the correct statutory regime and to assess whether the statutory preconditions for the making of a confiscation order are met.

In making this assessment in a particular benefit case, prosecutors should consider the three questions posed by the House of Lords in the case of *May*:

- (i) Has the defendant (D) benefited from relevant criminal conduct?
- (ii) If so, what is the value of the benefit D has so obtained?
- (iii) What sum is recoverable from D?

Prosecutors should pay particular attention to the endnote to the case, which provides guidance to the court as to the approach to be taken in confiscation proceedings:

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

*(2) The court should proceed by asking the three questions posed above: (i) Has the defendant (D) benefited from relevant criminal conduct? (ii) If so, what is the value of the benefit D has so obtained? (iii) What sum is recoverable from D? Where issues of criminal lifestyle arise the questions*

*must be modified. These are separate questions calling for separate answers, and the questions and answers must not be elided.*

- (3) In addressing these questions the court must first establish the facts as best it can on the material available, relying as appropriate on the statutory assumptions. In very many cases the factual findings made will be decisive.*
- (4) In addressing the questions the court should focus very closely on the language of the statutory provision in question in the context of the statute and in the light of any statutory definition. The language used is not arcane or obscure and any judicial gloss or exegesis should be viewed with caution. Guidance should ordinarily be sought in the statutory language rather than in the proliferating case law.*
- (5) In determining, under the 2002 Act, whether D has obtained property or a pecuniary advantage and, if so, the value of any property or advantage so obtained, the court should (subject to any relevant statutory definition) apply ordinary common law principles to the facts as found. The exercise of this jurisdiction involves no departure from familiar rules governing entitlement and ownership. While the answering of the third question calls for inquiry into the financial resources of D at the date of the determination, the answering of the first two questions plainly calls for a historical inquiry into past transactions.*
- (6) D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property. It may be otherwise with money launderers.'*

Further consideration of the three statutory questions is set out in the following paragraphs.

*Has the defendant (D) benefited from relevant criminal conduct?*

The first question for prosecutors to ask is whether the defendant has ‘benefited’ from his criminal conduct within the meaning of the relevant Act. In considering the answer to this question, prosecutors should focus on the language of the relevant statutory provisions. So, for example, when dealing with the Proceeds of Crime Act 2002, ‘*a person benefits from conduct if he obtains property as a result of or in connection with the conduct*’: section 76(4).

There can be no substitute for direct reference to the relevant statutory provisions and to the judgments of the House of Lords in *May* (in particular, on this question, paragraphs 10-19), *Jennings* and *Green* (and subsequent Court of Appeal cases). However, three important statements of principle emerge from these House of Lords decisions and subsequent Court of Appeal decisions:

- (i) For confiscation purposes, a defendant will generally only obtain property if in law he has an interest in the property and will only benefit from a pecuniary advantage, if he evades a liability to which he is personally subject. So a defendant convicted of being knowingly concerned in the fraudulent evasion of an excise duty for his role in assisting in the distribution of smuggled cigarettes on which no duty had been paid did not obtain a pecuniary advantage, because the relevant excise duty regulations did not extend liability to those in the defendant’s position (*R v Chambers* [2008] EWCA Crim 2467).
- (ii) Where a defendant is a member of a long-standing conspiracy to defraud, but only joined the conspiracy on the day on which the police brought it to an end (on which day the conspiracy did not benefit from its criminal conduct), the defendant has not benefited (*R v Olubitan* [2004] 3 Cr App R (S) 70). The provisions relating to ‘benefit’ in the Criminal Justice Act 1988, as amended, are ‘*not to be construed so that a person may be held to have obtained property or derived a pecuniary advantage when a proper view of the evidence*

*demonstrates that he has not in fact done so*’ per May LJ, paragraph 25). These comments apply equally to the Proceeds of Crime Act 2002.

