

JERSEY / JUDGMENT

Templeton-Brown v AG [2020]

JCA 165 (20 August 2020)

[2020] JCA 165

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Court of Appeal 20 August 2020 Before : George Bompas, Q. C., President; Lord Anderson of Ipswich, K. B. E., Q. C., and; Sir Michael Birt. Norman Templeton Brown -v- The Attorney General Advocate J. W. R. Bell for the Appellant. S. C. Thomas Esq., Crown Advocate.

JUDGMENT

THE president:

Introduction

1. This is the judgment of the Court on the Appellant's application, under Article 24(1)(c) of the Court of Appeal (Jersey) Law 1961, for leave to appeal against a confiscation order made on 10 January 2020 by the Royal Court. This order was made following a hearing ("the Confiscation Hearing") on 30 July 2019 before the Bailiff, T. J. Le Cocq Esq, sitting with Jurats Blampied, Ramsden, Thomas, Christensen and Austin-Vautier. 2. For present purposes the material events start with the arrest of the Appellant, on 9 November 2017, with several others on suspicion of conspiracy to supply drugs, namely cannabis resin. He has since been in custody. On 20 July 2018 the Appellant, having pleaded guilty on a basis which was not accepted by the Crown, was convicted on a count of conspiracy to supply cannabis resin. 3. Ten months later, on 23 May 2019, at a sentencing hearing ("the Sentencing Hearing") the Appellant was sentenced to a prison sentence of 5 years and 9 months. The sentencing judgment was given at the Sentencing Hearing by the then Bailiff, Sir William Bailhache, sitting with Jurats Ramsden, Thomas, Pitman, Christensen and Averty. The tribunal was not the same as that which heard the Confiscation Hearing. 4. A reason for the length of time between the conviction and the sentencing was that, among matters, there was a dispute concerning the Appellant's role in the conspiracy; and this led to a Newton hearing on 15 May 2019 ("the Newton Hearing"). 5. The Appellant's role in the conspiracy was to have his rented lock-up garage used for the storage of cannabis resin. The sentencing remarks made by the Royal Court in the judgment ("the Sentencing Judgment") given on 23 May 2019 (AG-v-O'Connor Smitton Arrowsmith Howes Heskin Templeton-Brown

[2019] JRC 093A) explained among other things that (paragraph [8]) "... we said at the close of the Newton hearing that we concluded that he was more than a mere custodian, but he was a custodian, he had an important part to play ... we do not see that he should get any credit for not knowing how much cannabis would in fact be stored on the premises. He agreed that he would be a part of this conspiracy and he has to accept that in our view". (Later in this judgment we set out the entirety of the relevant part of the Sentencing Judgment so far as concerns the Appellant). 6. It was also noted in the Sentencing Judgment (in the same paragraph) that the Appellant, having been on holiday in India, returned and "had gone to inspect the garage ... and had changed the padlock on the garage, which of course secured the drugs in the garage for that much longer". 7. At the Sentencing Hearing the Royal Court adjourned to a hearing on 30 July 2019 the application by the Prosecution, made at the Sentencing Hearing, for a confiscation order against the Appellant. At the Sentencing Hearing, however, the Royal Court did deal with and make orders on the Prosecution's application for confiscation orders against others of the Appellant's co-defendant conspirators, while adjourning the applications in respect of Arrowsmith and O'Connor. 8. We have referred already the Confiscation Hearing on 30 July 2019. At this hearing three challenges were made by the Appellant to the confiscation order being sought by the Prosecution. (i) The first was that the hearing was beyond the time permitted by the Proceeds of Crime (Jersey) Law 1999 ("the 1999 Law"). The foundation for this challenge was that the Confiscation Hearing was now out of time, having been postponed irregularly, and beyond any proper exercise of the postponement power in the 1999 Law, from the Sentencing Hearing on 23 May 2019 (a hearing well over six months after the Appellant's conviction, the relevance of this fact being the six months' period specified in the 1999 Law discussed below). (ii) The second concerned the Appellant's connection with the cannabis which had been the subject of the conspiracy to supply: not all the cannabis had been in the Appellant's garage, only part. The Appellant argued that he had not "obtained" any of this cannabis at all for the purposes of the confiscation provisions of the 1999 Law, discussed later; the Prosecution argued that he was to be considered to have obtained it all. (iii) The third matter concerned a deduction for income tax which the 1999 Law appeared to allow when the court is to fix the amount of a confiscation order. It appears that this matter was only raised briefly as a matter of detail during the hearing before the Royal Court and the Royal Court did not refer to the matter in its judgment, although it did not make the deduction requested by the Appellant. 9. As mentioned above, the Royal Court gave its decision and judgment on the confiscation application on 10 January 2020 (AG v O'Connor and Templeton-Brown

[2020] JRC 006). In its judgment ("the Confiscation Judgment") the Royal Court specifically rejected the first two arguments we have just described. However, as regards the second of the three arguments the Royal Court rejected also the Prosecution's contention that the Appellant had obtained all of the cannabis, concluding that he had obtained only that quantity found in his garage when he was arrested. The Court then made a confiscation order against the Appellant on the basis that the value of the drugs in the garage was

£79,500, this being significantly less than the £507,000 total value of all drugs seized by the Police and involved in the complete conspiracy. 10. In limiting the amount of the confiscation order in respect of the Appellant, as just explained, the Royal Court rejected the Prosecution's argument that, as a conspirator, the Appellant should be taken to have obtained, along with his co-conspirators, the totality of the conspiracy drugs. 11. It is important to note that in the present case the Confiscation Hearing proceeded on the basis of (1) the Sentencing Judgment, and (2) a document prepared by the Prosecution following the Newton Hearing and headed "Summary of facts for sentence" ("the Summary"). The content of these two documents (we have been told), subject to one point mentioned below, represent the totality of the facts on which the Royal Court made its material findings in relation to the Appellant following the Confiscation Hearing. However, we have also been given in the Appellant's bundle a copy of the Attorney General's statement of 21 May 2019 ("the Statement") which set out certain further details, and which was referred to in the Prosecution's written submissions for the Confiscation Hearing. The Statement, which contained detailed consideration of the Appellant's financial circumstances and antecedents, and addressed in particular the value of his property at the time it was prepared, appears not to have not to have been relied on by the Prosecution at the Confiscation Hearing as providing material relevant to the question whether the Appellant had obtained any of the cannabis with which the conspiracy was concerned. The Statement did not disclose any unidentified source of income of the Appellant, who owned a carpentry business employing some 7-8 employees. 12. The relevance of this is that at the Newton Hearing there had been consideration of various factual issues concerned with the Appellant's plea of guilty to conspiracy to supply cannabis. It is apparent from the Sentencing Judgment that certain of these issues had been resolved in the Appellant's favour, others not. But the Royal Court had at the Confiscation Hearing no more than the two documents we have just referred to to provide it with evidence on the crucial issue concerning the Appellant's "obtaining" of any of the drugs involved in the conspiracy: to all intents and purposes they provided the totality of the primary facts before the Royal Court at the Confiscation Hearing. 13. The one point which does not emerge from the Sentencing Judgment or the Summary is that a lady by the name of Hodges, who features extensively in the Summary, had been charged but acquitted of the same charge of conspiracy to supply. Accordingly her name did not appear in the heading of the Summary, and she was not listed in the document as one of the Appellant's co-conspirators. We were told that one paragraph of the Summary omitted her name, this being paragraph 20. There had been reference to Hodges and one Heskin, one of the conspirators, having been doing various things such as visiting a bank and then a pub, in St Helier on the morning of 5 October 2017. Then it was said " Police officers observed [the Appellant] arrive in his van, get out and speak with Heskin before driving off. There appears to have been nothing social about this meeting" . In fact, as we understand it, Hodges also was present, but her name was deleted from the text in the preparation of the document as a result of her acquittal. 14. It is also relevant that in the Sentencing Judgment the Royal Court, referring back to the Newton Hearing, explained

that "We did not accept that the Crown had established that a meeting which [the Appellant] had with one of his co-defendants, Heskin, was for the purpose of transferring money to Heskin" . 15. We consider in greater detail later in this judgment precisely what is to be distilled from the two documents before the Royal Court at the Confiscation Hearing. 16. The Appellant wishes to advance three arguments on appeal from the confiscation order made against him by the Royal Court. These are, broadly the same arguments as advanced at the Confiscation Hearing, and are in summary: (i) That the Court had no jurisdiction to hear, alternatively ought not to have heard, the confiscation application so long after the Appellant's conviction. (ii) That the Appellant had not "obtained" any property in the course of the conspiracy, and therefore did not benefit from any criminal conduct so as to be liable to a confiscation order. (iii) That the Court mistakenly failed to take into account, when setting the amount of the confiscation order, the Appellant's income tax liabilities which should properly have led to a smaller amount being ordered. 17. The second of the three arguments cannot properly be presented as an invitation to this Court simply to substitute its own judgment for that of the Royal Court. To succeed on this second argument the Appellant has to show that the Royal Court at the Confiscation Hearing either (a) misunderstood and failed to apply properly the correct principles for deciding whether the Appellant had "obtained" in the course of the conspiracy the cannabis in his garage, or (b) had reached a conclusion that was not reasonably open to it on the evidence before it. 18. We consider each of these three grounds in turn. The immediately relevant provisions of the 1999 Law, some of which we discuss in detail later, are certain definitions in Article 1(1), and Articles 1(2) to 1(2B), and Articles 2, 3, 4 and 6). Time limit 19. The time-limit challenge to the Royal Court's order springs from Article 6 of the 1999 Law. In broad summary: (i) The general power to make confiscation orders is conferred by Article 3 of the 1999 Law in terms which contemplate that such orders will be applied for and made at the same time as a defendant appears for sentencing. Thus Article 3(1) gives to the Court power to act under the Article, which power includes making a confiscation order (Article 3(4)(b)), where a defendant appears to be sentenced and various conditions are met. Indeed, section 3(5) contemplates that a confiscation order, when made, is to be taken into account before the defendant is fined, ordered to make any payment, or made subject to certain forfeiture orders. (ii) However, Article 6, headed "Postponed determinations", gives the Court power, if acting under Article 3 but considering further information to be needed in relation to the proposed confiscation order, to postpone consideration of the proposed confiscation order for the information to be obtained. Article 6(1), giving this power, is in the following terms: "(1) Where the Court is acting under Article 3 but considers that it requires further information before - (a) determining whether the defendant has benefited from any relevant criminal conduct; or (b) determining the amount to be recovered in the defendant's case by virtue of Article 3, it may, for the purposes of enabling that information to be obtained, postpone the making of the determination for such period as it may specify." (iii) If the Court orders such a postponement, Article 6(7) allows the Court in the meantime to deal with sentencing. Article 6(2) allows postponement more than