- (iii) The mere fact that a defendant is more than a ‘minor contributor’ to an offence in which property is obtained is not sufficient to establish that the defendant himself obtained the property. As the House of Lords said in *CPS v Jennings* (at paragraph 14):

*‘A person’s acts may contribute significantly to property (as defined in the Act) being obtained without his obtaining it. But under section 71(4) a person benefits from an offence if he obtains property as a result of or in connection with its commission, and his benefit is the value of the property so obtained, which must be read as meaning “obtained by him”.’*

*If so, what is the value of the benefit D has so obtained?*

If the prosecutor concludes that a particular defendant has benefited from conduct, the next question to consider is the value of that benefit. Again, there is no substitute for direct reference to the relevant statutory provisions, and to the judgments of the House of Lords in *May* (in particular, on this question, to paragraphs 20-34), *Jennings* and *Green* (and subsequent Court of Appeal cases). However, four important statements of principle emerge from these House of Lords decisions.

- (i) Section 71(4) of the Criminal Justice Act 1988 (and section 76 of the Proceeds of Crime Act 2002) calls for an essentially factual enquiry: what is the value of the property obtained? Where a defendant applies £10,000 of tainted money as a down-payment on a £250,000 house, legitimately borrowing the remainder, *‘it cannot plausibly be said that he has obtained the house as a result of or in connection with the commission of his offence’* (see *May*, paragraph 26).
- (ii) A defendant who obtains a pecuniary advantage (or property) by deception and then uses some of the proceeds of his crime to pay an accomplice benefits to the total value of pecuniary advantage (or property) obtained. The value of his

benefit is unaffected by the payments made to the accomplice, because what matters is what the defendant obtains, not what he retains (*R v Patel* [2000] 2 Cr App R (S) 10). This is consistent with the approach to be taken in drug trafficking cases where no account is taken of the defendant's costs: a defendant's benefit is his gross rather than net profit.

- (iii) Where more than one defendant has been convicted for his role in a criminal enterprise, the court will have to consider the benefit attributable to each defendant. In deciding this, the court must consider the capacity in which each defendant receives the proceeds of crime. Where the proceeds of crime are received jointly by more than one defendant, the benefit to each defendant is the full amount of the proceeds received: apportionment in a case of joint receipt is not permitted by statute. Where there is no evidence one way or the other whether the proceeds were obtained jointly by the defendants, the court is entitled to divide the proceeds by the number of conspirators, and declare the benefit figure in that sum (*R v Gibbons* [2003] 2 Cr App R (S) 169).
- (iv) Where defendants have not jointly obtained benefit, but there has been a disposal by one member of a criminal enterprise to another who knowingly receives it, each is treated as the recipient of a benefit to the extent of the value of the property which has come into the possession of each of them. The amount of the benefit a defendant obtains is not affected by the amount which might be obtained by others to whom he transfers any part of the benefit (*R v Sharma* [2006] Cr App R (S) 416).

*What sum is recoverable from D?*

This is an important stage in the court's decision making, but the answer to the question will be determined by the facts, so that the problems which arise are not, in the main, questions of principle. The relevance of the question to the prosecutor's decision is however apparent. If it appears that a defendant has no assets with which to pay any confiscation order, prosecutors will have to consider whether it would be in the public interest to seek a confiscation order against that defendant.

In order that the above three questions can be properly considered, it is imperative that those responsible for the criminal investigation should be made aware of the importance of establishing the role of a particular defendant in a criminal enterprise, so that the case for confiscation can be presented as clearly as possible.

It is equally important that any basis of plea sets out the defendant's role and that the prosecutor makes clear to the Court whether there are any assertions made by the defendant, which it cannot dispute for the purposes of sentence, but that may be contradicted by information that subsequently becomes available in the confiscation proceedings.