once. However, and critically for present purposes, Article 6(3) imposes a restriction in the following terms: "(3) Unless it is satisfied that there are exceptional circumstances, the Court shall not specify a period that - (a) by itself; or (b) where there have been one or more previous postponements under paragraph (1) or (4), when taken together with the earlier specified period or periods, exceeds 6 months beginning with the date of conviction." 20. The Appellant seeks to argue that because his conviction was more than 6 months before the sentencing hearing, it was not open to the Court to make a confiscation order at all at the hearing of the postponed application on 30 July 2019. It was then too late for the Court to act, so it is argued, because the postponement order made on 23 May 2019 was altogether defective. 21. As we have explained, this argument was advanced at the hearing on 30 July 2019, and was then rejected by the Royal Court. We have no hesitation, in agreement with the Royal Court, in rejecting this argument. 22. The only restriction on the Court's power to act after a period from the date of conviction relied upon by the Appellant is that in Article 6(3). That restriction does not engage at all until there is a postponement sought beyond the sentencing hearing; that is, the Article 6(3) restriction is only relevant where, at the sentencing hearing (or thereafter, if there has already been a postponement) the Court is minded to, and does, postpone the hearing for the purposes of enabling information to be obtained. 23. It follows that the confiscation application could have been properly entertained at the Sentencing Hearing. 24. The Appellant's argument, however, is that Article 6(3) prevented postponement of the hearing of the application from the Sentencing Hearing, unless there were "exceptional circumstances". Quite what circumstances qualify as exceptional so as to enable a postponement where otherwise Article 6(3) would prohibit postponement is not stated in the 1999 Law. We return to this below. 25. The Appellant's point is that at the Sentencing Hearing, when the hearing of the confiscation application was postponed by the Royal Court to 30 July 2019, the Royal Court did not address the question of exceptional circumstances, so that the Royal Court was not then able to satisfy itself on the point, with the consequence that the purported exercise of the postponement power was defective and a nullity, leaving the Court at the Confiscation Hearing without any proper application before it. 26. Before us Advocate Bell, who appeared for the Appellant at the Sentencing Hearing and at the Confiscation Hearing, also pointed out as follows (and we quote from his written submissions): "13. At the Sentencing Hearing on 23 May 2019, the Prosecution asked the Court to adjourn their application for a confiscation order regarding the Appellant to 30 July 2019 because the application for a Confiscation Order was opposed by the Defence. The Court granted the Prosecution's request for an adjournment. 14. The following observations are made about this aspect of the Sentencing Hearing: ... ii. The Prosecution did not apply for a postponement by reason of 'exceptional circumstances' as required by Article 6(3). Neither did the Court express that they were satisfied that there were exceptional circumstances to postpone the application beyond the statutory six month period." iii. When the Court adjourned the Crown's application it did not do so for the purposes of enabling further information to be obtained as envisaged by Article 6(1). The Court gave no directions as to the filing of any information. Therefore the application could have

been dealt with at an earlier stage." 27. The Sentencing Judgment explained simply "Confiscation hearing adjourned until 30th July, 2019" . But we also note what was set out in the Act of Court setting out the orders made at the hearing (see below). Further, when the Royal Court made the order at the Sentencing Hearing the Advocates for all the defendants (including the Appellant) and for the Attorney General were present. None of the counsel suggested to the Court that putting off the hearing of the confiscation application against the Appellant could and should only be done if the Court was satisfied that there were exceptional circumstances. Before us it has not been said on behalf of the Appellant that the Royal Court was acting in anything other than good faith when putting off the substantive hearing of the confiscation application to a later date: indeed, as we mention below, it was not suggested to the Royal Court by anyone that the substantive hearing had to take place then and there at the Sentencing Hearing in the absence of the Court having addressed the reasons for adjourning the hearing of the application. 28. It seems to us, although neither party before us made any submissions on the point, that the provisions of the 1999 Law are inconsistent with, and Article 6(3) of the 1999 Law excludes, any parallel common or customary law jurisdiction to adjourn confiscation proceedings. In other words, at the hearing on 23 May 2019 the Court had no jurisdiction to adjourn the confiscation application to suit the Court's or the parties' diaries, at any rate where the sentencing hearing itself was not adjourned. In other words, if there was to be an adjournment of the confiscation application so that that was to be heard and disposed of at a later hearing than that which resulted in the Appellant's sentencing, the adjournment had to be, and could only be, by way of an exercise of the power conferred by Article 6(1). 29. The conclusion described in the previous paragraph is consistent with the judgments given in *R v Soneji*

[2005] UKHL 49 ,

[2006] 1 AC 340 (Lord Steyn at [27], Lord Rodger at [33], Lord Cullen at [50], Lord Carswell at [60] where he agrees with Lord Steyn, and Lord Brown at [70] where he agrees with Lords Steyn and Rodger): when dealing with section 72A(3) of the Criminal Justice Act 1988 (the then UK equivalent to Article 6(3) of the 1999 Law) it was held that there is no co-existing common law jurisdiction to adjourn co-existing with the statutory (and conditional) jurisdiction. 30. In the present case the Respondent does not contend that what was done, as regards the confiscation application on 23 May 2019, was other than a professed exercise of the Article 6 power. This contention is consistent with the Act of Court made in respect of the 23 May 2019 hearing: that states that in respect of the Appellant there was an application made for a confiscation order in accordance with Article 3 of the 1999 Law, as to which the Court, in respect of the Appellant "pursuant to Article 6 of the 1999 Law, postponed the further consideration to the 30th July, 2019" . At any rate as recorded in the Act of Court, the power which the Court professed to exercise was the statutory power in Article 6 and not any inherent jurisdiction to adjourn. 31. Given that the Article 6 power was not being exercised for the purpose of allowing time for further investigation, and that no consideration was given at the Sentencing Hearing to the question whether there

were exceptional circumstances to justify its exercise, Advocate Bell submits that the professed exercise was a nullity, whether or not there were exceptional circumstances which, if considered at the 23 May 2019 hearing, might have justified an exercise of the power. 32. In the Soneji case, above, the Appellate Committee of the House of Lords was confronted with legislation which was, so far as relevant, in much the same language as the 1999 Law. The facts of the Soneji case are not materially different from the present, so far as relevant to the first issue on this appeal. The Court of Appeal had quashed the confiscation order on the basis that the court below had failed to satisfy itself that exceptional circumstances existed when adjourning the hearing of a confiscation application, and that that failure deprived the court at the later hearing of jurisdiction to make a confiscation order. The House of Lords unanimously allowed the Crown's appeal. The mere fact that there was a failure to comply with a statutory provision prescribing the doing of some act before a power was exercised would not necessarily be sufficient to render the doing of that act invalid. What was necessary was to consider whether it was a purpose of the legislature that such a failure would have that result; and in the case in hand the legislature could not have intended that result. 33. In arriving at the conclusion concerning the confiscation legislation and the legislative purpose as regards the postponement power, the House of Lords took into account on the one hand the public interest in not allowing convicted offenders to escape confiscation for bona fide errors in the judicial process, and on the other prejudice to the defendant. Here the House of Lords considered that there was no prejudice as to sentences; the relevant prejudice was as to delay in the making of the confiscation order, which was insufficient to outweigh the public interest. 34. The speeches of the different judges in Soneji are of some length. For present purposes it is sufficient to focus on the leading speech, that of Lord Steyn. He considered in detail the previous law concerning the distinction between directions which were mandatory and those which were directory. He concluded that "the emphasis ought to be on the consequence of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity" (para [23]). Having directed himself in this way, his reasoning in relation to the confiscation orders in question was succinct: "24. It remains to address the point of statutory interpretation in accordance with the test as I have outlined it. On behalf of the two accused counsel submitted that, given the criminal law context, a strict approach to construction of section 72A of the 1988 statute should be adopted. Bearing in mind that one is not dealing with the definition of crimes, but with the process of making confiscation orders, I would reject this approach. The context requires a purposive interpretation: Sir Rupert Cross in *Statutory Interpretation*, 3rd ed (1995), 172-175. Secondly, counsel argued that such an interpretation would render wholly ineffective the Parliamentary intent of providing for a specific time limit. I would not accept that this is correct. At the very least the courts can, where necessary, vindicate the scheme adopted by Parliament by the abuse of process jurisdiction and perhaps in other ways. Thirdly, counsel for the accused relied on an alleged injustice caused to the accused by the delay of the confiscation procedures. In my view this argument was overstated. The prejudice to the two accused was not significant.