If there is a trial, prosecutors should ensure that, so far as possible, the evidence establishes the precise role of each defendant in the criminal enterprise. As the evidence from the criminal investigation, the financial investigation and the evidence from any trial is revealed, prosecutors should keep under review whether confiscation is appropriate in a particular case. By the end of a trial, evidence which originally provided a firm basis for a decision to instigate proceedings may have been shown to be unreliable. Equally, evidence which originally suggested that a confiscation order ought not to be sought may have been superseded by evidence which leads to the opposite conclusion.

### **Two examples of how the principles apply to particular sets of facts.**

The Court of Appeal has applied the principles found in *May*, *Jennings* and *Green* in a number of recent cases. Two of these cases are particularly helpful as illustrations of the application of the principles: *R v Sivaraman* [2009] 1 Cr App R (S) 80 and *R v Allpress* [2009] EWCA Crim 8.

#### ***R v Sivaraman***

In *Sivaraman*, the defendant, an employee in a fuel outlet, had pleaded guilty to a conspiracy to evade excise duty. The defendant and the proprietor of the fuel outlet had conspired to buy 'red' diesel, to remove the dye, and to sell it on as if it were 'normal' diesel. By this means the proprietor obtained a pecuniary advantage arising

out of the fact that 'red' diesel attracted a lower level of duty than 'normal' diesel. The defendant's part in the conspiracy was to accept deliveries of 'red' diesel in the course of his employment: he was clearly more than a '*very minor contributor*' to the conspiracy. The total pecuniary advantage obtained in the course of the conspiracy was £128,520 but the defendant had received payments of £15,000 for the part he played. The benefit figure attributable to the defendant was found by the Crown Court to be £128,520.

Applying the principles found in *May*, *Green* and *Jennings* to the facts in *Sivaraman* the Court of Appeal held that the Crown Court had erred and that the correct value of the defendant's benefit was £15,000, because (per Toulson LJ, paragraph 15):

*'the proposition that a person acting purely in the capacity of employee, who receives a consignment of illicit fuel on behalf of his employer, and who, as a reward for doing so, received only an enhanced wage or cash payment, must necessarily as a matter of law be taken to profit to the same extent as his employer does from the purchase and sale of the consignment is unsound.'*

The reason for this conclusion was that the question whether or not a defendant had obtained property was not determined simply by considering whether the defendant was '*more than a very minor contributor to the offence*'. On the contrary, applying the principles of *May*, *Green* and *Jennings*, since the defendant was not a joint purchaser, but rather was an employee, he did not obtain a benefit to the total value of pecuniary advantage obtained, as he had incurred no liability under the relevant regulations. The defendant's benefit was restricted to the property that he had obtained, namely the value of the payment he received for his part in the conspiracy, which was £15,000.

The Court of Appeal stressed the importance of the findings of fact made by the lower courts and of emphasised the need '*to apply the words of the statute in as commonsensical a way as possible*' (paragraph 13). This guidance should be borne in mind by prosecutors.

Prosecutors should also note the comments of the Court in relation to the three issues (i) determining a defendant's criminal liability, (ii) determining a defendant's



culpability and therefore the appropriate sentence and (iii) determining the benefit attributable to a defendant are distinct issues which call for different considerations. On this, the court said:

- (i) *‘Conspirators are criminally liable for the acts of their confederates done within the scope of their employment; but, when considering questions of confiscation the focus of the inquiry is on the benefit gained by the relevant defendant, whether individually or jointly’* (paragraph 20).
- (ii) Similarly, *‘the greater the involvement of a defendant in a conspiracy, the greater will be the appropriate level of punishment. But it does not follow that the greater the involvement the greater the resulting benefit to that defendant. Within the statutory definitions contained in the Act, what benefit a defendant gained is a question of fact’* (paragraph 19).

R v Allpress, R v Symeou, R v Casal, R v Morris, R v Martin [2009] EWCA Crim 8

In this case the Court of Appeal considered a question which had been left open by the House of Lords in May, namely how benefit ought to be calculated where the relevant criminal conduct was money laundering. In reaching its conclusions, the Court of Appeal emphasised the importance of the findings of fact in any particular case.