It is also decisively outweighed by the countervailing public interest in not allowing a convicted offender to escape confiscation for what were no more than bona fide errors in the judicial process. 25. In my view an objective appraisal of the intent, which must be imputed to Parliament, points against total invalidity of the confiscation orders." 35. The speeches of the other members of the Appellate Committee were to similar effect. 36. On behalf of the Respondent Crown Advocate S Thomas drew attention to the fact that in this Island the Court of Appeal and the Royal Court have cited Soneji with approval; and for this he referred us to *Burby & Burby v Thompson & Betram*

[2008] JCA 204 , and *AG v Arthur*

[2019] JRC 113 . In the former case the Court of Appeal, at paragraph [26] of the judgment of the Court given by Clare Montgomery QC, endorsed (albeit in relation to a different statutory regime, namely Article 91 of *Loi (1880) sur la Propriété Foncière* dealing with proceedings for degrevement) the approach to statutory interpretation mandated by Lord Steyn in his speech quoted above. 37. In support of the Appellant's appeal Advocate Bell has relied on the case of *Revenue & Customs Prosecution Office v Iqbal*

[2010] EWCA Crim 376 ,

[2010] 1 WLR 1985 . In that case the English Court of Criminal Appeal held that a confiscation order was invalid because it was made more than 2 years after the defendant's conviction and without a court order made before the expiry of the two years postponing the hearing of the confiscation application until after the 2 years (see paras [10] and [16]). By the time this case was decided the relevant legislation in the UK had changed, having been amended by the Serious Crime Act 2007. The Court of Appeal distinguished the *Soneji* case precisely because of the change in the legislative framework (see paragraphs [25] and [26] of the Court of Appeal's judgment). 38. In our judgment the *Soneji* case provides authoritative guidance as to the way in which Articles 3 and 6 of the 1999 Law are to be interpreted. It cannot have been the legislature's intention that the jurisdiction to make a confiscation order should be lost, notwithstanding a pending application, simply because the court when postponing the hearing of the application has failed to consider the question whether the circumstances qualify as exceptional so as to justify the making of the order. In this case there was no doubt simply a failure in procedure which was not noticed by the Court and which was not drawn to the Court's attention by any of the Advocates present, including the Appellant's. For that failure to have the effect contended for by the Appellant would be quite startling. 39. A feature which we would highlight in the *Soneji* judgments is that the House of Lords did not enter into the question whether, at the time when the court adjourned the confiscation application, there were " exceptional circumstances " which could have been relied upon to justify that decision. As we point out below, the judges were clear that " exceptional circumstances " should not be narrowly construed. But the question whether the adjournment decision was invalid or not did not rest on a later examination of the prevailing circumstances to see whether they were exceptional. Rather, the indication was that it was an abuse of process that could

invalidate an adjournment decision, and hence a subsequent confiscation order. So it was that at [33] Lord Rodger said: "33. As my noble and learned friend, Lord Steyn, has explained, in the present case it is said that, in good faith, the court postponed a relevant determination beyond six months from the date of Mr Soneji's and Mr Bullen's convictions, even though there were no exceptional circumstances to justify this. I respectfully agree with him that the court had no common law power to postpone the determination to obtain information. I also agree, however, that "exceptional circumstances" in section 72A(3) should not be interpreted too narrowly. The court must comply with the six-month requirement wherever reasonably possible, even if this means that its timetable has to be adjusted accordingly. Nevertheless, I would certainly not rule out the possibility that some listing difficulties could amount to "exceptional circumstances". But the judge must look into the position and see what can and cannot be done. Here the Court of Appeal held that he had failed to do so and that, accordingly, the court had not been entitled to postpone the determinations beyond six months after the defendants' convictions. The Court of Appeal further held that the resulting confiscation orders should be quashed. Therefore, the principal issue raised by the Crown's appeal in these cases is whether, assuming that the judge had not been entitled to postpone the determinations beyond the six-month limit, the confiscation orders were invalid." 40. Later in his speech Lord Rodger said at [42]: "42. In the present cases, the confiscation orders were made not much less than two years after the respondents' convictions. It may be that, if actings or failures on the part of the prosecution or the court authorities were to lead to a delay of more than six months, this might, depending on the circumstances, amount to an abuse of process which would make it unfair and inconsistent with the spirit of the Act for the court to make a confiscation order. But, here, about six months of the delay were due to the need for the court to resolve points, raised by the respondents, about its jurisdiction to make the orders. Nor is there any suggestion that the prosecution or court authorities were deliberately dragging their feet or otherwise acting in bad faith. In these circumstances I am satisfied that the delay in making the orders does not affect their validity." 41. Similarly, Lord Brown at the end of paragraph

[80] gave it as his judgment that provided the Court acted in good faith in the purported exercise of its power to postpone, the exercise of the power would not have been invalidated. 42. The parties have addressed submissions to the question whether there were exceptional circumstances prevailing in the present case which might have justified a postponement of the hearing of the confiscation application. The Royal Court, in the Confiscation Judgment of 10 January 2020, addressed at some length various issues which had led to delay in the sentencing process and in the pursuit, down to May 2019, of investigations required for the confiscation application. However, it is not clear from the material before this Court what, if anything, was required for the substance of the application to have been addressed on 23 May 2019 rather than being adjourned to the date in July 2019. There were confiscation orders made on 23 May 2019 against certain of the Appellant's co-conspirators. What made the Appellant's case any different has not been explained. So far as we can judge, the reason

for the adjournment can have been nothing other than want of available court time, and perhaps the readiness of the Advocates, to argue and decide the confiscation question. But, for the reasons we have explained, even if that reason could not count as an exceptional circumstance, the subsequent hearing of the application and the making of the confiscation order were not rendered invalid. 43. We do not consider it necessary, on the present appeal, to decide whether (a), as Crown Advocate Thomas has submitted, the prevailing circumstances at the Sentencing Hearing would have properly been found by the Royal Court to have been "exceptional" so as then to have justified a postponement (as indeed the Royal Court decided in the Confiscation Judgment; or (b) as Advocate Bell has submitted, the opposite is true. In view of what we have said above this issue does not require resolution on this appeal. 44. Nevertheless the speech of Lord Carswell at

[66] is relevant. "66. The present case may be approached via this broad construction of "exceptional circumstances". The trial judge, who was best placed to decide the issue of confiscation, was not available to hear that issue within the six-month period laid down by section 72A(3). The reason was that he was committed to other cases because of the heavy lists in his court. Other cases may arise where the judge is prevented by illness or some other pressing reason from dealing with confiscation within the prescribed period. The judge himself said, in a somewhat resigned fashion, that listing problems are not exceptional, being an unhappily common occurrence in these times. He would nevertheless have heard the case within time if he had been free to do so, and I consider that one can properly regard the circumstances as exceptional for the purposes of section 72A(3)." 45. Further, Lord Steyn explained, at paragraph [28], "An expression such as 'exceptional circumstances' must take its colour from the setting in which it appears. Bearing in mind the context I would not adopt a very strict approach". And in the first of the passages from speech of Lord Rodger which we have quoted above, Lord Rodger remarked that the expression as used in section 72A(3) of the UK legislation should not be interpreted too narrowly. 46. Finally, in *Arthur v AG*

[2020] JCA 016 this Court, in the judgment of the Court given by Sir Richard Collas, Bailiff of Guernsey, at [42] described the Royal Court in that case as having adopted the correct approach in following *R v Soneji* "in its liberal interpretation of 'exceptional circumstances' ". 47. As a postscript to this part of our judgment we suggest that, if the legislature has occasion to reconsider the 1999 Law, the opportunity should be taken to bring the provisions of the 1999 Law for the timing of confiscation hearings and for postponement such hearings into line with what is practical and what is commonly done in practice. On the one hand expedition is desirable, both in the interests of the State and of defendants. The third issue on this appeal underlines this consideration. But this case illustrates also the other side of the picture. Reasonable allowance needs to be made for the fact that the listing and timing of hearings has to be efficient within the framework of what is practical: it is commonplace for a sentencing hearing to be listed without time also being set aside at the same hearing for dealing with what may be elaborate confiscation hearings. It ought to be made expressly possible for the court to manage hearings without

at the same time having to decide whether the circumstances for the exercise of the power are exceptional and for the purpose of gathering information. Obtaining property - benefit from relevant criminal conduct 48. At the heart of the Appellant's second ground for his proposed appeal is the nature of his connection with the cannabis resin which came to be in his garage in the course of the conspiracy. His argument is that he was a custodian of the material when it lay in his garage, that he did not own it or have any rights in relation to it and that it was brought to his garage by, and was to be disposed of at the direction of, others and not him, so that the cannabis cannot be characterised as property obtained by him so as to support a finding that he benefitted from the criminal conduct of which he was convicted. 49. This argument is directed at the first of the three questions which require to be addressed by the court before making a confiscation order, questions which according to the House of Lords in *R v May*

[2008] UKHL 28 ,

[2008] AC 1028 at [8] were part of the essential structure of the confiscatory provisions in each of the various statutes passed in the UK down to that time. These questions, which arise equally in the confiscatory provisions in the 1999 Law, are: (i) Has the defendant benefitted from the relevant criminal conduct? (ii) If so, what is the value of the benefit the defendant has so obtained? (iii) What sum is recoverable from the defendant? 50. We have referred already to Article 3 of the 1999 Law. Article 3(3) is where the first of these questions is set out in the 1999 Law: it explains that a step on the way to the making of a confiscation order is a determination whether the defendant "has benefited from any relevant criminal conduct" . 51. In the present case the relevant criminal conduct was the Appellant's participation in the criminal conspiracy (see Article 1(2B) of the 1999 Law, which explains what counts as relevant criminal conduct). 52. The Appellant's contention, however, is that the Royal Court was mistaken in concluding that for the purposes of the 1999 Law, the cannabis resin in the garage qualified as a benefit obtained by the Appellant from the conspiracy. As to this, there is a definition in Article 1(2A) of the 1999 Law which explains when a person is taken to benefit from criminal conduct. This provision is in the following terms: "(2A) For the purposes of this Law - (a) a person benefits from any criminal conduct if that person obtains property as a result of or in connection with the conduct; and (b) in particular, but without derogation from sub-paragraph (a), a person benefits from criminal conduct if the person receives any payment or other reward in connection with such conduct, whether carried on by that person or by another." 53. Before addressing the legal arguments concerning the conclusions drawn by the Royal Court at the Confiscation Hearing, it is appropriate to describe the case presented to the Royal Court on the basis of the Sentencing Judgment and the Summary. This case did not require the Royal Court to make factual findings on the basis of conflicting evidence, but only to draw inferences and conclusions based on the statements to be found in the Sentencing Judgment and Summary. 54. Crown Advocate Thomas has drawn attention to the fact that issues for determination at the Sentencing Hearing, and thus at the Newton Hearing before that, were to be proved to the criminal standard, while in contrast those at

the Confiscation Hearing needed proof only to the ordinary civil standard (see Article 3(8) of the 1999 Law). That said, the primary facts had already been found before the Confiscation Hearing, and at that hearing the Royal Court had to proceed on the basis of the description of the findings given in the Sentencing Judgment and the Summary. 55. Key points from the Summary are as follows, focussing on the parts of the Summary concerned directly with the Appellant. The Summary has other detail concerning others of the co-conspirators mentioned below. We also interpolate into this narrative, taken from the Summary a description of the evidence about a change of padlock which was relied upon in the Confiscation Judgment, and as appropriate draw attention to other matters from the Sentencing Judgment: (i) Three men, O'Connor and Heskin from Liverpool and a local man, Smitton, embarked on a conspiracy to import and supply a large quantity of cannabis into the Island. According to the Sentencing Judgment Heskin was to be responsible for the money arrangements, O'Connor was to be responsible for co-ordinating the arrangements in Jersey by ensuring the drugs arrived and liaising with Smitton who was going to be responsible for the Jersey distributions. Arrowsmith was to be a custodian (that is, according to the Sentencing Judgment "He had to hold the drugs in a safe place until such time as they were to be made available to those who were purchasing them"), but was said in the Sentencing Judgment to have joined the conspiracy late. (ii) On 16 September 2017 O'Connor arrived on the Island and stayed until 1 October 2017. Within three hours of arriving he was in telephone contact with the Appellant; and between 28 and 29 September 2017 there were 13 separate telephone calls made by the Appellant to O'Connor. (iii) The Appellant had a rented garage. (iv) On 4 October 2017 Heskin and his girlfriend, April Hodges (who was later tried and acquitted of the charge of conspiring to supply cannabis), arrived on the Island from Liverpool. On arrival they made a small cash deposit into a bank, and then bought a pay-as-you-go phone later used for contact with co-conspirators. Later in the morning the following day Heskin and Hodges again visited the bank and made a further small cash deposit. They then visited a pub which was closed. (v) At this time the Appellant arrived in his van, got out and spoke with Heskin before driving off. The Summary stated, as to this episode " There appears to have been nothing social about this meeting" . We should add that this meeting was the subject of a finding at the Newton Hearing recorded in the Sentencing Judgment: " We did not accept that the Crown had established that a meeting which [the Appellant] had had with one of his co-defendants, Heskin, was for the purpose of transferring cash to him" . (vi) Hodges and Heskin remained in Jersey until 17 October 2017, when they returned to Liverpool. During this time before returning they continued to have contact with Smitton. After returning, telephone contact between O'Connor, Heskin, Hodges and Smitton continued. (vii) The Summary states (at para [32]) that on 3 November 2017 the Appellant was on holiday in India; but the dates of the holiday are not stated. The Summary's last mention of him being in Jersey before the holiday is 5 October 2017, while the first after the holiday is dated to 7 November. (viii) On 30 October O'Connor travelled to Jersey from Liverpool by air. Heskin, Smitton and O'Connor continued in telephone contact with each other. (ix) On 2 November O'Connor met a local man, Paul

Howes, in St Helier. A recording of their conversation suggested that O'Connor had access to commercial quantities of cannabis, that he needed to distribute some and to pay some £50,000 or more to an off-Island third party supplier, and that Howes had access to the local market and could take and pay for some 2 to 4 kilos of the cannabis. (Howes, it should be said, was not convicted as a co-conspirator: he was convicted of the offence of possession with intent to supply.) (x) Between 4 and 7 November O'Connor and Arrowsmith had telephone contact. Also, on 3 November O'Connor was seen in the vicinity of the Appellant's garage, seemingly trying to find it without success. (xi) On 4 November there were various encounters between Arrowsmith and O'Connor, involving among other things journeys to and from Arrowsmith's apartment with a bag and a rucksack. First O'Connor is said to have gone into the apartment with Arrowsmith, O'Connor having been carrying a bag which appeared empty. A little later O'Connor came out with a rucksack which seemed to be full. He was seen to walk in the direction of the Appellant's garage. 15 minutes after leaving Arrowsmith's apartment he telephoned Arrowsmith. Five minutes later both met outside the apartment, went in and O'Connor came out empty handed. (xii) Over the next two days there was telephone contact among O'Connor, Arrowsmith, Smitton and Howes. Once O'Connor was seen walking towards Arrowsmith's apartment. (xiii) On 7 November drugs were transferred from O'Connor to Howes. The sightings of the conspirators (including the Appellant) and the phone exchanges in the run up to this are not easy to follow. An inference is that the drugs provided to Howes were passed by O'Connor to Howes in the afternoon of that day, having been brought by O'Connor out of Arrowsmith's apartment. In the early afternoon of that day the Appellant had been seen picking up Arrowsmith in his van. (The Summary did not say, and did not invite the inference, that the van ride was to take Arrowsmith to the garage to pick up drugs supplied to Howes). (xiv) The Summary does not in fact refer to any occasion when drugs were moved into or out of the garage. Plainly, however there was at least one occasion when drugs were moved into the garage, as drugs were found there when the Police searched it on 9 November 2017. (xv) As mentioned above, the Summary refers to the Appellant having been in Jersey on 7 November. He may well have returned a day or two before, but after 3 November. It is known that on his return from holiday he went to the garage and changed the padlock on garage; but this is not stated in the Summary. Rather it emerges from the Sentencing Judgment, which records that the Appellant gave evidence of this fact. There is no record of the reason for changing the locks: there was no finding on the point, whether recording to accept or recording to reject some explanation offered by the Appellant (if indeed he had been asked for one) at the Newton hearing. (xvi) In the Prosecution's written submission for the Confiscation Hearing the following was stated: " It is asserted [by the Appellant] that he had agreed, when he was on holiday in India, for his lock-up to be used for the storage of cannabis for a brief period. He stipulated that the drugs were to be removed by the time he came back to Jersey. When he returned and found that this had not happened, he contacted the individual responsible for the drugs and said that he wanted the drugs removed" . The first sentence of this statement appears from the Sentencing Judgment, where it is recorded

that the Appellant's evidence as to the time when he agreed to the garage being used was rejected by Superior Number, as was his claim that the telephone conversations of September 2019 were concerned with Chester races. Neither in the Summary nor in the Sentencing Judgment is there any record of what is stated in the second and third sentence. But the Sentencing Judgment, while rejecting the Appellant's evidence about the time when his involvement in the conspiracy started, explained "We found that his statement to us, that his involvement started when he was on holiday and that he simply accepted that he would make his garage available for an unknown quantity of drugs to be left in that garage, we found that to be incredible" . We have quoted in full elsewhere the material passage in the Sentencing Judgment, including the reference to the Appellant's evidence. (xvii) Heskin and Hodges arrived on the Island by air from Liverpool in the evening of 7 November. They were in touch with Smitton by telephone then and the following morning. (xviii) There was a meeting also on that following morning between Arrowsmith and O'Connor. A covert recording was made of this, and from that (according to the Summary an "expert in drugs trafficking has reviewed that conversation and draws the following conclusions" . These were that the Appellant was the subject of the conversation, that he was said by O'Connor to have access to a commercial amount of illicit drugs in which O'Connor had an interest, that the drugs should all have been sold, that the Appellant was worried about law enforcement activity and had not distributed what he had access to, and that O'Connor needed the drugs Arrowsmith had to distribute and would take responsibility for collecting payment. Before us Advocate Bell submitted that the content of the Summary as regards the recorded conversation and the interpretation placed on it by the "expert in drugs trafficking" was not admissible as evidence of the truth or accuracy of the conclusions described. Neither the Prosecution's written submissions for the Confiscation Hearing nor those before us drew attention to the expert's conclusions or sought to rely on them. (xix) On the evening of 8 November O'Connor, Smitton, Heskin and Hodges were seen together in a bar. (xx) On 9 November O'Connor, Arrowsmith, the Appellant and Howes were all arrested. Arrowsmith's apartment was searched, as was the Appellant's garage. The values of the drugs (street and wholesale) from Arrowsmith's apartment were said to be £390,000 to £520,000, and £104,000 to £156,000; and from the garage were said to be £79,000 to £106,000 and £22,400 to £33,600. We interpolate here that a quantity of cannabis was also seized by the Police from Howes' home address, only a little more than one-third (2.5kgs out of 6kgs) being considered to be cannabis from this conspiracy; and in the Sentencing Judgment so far as concerns O'Connor the street values were explained as being £500,000 for drugs from Arrowsmith's apartment, £100,000 for those from the garage, and £100,000 for the cannabis from Howes' home address (implying a value of about £41,500 for the conspiracy cannabis). On this view, the street value of all the drugs known to have been the subject of the conspiracy appears to have been some £641,500, the garage drugs representing a little less than one sixth of the whole. Paragraph [17] of the Prosecution's written submissions for the Confiscation Hearing valued the whole at £507,000, using the lower street values set out above, but again valuing the garage drugs at a little less than one sixth of the

whole. 56. What was said about the Appellant in the Sentencing Judgment needs to be set out in full: "8. ... [The Appellant] said, in his evidence at the Newton hearing, that his involvement was limited to receiving a telephone call while he was on holiday in India, when he agreed to make his garage available for the storage of some drugs. He told us that he did not accept that he was involved in the conspiracy at any earlier stage because the discussions which he had with one of his co-defendants in September related to some invitations to the Chester Races. He told us that he did not know the quantity involved and it is said that we should have regard to the amount that was actually found in his garage, which was 4.9kgs. He did tell us at the Newton hearing that he had gone to inspect the garage when he came back from holiday in India and had changed the padlock on the garage, which of course secured the drugs in the garage for that much longer. We did not accept that the Crown had established that a meeting which he had with one of his co-defendants, Heskin, was for the purposes of transferring money to Heskin. However, we also made it plain at the closing of the Newton hearing that we did not accept his basis of plea either. We found that his statement to us, that his involvement started when he was on holiday in India and that he simply accepted that he would make his garage available for an unknown quantity of drugs to be left in that garage, we found that to be incredible. We did not accept his evidence in relation to the Chester Races. So we said at the close of the Newton hearing that we concluded that he was more than a mere custodian, but he was a custodian, he had an important part to play. Today we do not see that he should get any credit for not knowing how much cannabis would in fact be stored on the premises. He agreed that he would be part of this conspiracy and he has to accept that in our view. Accordingly we take the view that he has a lesser involvement than O'Connor, Heskin and Smitton and we fix a starting point in relation to Templeton-Brown at 9 years' imprisonment." 57. Neither Advocate Bell nor Crown Advocate Thomas has been able to draw our attention to any Jersey cases relevant to the second issue before us, namely whether the Appellant could be said to have "obtained" the cannabis in his garage. In *Warren v AG*