In R v Allpress, the defendant had carried £156,210 of money representing the proceeds of drug trafficking to various destinations in Europe, on behalf of a man named Michael. She was paid £3,600 by way of costs and payments. She pleaded guilty to a money laundering offence, contrary to section 50(1)(a) of the Drug Trafficking Act 1994. The central question for the court was whether the defendant’s benefit was the value of the money couriered, or the value of the costs and payments received. The Court of Appeal concluded that the general principles found in May, Green and Jennings were applicable to money launderers. Consequently, the Court said (at paragraph 80) that *‘if D’s only role in relation to property connected with his criminal conduct, whether in the form of cash or otherwise, was to act as a courier on behalf of another, such property does not amount to property obtained by him within*

*the meaning of POCA 2002 s80(1) or CJA 1988 s71(4) or to “payment or other reward” within in the meaning of DTA 1994 s2(3)’. Consequently the benefit figure for this defendant was £3,600.*

In *Symeou* and *Casal* the defendants had also acted as couriers of cash which was the proceeds of drug trafficking. It followed from the Court’s analysis of the approach to be taken in relation to cash couriers that in each case the appropriate benefit figure was the sum of money received by way of payments or expenses, rather than the value of the money couriered.

In *Morris*, the defendant had been a solicitor who had laundered the proceeds of a VAT fraud perpetrated by a man named Woolley. The proceeds of the VAT fraud (just short of £8 million) had been paid into the defendant’s law firm’s bank account over which the defendant had sole operational control. From here the money was transferred by the defendant, for the benefit of Woolley, to various recipients. The defendant was convicted of three money laundering offences, contrary to section 93A(1)(a) of the Criminal Justice Act 1988 and confiscation proceedings were instigated. The judge at first instance had found that the defendant was acting as more than a bare trustee of the funds held in the law firm’s account. On the facts, the defendant’s control over the money was such that he had obtained the money for the purposes of the Criminal Justice Act 1988. The benefit figure was therefore just short of £8 million. The Court of Appeal upheld the judge’s ruling, and considered that the judge’s findings of fact were critical. On the facts, the defendant had been more than bare trustee of the money. Since he had control of the account into which the money was paid, the starting point was that he owned the money. His benefit was therefore in the sum of the money laundered.

In *Martin*, the defendant had acted as a custodian for sums of money which derived from his brother’s criminal conduct. The defendant pleaded guilty to possession of criminal property contrary to section 329 (1) (c) of the Proceeds of Crime Act 2002. The Court of Appeal found that a mere custodian of cash, who had received no direct or indirect personal benefit, ought to be treated in the same way as a courier of cash. It followed that the defendant had not benefited from his criminal conduct.

### **The exercise of the prosecutor's discretion.**

Parliament, by enacting the confiscation legislation in the way that it did, intended to create a scheme to ensure that offenders did not benefit from their offending. A proper application of the statute can produce “draconian results” (per Lord Rodger in *R v Cadman Smith*[2002] 1 Cr. App. R. 35, HL). Furthermore, Parliament’s decision to remove the Court’s discretion not to make a confiscation order was a deliberate measure designed to strengthen, and not weaken, the legislative framework for confiscation.

Prosecutors have a duty to carry out their functions in accordance with the intention of Parliament, but it is important that they remember that they retain a discretion whether or not to instigate confiscation proceedings. In considering how to exercise their discretion, prosecutors need to consider their role as ministers of justice and should remember the three legitimate aims of confiscation set out in *R v Rezvi, R v Benjafield* [2003] 1 AC 1099, namely to ‘*punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises*’ (per Lord Steyn, paragraph 14).