[2014] JCA 080 this Court had an appeal under the Drug Trafficking Offences (Jersey) Law ; but it was not in issue that the defendant had benefitted from drug trafficking, the point having been conceded at the defendant's trial when he was convicted of conspiracy to import cannabis. We were referred, however, to a number of cases from the UK, starting with *R v May* , above, decided on the meaning of comparable confiscatory provisions to those in the 1999 Law, in particular section 76(4) of the UK Proceeds of Crime Act 2002. That section is in all relevant respects the same as Article 1(2A)(a) of the 1999 Law. We accept that in reaching our decision concerning the meaning and effect of Article 1(2A)(a) of the 1999 Law we should have regard to both the judgments given in the House of Lords and Supreme Court on section 76(4) Proceeds of Crime Act 2002, and those of the Court of Appeal. 58. A feature of the present appeal is that it is concerned only with the parcel of cannabis in the Appellant's garage. It is therefore not concerned either with cash or money moving through the banking system, or indeed with the cannabis found in Arrowsmith's

and Howes' properties. As mentioned above, at the Confiscation Hearing the Prosecution had contended that the property obtained by the conspirators together, and hence by the Appellant as one of the conspirators, was the whole of the conspiracy drugs valued at £507,000, and had sought against the Appellant a confiscation order based upon that having been property obtained and hence the basis for the value of the Appellant's benefit from his criminal conduct. This submission was rejected by the Royal Court in the Confiscation Judgment; and there has been no appeal against this rejection. What the Royal Court said on the point was that "We do not, however, see a sufficient evidentiary basis to suggest that [the Appellant] was involved in the entirety of the importation and in our judgment his benefit was the value of the drugs seized in his lock up garage" . 59. We consider the Royal Court's unappealed rejection of the Prosecution's case, referred to in the previous point, needs to be kept in mind on this appeal. It entails a conclusion that the Appellant is to be distinguished from O'Connor, Heskin and Smitton, each of whom was taken to have obtained the whole of the conspiracy cannabis, in O'Connor's case having been dealt with at the Confiscation Hearing at the same time as the Appellant's was dealt with. He cannot be treated simply as a joint member of the conspiracy who for that reason is to be taken to have jointly obtained with his fellow conspirators the property obtained by any of them in the course of their conspiracy. Necessarily his role in the conspiracy did not go beyond the drugs in his garage. 60. We start our consideration of the relevant principles by looking at the position of the Appellant standing apart from his co-conspirators. 61. The cannabis in question is a chattel: it is physically moveable property. But, for the purposes of the 1999 Law "property" is defined in Article 1(1) in terms which, in the case of an item of physically moveable property, include not only the item but also any interest in or power in respect of it, and any right in relation to it including a right to possession of it (paras (b) and (c) of the definition). Further, the definition makes it clear that " for the avoidance of doubt a reference in this Law to property being obtained by a person includes a reference to any interest in that property being obtained." The importance of this, for the present case, that if it were held that the Appellant had obtained, say, an interest in the cannabis or a right in relation to it, the valuation of the property for the purposes of the third question mentioned in paragraph 49 above, and discussed further in relation to the third issue on this appeal, would be the interest in the cannabis or the right in relation to it obtained by the Appellant, and not the cannabis taken by itself. 62. The cases relied upon by Advocate Bell, referred to in greater detail below, all cases from England and Wales, establish that a person will not "obtain" property for the purposes of the relevant confiscatory provisions in that jurisdiction where the person has no legal interest in it and neither has the person any power of disposition or control, so that someone who is a courier or custodian of property, and nothing more, does not "obtain" it. Advocate Bell submits that we should give the same interpretation to Article 1(2A)(a) of the 1999 Law. 63. In our judgment, having regard to the cases relied on by Advocate Bell and leaving out of account the application of these principles in the case of a conspiracy, ordinarily a defendant will "obtain" a chattel within Article 1(2A)(a) only if the defendant comes to own it or assume (that is, take to himself or herself) the right of an

owner, this right connoting a power of disposition or control. 64. That said, it should be kept in mind that the word "obtain" is a word of ordinary language, and what we have just described is not a substitute for the words of the Article. But what the cases do establish is that merely because one holds or has physical possession of something it does not follow that one has "obtained" it. There must be more than merely having it. What will matter is how and for what purpose one has come to hold or have physical possession and what then one can or does do with it. A dictionary meaning of the verb "obtain" in the Shorter Oxford English Dictionary, indeed the first given meaning, is "to procure or gain, as the result of purpose and effort". In our judgment the cases establish that as a minimum there must be some element of right acquired or asserted for the person to have obtained it. 65. That the word "obtain" is used as a matter of ordinary language was emphasised at paragraph [45] of the Supreme Court's judgment in *R v Ahmed*

[2014] UKSC 36 ,

[2015] AC 299 where, having made reference to what had been said by Lord Bingham in *R v May* , the judgment explained in the context of a joint enterprise conspiracy that "The fact that the item may have been taken physically 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 ..." . 66. However, almost immediately, when one considers the position of someone - it may be a courier, a warehouse keeper or the like - who holds property which is the subject of a conspiracy and as a participant in the conspiracy, there is a difficulty. In such a case the different conspirators may have different roles to play in relation to the property. 67. *R v Ahmad* is the most recent of the cases and at [50] it was pointed out in the Supreme Court's judgment that "There has sometimes been a tendency to equate 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 *R v Allpress* " (see below). The Supreme Court then went on to caution against concluding that property is jointly obtained simply because of the difficulty of determining how the asset(s) obtained have been distributed between defendants, while nevertheless saying that a finding of joint obtaining may be the proper or only available finding. 68. The difficulty of applying the confiscation provisions of the UK equivalents to the 1999 Law in the case of conspiracies and joint enterprises has resulted in numerous appeals coming before the Court of Appeal and the House of Lords and Supreme Court, a point made in paragraph

[39] of the judgment in *R v Ahmad* . We discuss several, but by no means all, of these below. 69. The first of the cases to which we have been referred is *R v May* (above). It was not concerned so much with the quality of the legal right, or nature of possession or control, which a person might need to have in order to be found to have "obtained" it for the purposes of the equivalent to Article 1(2A(a), but rather with the way in which co-

conspirators might be found to have obtained property acquired in the course of the conspiracy. It was one of a trio of cases decided at the same time on UK confiscatory and like provisions by the same panel (Lord Bingham, Lord Phillips, Baroness Hale, Lord Carswell and Lord Brown) the two other cases being *R v Jennings*

[2008] UKHL 29 ,

[2008] 1 AC 1046 , and *R v Green*

[2008] UKHL 30 ,

[2008] 1 AC 1053 . There was, inevitably, consideration given to the general meaning of the expression "obtain" as used in these provisions. 70. Thus, in *R v May* Lord Bingham gave a speech in which he explained at [1] and [2] that " This is the considered opinion of the committee" ; and also that "This is the first of a trilogy of appeals relating to the confiscation of criminal assets. They raise important questions of the interpretation and application of the statutes which, at the relevant times, governed this matter ..." . The Appellate Committee's opinion was, at [48] expressed as set out below. If strictly obiter, it was nevertheless intended to be definitive, as pointed out by the English Court of Appeal in *R v Allpress* below at para 68. What was explained was (dividing up the numbered subparagraphs for clarity): "48. The committee would conclude by drawing attention to the current importance of the power to make confiscation orders. ... Recognition of the importance and difficulty of this jurisdiction prompts the committee to emphasise the broad principles to be followed by those called upon to exercise it in future.

- (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." 71. It should be noted at once that the Supreme Court has, in *R v Ahmad*, emphasised the gloss to be put on this last proposition, proposition (6): at paragraph 42 it was explained that when, in paragraph 48(6) of *R v May* "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". And it was added "In *R v Allpress* ... para 64, the Court of Appeal helpfully interpolated the words 'assumes the rights of owner' to make this clear". 72. The case of *R v Jennings*, above, was concerned with a restraint proceeding, but the statutory provisions raised similar issues about obtaining property to those considered in *R v May*. In relation to the question of the obtaining of property, the Appellate Committee's opinion (at [13]), after reference had been made to *R v May*, was: "... There is a real danger in judicial exegesis of an expression with a plain English meaning, since the exegesis may be substituted for the language of the legislation. It is, however, relevant to remember that the object of the legislation is to deprive the defendant of the product of his crime or its equivalent, not to operate by way of fine. The rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent. He cannot, and should not, be deprived of what he has never obtained or its equivalent, because that is a fine. This must ordinarily mean that he 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." 73. The second case relied upon by Advocate Bell, *R v Ahmad*, above, was concerned with the valuation of benefit obtained when there was a joint enterprise conspiracy. Advocate Bell submitted that in that case the Supreme Court regarded

R v May supra as having endorsed the general proposition that common law principles are applicable in determining whether property has been obtained, including whether it has been obtained jointly by conspirators in the course of the conspiracy. We discuss this case in detail below. 74. The third case relied upon by Advocate Bell is R v Allpress

[2009] EWCA Crim 8 ,

[2009] 2 Cr App R S 58 , the case referred to in the extract we have quoted above from the judgment in R v May . In this case the Court of Criminal Appeal of England and Wales sat as a panel of five judges to hear five confiscation cases where the criminal activity was money laundering. In giving the judgment of the Court of Appeal Toulson LJ (who was one of the Supreme Court justices to give the judgment of the Supreme Court in R v Ahmad) discussed at length what is required for a person to be found to have obtained property for the purposes of the confiscation provisions comparable to those in the 1999 Law. In R v Ahmad none of the many references made to R v Allpress is in terms of disapproval or disagreement. In terms of Article 1(2A)(a) of the 1999 Law the definition of "property" in Article 1(1) is relevant when considering R v Allpress . Earlier in this judgment we have drawn attention to features of that definition. 75. We return to the Allpress case later when considering the approach to be taken when it is said that a defendant conspirator has obtained property so as to have benefitted from it, when the ownership or control lies with others of the conspirators and the defendant may have had no immediate contact with the property or perhaps may have had it pass through his or her hands. The case was concerned chiefly with couriers and custodians of cash and money, rather than of chattels. Nevertheless, the Court of Appeal had also to approach the questions before it having regard to the way one might be found to have obtained chattels; and what was said as to these questions provides guidance as to the way Article 1(2A)(a) of the 1999 Law should be interpreted, being similar to section 71(4) of the Criminal Justice Act 1988 (considered in the Allpress case): "(4) For the purposes of this Part of this Act 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." 76. In the Allpress case the Court of Appeal was clear that someone who had mere manual possession of an item of property was not to be regarded as having obtained property for the purpose of the statutory compensation provisions under consideration simply by reason of his or her holding the property. This was explained at paragraph s [72] to [75], [77], [80] and [82] of the judgment of Toulson LJ: "72. In the case of the statute which we are considering, the answer to the question whether a person is intended to be regarded as holding an interest in property by mere manual possession, or whether something more is required, is put beyond doubt by the words "a right to possession".