In general benefit cases, the court is concerned with proceeds arising from offending beyond that for which the defendant has been convicted in the current proceedings and a proper application of the assumptions may result in a confiscation order that is massively greater than the defendant’s benefit from particular offending. In particular benefit cases, however, prosecutors must first apply the principles from *May* set out above and answer the three questions and determine that the defendant has benefited from his particular benefit; the approximate amount of that benefit; and how much is likely to be recoverable.

The prosecutor should consider in each case whether the statutory regime would operate in a way that would be oppressive. Examples of when it may be inappropriate for prosecutors to instigate confiscation proceedings are set out below.

Although following a request by a prosecutor, the courts no longer hold a discretion whether or not to make a confiscation order against a defendant who falls within the

statutory regime, the courts retain a jurisdiction to stay confiscation proceedings as an abuse of process. This jurisdiction may be invoked in order to halt proceedings which ought not to have been instigated by the prosecutor. The jurisdiction will only be exercised with “considerable caution” and is ordinarily confined to cases of “true oppression” (*R v Shabir* [2008] EWCA Crim 1809). It is important to note that if the guidance set out above is followed, the question of abuse of process will rarely, if ever, arise.

**Some examples of when it may be inappropriate for prosecutors to decide to instigate confiscation proceedings.**

While the categories of the abuse jurisdiction are not closed, the Court of Appeal has identified three situations in which it is legitimate for proceedings to be stayed.

The first situation is where the Crown has reneged on an earlier agreement not to proceed. As a matter of common sense, it is inappropriate to proceed in such cases.

The second situation is, in a simple benefit case, where the defendant has voluntarily paid full compensation to the victim or victims, or is ready, willing and able immediately to repay all of the victims to the full amount of their losses, and has not otherwise profited from his crime (*R v Morgan* [2009] 1 Cr App R (S) 60). In such cases it may be inappropriate for the prosecutor to instigate confiscation proceeding but this will require an independent judgment on the facts of each case. A decision one way or the other must be properly reasoned and it is advisable to keep a clear and accurate record of the decision.

The third situation calls for the most careful consideration by prosecutors. This situation arises where proper application of the relevant statute to a defendant’s case would, if the court were asked to proceed to confiscation, compel the court to find that property obtained in the most part legitimately by the defendant, and to which the defendant would have been entitled but for his criminal conduct, must be treated as benefit. An example of this situation arose in the case of *R v Shabir* [2009] 1 Cr App (S) 84. In that case the defendant was a pharmacist who had submitted false, inflated, claims to the NHS. The total amount obtained by deception was approximately

£179,000, but the defendant had been entitled to most of the money claimed, except £464. In that case it was held to be inappropriate to proceed to confiscation, but such examples will be rare and confined to cases of ‘*true oppression*’ (per Hughes LJ, at paragraph 23). In order to establish oppression and thus abuse of process it is clearly not sufficient that the effect of confiscation will be to extract from a defendant a sum greater than his net profit from crime. Moreover, in general benefit cases (where the lifestyle provisions apply), it may be perfectly proper for a confiscation order to be ‘*massively greater*’ than a defendant’s benefit from particular offending (*R v Shabir*, per Hughes LJ, at paragraph 27). Any injustice as perceived by the court can, in any event, be overcome by the court declining to apply the lifestyle presumptions (the relevant provision in the Proceeds of Crime Act 2002 is section 10(6)). As in the cases set out above, every case will have to be considered on its own facts, but a decision one way or the other must be properly reasoned and it is advisable to keep a clear and accurate record of the decision.

In addition a fourth situation exists which might be susceptible to a challenge by a defendant to stay confiscation proceedings as an abuse of process, namely where a defendant has obtained paid employment by a false representation to his employer. The defendant’s wages may be his benefit (*R v Carter* [2006] EWCA Crim 416), but some cases will arise where the link between the criminality and the receipt of payment from dishonestly obtained employment is too remote, for example, where had the representation been corrected, the employment would have continued, or where after many years of otherwise lawful employment, a relatively minor previous conviction is discovered.

CPS

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