73. Some bailments may be on terms which give to the bailee a right to possession as against the bailor, that is, a right to possession for his own benefit, and others will not. 74. Crossley Vaines on Personal Property (5th edn), (1973) p.70 states: "Bailment eludes precise definition because the term covers a host of legal relationships which have as a common denominator

only that one is in possession of another's chattel. Possession is the salient feature, but the forms and incidents of bailment are miscellaneous... The bailment may be for the benefit of the bailor e.g., a deposit, or for that of the bailee, e.g., a loan."

75. That general statement remains accurate. To return to the example of the till operator in the supermarket, he or she has manual possession of the money paid by the customer until it is placed in the till (and will continue to have some manual control over the contents of the till during the operator's shift, because he or she can take money from the till to give to another customer by way of change), but the till operator has no right to possession of the money; he or she holds the money for the employer. ...
77. Moreover, even if the mere custodian were held to have a limited interest in the property, the relevant value would be the value of that interest, which if the property was being held purely for another would be nil. ...
80. We conclude 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 ... CJA 1988 s.71(4) ...". ...
82. We reach the same conclusion in relation to a mere custodian of cash for another. ...". 77. In the result, in the Allpress case the Court of Appeal quashed the confiscation orders made as regards four of the five defendants. The only order which was upheld was that of a solicitor, Morris, who banked money obtained by co-conspirators in "missing trader" frauds through his firm's client account in the names of different clients and who then made disbursements for the benefit of the conspirators. (The case of Morris is referred to in the judgment, quoted below, in *R v Clark*.) 78. In the present case Crown Advocate Thomas seeks to meet the Appellant's case on the facts. His argument has two connected planks. The first is that the Royal Court at the Sentencing Hearing, in the passage in the judgment quoted in paragraph 5 above, said that the Appellant was more than a mere custodian, but he was a custodian, he had an important part to play. In this he repeats his submission made at the Confiscation Hearing (according to paragraph 37 of the judgment following the hearing), that: "because the Superior Number [at the Sentencing Hearing] rejected the description of the [Appellant's] role as a 'mere custodian' we may be satisfied that he was an important participant and was jointly responsible with the others for the drugs recovered in the course of the conspiracy even though only a portion of the drugs were stored at his premises". 79. On this basis, the case is that this was a finding that the Appellant was more than a manual custodian in whose care the drugs lay and that the finding connoted a power of disposition or control; and the case is then strengthened, submits Crown Advocate Thomas, by the references both in the part of the Sentencing Judgment quoted in paragraph 6 above and in the judgment following the Confiscation Hearing (quoted later) to the Appellant having changed the lock on the garage. This changing of the lock is said to be evidence of his having control over the cannabis in the garage. 80. A submission made by Crown Advocate Thomas, citing the Appellate Committee in *R v May* at paragraph 48(6), is that "a 'mere custodian' is

someone who is rewarded by a specific fee and has no interest in the property or proceeds of sale", and that the Royal Court was therefore to be taken to have found that this was not a case where the Appellant was to be rewarded by a specific fee. 81. We reject that submission; we cannot accept that when the Royal Court, at the Sentencing Hearing, found that the Appellant was "more than a mere custodian, but he was a custodian", the Court made any finding concerning the absence of any fee and the existence of an interest in the property or proceeds of sale of the property lying in his garage. The statement, quoted in the previous paragraph, made by the Appellate Committee and relied upon by Crown Advocate Thomas was drawing attention to features which might enable a court to distinguish between those who qualify as having obtained property, and those who do not. But it was not laying down a rule that their presence or absence in any case would necessarily determine the characterisation. These features are not the simple touchstone, highly relevant as they may be when the Court is being invited to draw inferences as to the relationship between a person and property held by the person. Furthermore, in the present case we have not seen any evidence or finding one way or the other before either the sentencing court, or more importantly the court at the Confiscation Hearing, concerning the absence of any fee. Indeed, we were told that there was no argument about the point one way or the other at the Confiscation Hearing. 82. The second plank of Crown Advocate Thomas's argument is that the Royal Court found that the cannabis in the garage had been obtained by one or more of the other conspirators and that, by reason of the conspiracy and the Appellant's participation, he too was to be taken as a co-owner, or at any rate as jointly in control of the cannabis, with other conspirators so as to be held to have obtained it with them. In other words, Crown Advocate Thomas' submission is that, whatever might have been the conclusion if one had looked only at the position of the Appellant taken by himself, and concentrated on the bare fact that the cannabis was lying in his garage and that he had changed the lock on the garage when the cannabis was there, nevertheless he was a co-conspirator in a conspiracy to supply cannabis, some of which was stored in his garage, and therefore his connection with the cannabis is as co-conspirator with others in a conspiracy to supply the cannabis, that being then the reason why to his knowledge and with his agreement there was cannabis of the conspirators there. 83. For this proposition Crown Advocate Thomas relies on several authorities. Three were considered by the Royal Court in the Confiscation Judgment, namely *R v Green*, above; *R v Lambert*

[2012] 2 Cr App R(S) 90; and *R v Ahmad*, above. The fourth is *R v Clark and Severn*

[2011] EWCA Crim 15,

[2011] 2 Cr App R S 55. 84. In *R v Clark* a confiscation order had been made against the appellant based on the value of stolen cars which passed through his hands. There was a conspiracy involving the theft of cars, their containerisation and then export. The appellant's role was to carry out the containerisation of the cars. The question was whether, as the judge had held, he had obtained the cars, and thus whether the benefit from his criminal conduct in participating in the conspiracy was the value of the cars. The Court of Appeal quashed the

compensation order made by the judge. In that case, however, the Court of Appeal had a power which is not available to this Court, namely a power to remit the case for a further

determination.

85. The Court of Appeal's judgment given by Rix LJ, gave careful attention to the judgment in *R v Allpress*, which it approved and from which it cited extensively (including parts of the judgment which we have set out). Rix LJ's judgment in *R v Clark* continued with the following statements among others: "28. ... [The appellant] was not a courier or custodian of money or drugs, but he was, through his company EazyStore, a bailee of the cars for the purpose of containerising and transporting them to Felixstowe in preparation for their shipment to East Africa. He was an "integral facilitator", but there was nothing to link him either with the original thefts or with the onward sales in Africa or the proceeds of such sales. His role was no doubt an important part of the overall handling conspiracy, but there was nothing apart from the importance of that role to suggest that the cars were jointly owned by him (or Severn) with other principal conspirators. Nor, like Morris in *Allpress*, did his involvement amount to putting the cars into his account or his name. The shipment from Felixstowe was in any event arranged by a separate shipping agent, and there is no case that the cars were exported in EazyStore's or his name. ...
30. It was submitted on behalf of the prosecution in some of the appeals that the court was wrong to say in para 12(6) of *R v Sivaraman* [
- [2008] EWCA Crim 1736] that 'where property is received by one conspirator, what matters is the capacity in which he receives it, that is, whether for his own personal benefit, or on behalf of others, or jointly on behalf of himself and others'. We will come to the question whether any of the legislation requires a different approach in relation to money, but we remain of the view that the sentence correctly states the effect of *May* and others. Otherwise, the judicial committee would not have concluded its report in *May* by observing that mere couriers or custodians are unlikely to be found to have obtained the relevant property. A mere courier or custodian is a bailee who receives physical possession of property for another." There then followed this important paragraph: "31. In *Sivaraman* the court also addressed two misconceptions which subsequent cases suggest may still be common. One was that in assessing benefit in a conspiracy case each conspirator is to be taken as having jointly obtained the whole benefit obtained by 'the conspiracy'. A conspiracy is not a legal entity but an agreement or arrangement which people may join or leave at different times. In confiscation proceedings the court is concerned not with the aggregate benefit obtained by all the parties to the conspiracy but with the benefit obtained, whether singly or jointly, by the individual conspirator before the court. The second misconception is a variant of the first. It is that anybody who has taken part in a conspiracy in more than a minor way is to be taken as having a joint share in all benefits obtained from the conspiracy. This is to confuse criminal liability and resulting benefit. The more heavily involved a defendant is in a conspiracy, the more severe the penalty which may be

merited, but in confiscation proceedings the focus of the inquiry is on the benefit gained by the relevant defendant. In the nature of things there may well be a lack of reliable evidence about the exact benefit obtained by any particular conspirator, and in drawing common sense inferences the role of a particular conspirator may be relevant as a matter of fact, but that is a purely evidential matter." 86. At this point it is necessary to consider further the judgment given by the Supreme Court in *R v Ahmad*. Before the Supreme Court were two appeals. (i) One, the *Ahmad* appeal, concerned a missing trader fraud in which large amounts of money involved in the fraud had passed through a company of which the two defendants (co-conspirators) were shareholders and directors. It was held that in principle the two defendants had obtained jointly, for the purposes of the Proceeds of Crime legislation, the whole of the relevant money. In this regard Hooper LJ had said, when the case was before the Court of Appeal (*Ahmed v R*

[2012] 1 WLR 2335 at [21]) and in reliance of what had been said by Lord Bingham in *R v May*

[2008] AC 1028 at [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 ..." (see *Ahmad* at [16]). (ii) In the other appeal, the appeal of *Fields and others*, three defendants had been convicted in a conspiracy to defraud using a company; and (as appears from the judgment given by Davis LJ in the Court of Appeal at para [30]), they have been found to be co-principals in a joint operation, that the case was one of joint benefit as to three of them, and that there was no challenge on appeal to that finding of fact. (iii) The issue before the Supreme Court was not therefore the quantification of the aggregate recoverable amount of the conspiracy property, or of the fact that this was obtained jointly (see para

[23] of the judgment of the Supreme Court). What was in issue was the identification and quantification of benefit obtained by co-conspirators: the appellant defendants' case was that it would be contrary to principle and unfair for each of the co-conspirators to be taken to have obtained the whole of property involved in the conspiracy, or alternatively for each severally to have to pay to the State the total amount of the benefit taken to have been obtained by all. There was no question that the property obtained by the conspirators together was the money passing within the companies; rather, each conspirator should be taken to have obtained a proportionate share of the money. 87. This being the context of the case before the Supreme Court, the judgment of the court given by Lords Neuberger, Hughes and Toulson included at paragraphs [1] to [10] and [34] to [40] a discussion of general principles, with paragraphs [41] to [59] being set out under the heading "The first question: has the defendant benefited?". Thereafter the judgment addressed the question of quantification and double-recovery. 88. We have quoted already from paragraph [50] of the judgment. Paragraph [51] continues in a similar vein, clearly explaining that it would be wrong simply to conclude that because a person is party to a conspiracy, the person is to be treated as having obtained jointly with the co-conspirators all the property obtained by any of them. This paragraph is in the following terms (emphasis added): "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." 89. At paragraph [70] of the judgment the court commented, in relation to the Fields defendants, that in view of the absence of appeal against the judge's finding, the Court of Appeal had been right to hold that the benefit to be valued in the case of each defendant was the whole amount of the property obtained. Then it was said " 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 be that the defendants have obtained different property ". This, it would seem is a further indication that when in a confiscation context, there is a question as to what property is to be found to have been obtained by a defendant who is party to a conspiracy, the court should not simply start from the premise that, unless shown otherwise by a defendant, all the property obtained in the course of the conspiracy should be found to have been obtained jointly by all of the conspirators. 90. Again, at paragraph [41] the discussion of the question "has the defendant benefited?" began with the following, which appears to focus attention on the position of the individual in a conspiracy as the starting point: 91. Going the other way, however, and relied upon by the Prosecution in the present case, are other passages in the judgment in *R v Ahmad* . First, there is the very last part of paragraph [45], quoted from above. Having referred to paragraphs [41] and

- [42] and commented on the fact that the word "obtain" is used as a word of ordinary language, the judgment completed the last sentence by adding " and the non-statutory word 'joint' referred to by Lord Bingham in *R v May* ... paras 17, 27-34, should be understood in the same non-technical way". 92. Secondly, paragraph [42] of the judgment, in analysing what is required for property to be "obtained", explains the relevance of a power of control and disposition, and draws a distinction between the person with such power and the courier or custodian, in the following terms, before adding (in paragraph [43]) that " 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" . Paragraph [42] reads: "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 JSC and Hughes LJ in *R v Waya*

- [2013] 1 AC 294 , 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 *R v May*
- [2008] AC 1028 , para 48(6). In *R v Allpress*
- [2009] 2 Cr App R (S) 399, para 64, the Court of Appeal helpfully interpolated the words "assumes the rights of an owner" to make this clear." 93. Pausing there, it might be thought that in the present case the distinction between the position of the Appellant and that of O'Connor is easy to see if the Appellant is taken to be a custodian to whom the cannabis was entrusted for holding for the co-conspirators. This would naturally mean that he had not obtained jointly with any of the other co-conspirators any of the cannabis which did not pass through his garage; but it would also imply that he had not himself any power of disposition or control over the drugs when in the garage. (For reasons we explain later, we consider the changing of the locks to be of no assistance one way or the other on this particular issue). 94. Thirdly, the discussion at paragraphs [46] to
- [48] of the judgment in *R v Ahmad* may seem to lead to a conclusion that in a joint enterprise conspiracy the onus is on a defendant conspirator to show why their involvement is so limited that they did not obtain any property at all or are to be taken not to have obtained all of the conspiracy property rather than a part of it. These paragraphs read (emphasis added): "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 *R v May*, para 48(6), first sentence (although the word "owns" is probably inappropriate), in *R v Green*
- [2008] AC 1053 , para 15, and in *R v Allpress* [2009] 2 Cr App R (S) 399, para 31 (as quoted and approved in *R v Mackle*
- [2014] AC 678 , para 65). However, that will by no means be the correct conclusion in every such case. 47. As was said in *R v Sivaraman*
- [2009] 1 Cr App R (S) 46 , para 12(6) and in *R v Allpress*, paras 30-31 (and approved in *R v 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 *R v May*, paras 15 and 17, and in *R v Allpress*, paras 80-82) or a latecomer to a conspiracy in which nothing was obtained after his arrival (as discussed in *R v May*, para 19)." 95. Paragraph [49] then goes on to give illustrations of cases where there may be several individual obtainings in a joint enterprise conspiracy: "49. It is clear from *R v May* at para 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 *R v May* at para 32 that there could be such cases, albeit that *R v Gibbons* [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." 96. A theme which runs through the judgment in *R v Ahmad* is that the court dealing with a confiscation application in relation to a conspiracy can and should draw sensible inferences adverse to the defendant, when appropriate. Examples will be when information is not forthcoming from defendants, when the explanations presented by the defendants are implausible or where the defendants have been found to be lying. The context of the confiscation application, after all, is that the defendant has been found guilty of an offence, and the issue has become one to determine what, crudely speaking, the defendants got from their crime. This point is explained in particular in paragraph [36]: "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." 97. A final consideration in relation to *R v Ahmad* is that the Supreme Court appears to have been seeking to explain and endorse the existing principles as developed in cases starting with *R v May* and continuing with others of the cases to which we have already made reference. This is explained in paragraphs [39] and [40]. On the issue which is material for issue 2 before us, the Supreme Court did not see their judgment as offering a new departure from existing guidance: "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 *R v May*

[2008] AC 1028 , *Jennings v Crown Prosecution Service*

[2008] AC 1046 and *R v Green*

[2008] AC 1053 . Also, in *R v Waya*

[2013] 1 AC 294 , Lord Walker of Gestingthorpe JSC 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 and *R v Ascroft* [2004] 1 Cr App R (S) 326. *R v Mackle* (Patrick)

[2014] AC 678 was another decision of this court concerned with the 2002 Act, and in the course of his judgment, Lord Kerr of Tonaghmore JSC, 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* [2009] 1 Cr App R (S) 469 and *R v Allpress* [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." 98. Starting from first principles, we do not believe that when a confiscation order is sought and there

has been illicit property held by a defendant in connection with which the defendant is prosecuted and convicted, it will automatically be for the defendant to show that the property was not in fact "obtained" as a result of or in connection with the conduct. That would indeed be contrary to the statement made by Beloff JA giving the judgment of the Court of Appeal in *Warren v AG*

[2014] JCA 080 at [5] (a case decided, however, before the Supreme Court's decision in *R v Ahmad* (supra)). Whether or not the natural inference is that the property was so obtained will depend on the circumstance of the particular case. In a case such as the present, where a defendant has pleaded guilty to conspiracy to supply drugs, and drugs which are the subject of the conspiracy have been found to be held by him (that is, found on his property, where he knew they were or might be) a natural inference in the absence of any other explanation could be that the defendant was in control of them and had "obtained them". In such a situation it would then be for the defendant to show that after all the defendant's role in the conspiracy was the limited one of being a holder of the relevant property, for example as a courier or as someone storing them without any further interest in them, and that therefore the defendant had not obtained the property. Relevant to this could be the evidence and inferences to be drawn concerning the defendant's reasons for having the property, for example in return for a fee or a favour or in anticipation of a share in the property or proceeds (cf *R v Ahmad* at [47]). 99. The reason why in our judgment this analysis does not lead immediately in the present case to the conclusion that, as was held in the Confiscation Judgment, the Appellant had obtained the drugs found in the garage is the finding of the Superior Number at the Sentencing Hearing that the Appellant had been found to be a "custodian". That finding, in our judgment, implies that the Superior Number had held that the Appellant was looking after the cannabis in his garage, while the cannabis was there, for someone else and not for himself as his drugs under his control. 100. We have referred above to the Statement (that is, the Attorney General's Statement of 21 May 2019), given in advance of the Sentencing Hearing. This contained, so far as relevant to the immediate issue, the following after a reference to the Newton Hearing (describing the question concerning the factual basis of the Appellant's guilty plea, and saying "the Court has now found him guilty of being a custodian of the drugs and part of the Conspiracy"): "Following analysis of mobile telephone communication and surveillance evidence his role in the syndicate was suspected to be that of wholesale storage and concerned with the distribution of cannabis locally". Article 7(6) of the 1999 Law makes provision for the court to be able to require a defendant to indicate the extent to which each allegation in such a statement is accepted and, insofar as not accepted, to give particulars of any matters on which the defendant proposes to rely. By Article 7(8) of the 1999 Law the defendant's acceptance may be treated as conclusive of the matters accepted, and Article 7(9) explains that the same may follow where the defendant fails to comply with a requirement under Article 7(6). In the present case this process seems not to have been followed. Thus the Statement cannot have provided any assistance at the Confiscation Hearing, not itself apparently raising any issue

requiring a response and evidence from the Appellant. 101. The Confiscation Judgment is succinct, and so far as concerns the Appellant, contained in two paragraphs (the relevant part of the second paragraph quoted below having already been set out in this judgment): "50. ... There does not appear to us to be a sufficient basis for saying that [the Appellant's] interest in the drugs extended beyond the amount in his lock-up garage. However, on the basis of the findings of the Superior Number, we are satisfied that for those amounts at least he obtained control and had in reality dispositive powers. This is reinforced in our view by the fact that on his return to Jersey he changed the locks and could thereby have withheld or distributed the drugs from his lock-up garage at his discretion. 51. We do not, however, see a sufficient evidentiary basis to suggest that he was involved in the entirety of the importation and in our judgment his benefit was the value of the drugs seized in his lock-up garage, some £79,500...." 102. In seeking to explain why the conclusion in the Confiscation Judgment was reasonably open to the Royal Court, Crown Advocate Thomas has relied on the following matters: (i) The telephone contact between the Appellant and O'Connor on 28 and 29 September 2017. (ii) The meeting between the Appellant on the one hand and Heskin and Hodges on 5 October 2017. (iii) The van ride on 7 November 2017. (iv) The fact that drugs were found in the garage on 9 November 2017. (v) The Appellant's changing of the padlock on the garage on his return from India. (vi) The finding of the Superior Number referred to in the Sentencing Judgment, that they had rejected his evidence that the telephone contact in September 2017 had been concerned with Chester races. (vii) The finding of the Superior Number also referred to in the Sentencing Judgment, that they found incredible his statement that his involvement with the conspiracy started when he was on holiday in India and that he simply accepted that he would make his garage available for an unknown quantity of drugs to be left in the garage. (viii) The finding of the Superior Number that the Appellant was more than a "mere custodian" and that, although a custodian, he had an important part to play. 103. The question for us, then, is whether the Royal Court's conclusion concerning the Appellant having "obtained" the drugs in his garage set out in the Confiscation Judgment could not reasonably have been arrived at based on just what we have referred to in the previous paragraph, taken together with the important fact that the Appellant had pleaded guilty and been convicted of being a conspirator with the others in the conspiracy to supply cannabis. 104. In our judgment, on the very sparse material before the Royal Court at the Confiscation Hearing, the Royal Court was mistaken to attach any weight to the fact that on his return from India the Appellant changed the padlock on the garage. This is because there is no evidence to allow any conclusions to be drawn as to the Appellant's reasons for changing the lock. Indeed, there is not even evidence that he was asked about the reason when he gave evidence at the Newton Hearing. All that is known is the bare fact that he changed the lock. Whether the lock was changed as an assertion of ownership or control, or simply to improve the security of the garage in view of its valuable contents, or for some other reason, we do not know. 105. It follows that we cannot see how the changing of the lock assists the conclusion, reached by the Royal Court in their Confiscation Judgment and said to be based on the findings of the Superior Number (which must be those

recorded in the Sentencing Judgment) that the Appellant "obtained control and had in reality dispositive powers" in relation to the drugs in the lock up. Certainly, the changing of the lock might prevent someone, perhaps a fellow conspirator, who had previously had a key to the lock up from now getting access without having the Appellant provide a key or attend at the garage to unlock. But we cannot see that his change of the lock helps with a conclusion that any drugs in the garage already or thereafter moved into the garage are to be taken as in some colloquial sense "his", having been "obtained" by the Appellant in the course of the conspiracy, when (as the Superior Number had found) the Appellant was a custodian of the drugs in the garage. This is because the normal function of a custodian is to hold or protect something for someone else. Only if the finding that the Appellant was "more than a mere custodian" is taken as being a finding that the drugs were after all his, at least to some extent, can the change of the lock be considered significant, suggesting that the Appellant was looking after his own. But that assumes the very thing that the evidence is being relied upon to establish. 106. The first to fourth matters referred to in paragraph 102 above do no more than to identify when and how the Appellant joined the conspiracy, resulting in cannabis being in his garage as a "custodian" on the day of his arrest. These matters would have been quite different if, for example, there were some evidence that the Appellant was himself involved in finding and negotiating with distributors the onwards transmission of the drugs passing through his garage. 107. The sixth and seventh matters establish that at the Newton Hearing the Appellant was not truthful about the time when he joined the conspiracy, or about what he had agreed concerning the storage of drugs in his garage: he had tried at the least to play down the assistance he had given the other conspirators by offering and providing storage space for the drugs to be imported and supplied in the course of the conspiracy. 108. Nevertheless, the circumstance that a defendant is not truthful on one aspect of what he is charged with cannot support an inference that he must after all have been involved in aspects of the conspiracy which do not even appear to have been put to him and certainly are not the subject of any finding or other material before the court making a confiscation order. Specifically, because the Appellant was not truthful as described in the previous paragraph, it cannot in our judgment be inferred, and it does not follow, that his role in the conspiracy was to be any more than to receive, hold and allow the return of drugs placed into his garage in the course of the conspiracy; that, in other words, his role was to be any more than that of custodian. 109. The eighth of the matters referred to in paragraph 102 above is, it seems to us, the Prosecution's sheet anchor. Here the question is what conclusion was it open to the Royal Court at the Confiscation Hearing to arrive at, based on the finding in the Sentencing Judgment: "So we said at the close of the Newton hearing that we concluded that [the Appellant] was more than a mere custodian, but he was a custodian, he had an important part to play". 110. We have already quoted what was said in the Sentencing Judgment concerning the position of Arrowsmith as a custodian. In full, the relevant statement was: "He had to hold the drugs in a safe place until such time as they were to be made available to those who were purchasing them and it should not be understated that custodians play a very important part in a conspiracy of this kind". From

this it can be inferred that in saying, in relation to the Appellant, that he had an important part to play the Royal Court was doing nothing more than making the point that an enterprise of importing and supplying drugs in Jersey will be difficult, if not impossible, without a safe house, as it were, for the drugs. Custodians are essential for the conspiracy. But in itself that says nothing to assist a conclusion that the Appellant, for all that his part in the conspiracy as a custodian was important, had obtained the drugs in his garage. 111. The final part of the Superior Number's finding in the Sentencing Judgment is the statement that the Appellant was "more than a mere custodian". We cannot see this as a matter from which the Royal Court could draw any support for a conclusion concerning the nature of the Appellant's involvement with the other conspirators and his position in relation to the drugs in the garage so that they might be said to be in some sense his, in whole or part, and obtained by him. It is wholly unclear what distinction is conveyed by characterising someone as a custodian who is more than a "mere custodian". 112. If, for example, the distinction was that a custodian, not being a mere custodian, could expect to share with co-conspirators in the proceeds of the thing guarded, then obviously a custodian who is more than a mere custodian could be found to have obtained the thing guarded. But in the present case the benefit to obtained by the Appellant from having the drugs in his garage, and the reason why he decided to have them in the garage, appear from the materials before the Royal Court never to have been considered, put to the Appellant, or made the subject of any finding. 113. Alternatively, for example, if the function of the Appellant, which the distinction was intended to convey, was that he was to have been involved with O'Connor in organising the import of the drugs and their carriage to his garage, or that he was involved in assisting Heskin in the collection and transmission of the sale proceeds as drugs left the garage, the same inference could be drawn. But, again, there was no evidence at the Confiscation Hearing to suggest any of these matters. 114. Accordingly, in our judgment the Royal Court at the Confiscation Hearing could not make any finding about any of these matters referred to in the previous paragraphs, as the materials provided did not give any help. While there may well be cases in which at a confiscation hearing, a defendant claiming to be a custodian can be called upon to explain what was "in it" for the defendant in joining the conspiracy, and in which adverse inferences may be drawn in the absence of any, or any satisfactory, explanation, that course does not appear to have been followed in this case; Crown Advocate Thomas confirmed before us that at no stage had the issue of what, if any, reward the Appellant was to receive for being part of the conspiracy been raised with the Appellant; nor had the Royal Court been invited to draw any inferences from any failure on the Appellant's part to give any such explanation. 115. For the Confiscation Hearing the Prosecution took its stand on the matters set out in paragraph 101 above. In the Confiscation Judgment they were found (rightly, we think) to be insufficient to enable the Royal Court to reach a conclusion that the Appellant had obtained jointly with others all the conspiracy drugs (that is, including those in Arrowsmith's apartment and at Howes' home address) obtained by others of his fellow conspirators: he was not one of the co-principal conspirators jointly obtaining with them the conspiracy drugs. In our judgment the matters we have described

were insufficient, in the face of the finding by the Superior Number that the Appellant was a custodian, to show that his involvement in the conspiracy went further than holding the drugs for a period in his garage for the other conspirators, important as that was for the conspiracy. 116. In conclusion on this aspect, we are unable to see a sufficient evidential foundation, on the facts before the Royal Court as presented to us, for the Royal Court's conclusion that the Appellant had obtained the cannabis in the garage. Objectively, he cannot himself be shown to have done anything in relation to the drugs in the garage, other than making ready and maintaining a place for them to be stored. 117. We think that the Royal Court must have fallen into the error of considering that because the Appellant was party to a conspiracy to supply the cannabis in the garage, and because the Sentencing Judgment had remarked on the Appellant being more than a mere custodian, he was properly to be regarded as a co-owner of the cannabis; the error, in other words, referred to in *R v Clark* at [31] of treating a conspiracy as a form of entity or club whose members are co-owners of property obtained by the entity or club. As in *R v Allpress* and *R v Clark*, the facts do not allow more to be concluded about the quality of the Appellant's relationship with the drugs in the garage than that he was their custodian, it not being possible to infer more. 118. We should add that it is possible to sympathise with the Royal Court. The confiscation case was made difficult because the Court was not given for the Newton Hearing a clear list of the relevant issues it was being invited to decide, and therefore was not put into a position where it could make clear findings which would provide an appropriate factual framework for a determination of the confiscation case. As set out in *MacKenzie v AG*

[1995] JLR 9 at 22, it is the duty of counsel at a Newton hearing to produce an agreed list of specific issues which the Court is being asked to resolve. The Court then determines whether the Crown has proved its case to the criminal standard in relation to each specific issue. We were informed that that was not done in this case and it is therefore hardly surprising that, when the Court returned to deliver its decision, the Bailiff began by saying "This has been a difficult exercise because we are not entirely sure of the precise conclusions we are being asked to reach". Apart from a couple of minor issues, the main finding at the Newton Hearing was that the Appellant was not a 'mere custodian' but was a conspirator custodian. As both sides accepted he was a custodian and as he had pleaded guilty to conspiracy to supply controlled drugs, this finding did not advance matters very far. 119. Next, at the Confiscation Hearing the Royal Court was left to do its best to reach conclusions, having to do so by reference to the bald statements in the Summary, supplemented by the Sentencing Judgment and without the Appellant being called to give any explanation. The Appellant may have been fortunate that the confiscation proceedings took this course. As pointed out in *R v Ahmed*, a plea to conspiracy to supply drugs may, depending on the facts, enable the court to draw the inference that the conspirator has obtained the drugs in question. We have referred, above, to the procedure available under Article 7 of the 1999 Law. And if, at a confiscation hearing (where matters are determined to the civil standard of proof), a conspirator custodian refuses to say what his benefit is

from participating in the conspiracy, it may well be open to the court to draw an inference against him as to whether he has obtained the drugs. In this respect we would refer to the judgment of Lord Sumption in *Prest v Petrodel Resources Limited*

[2013] UKSC 34 ,

[2013] 2 AC 415 , in which he adopted at

[44] the view expressed by Lord Lowry with the support of the rest of the Judicial Committee of the Privy Council in *R v Inland Revenue Commissioners, Ex p TC Coombs & Co*

[1991] 2 AC 283, 300: "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a *prima facie* case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified." 120. For these reasons we consider that the Appellant's appeal in respect of the confiscation order should succeed. The amount of the confiscation order 121. The third issue on this appeal arises in relation to the third of the questions at paragraph 49 above when the court is making a confiscation order, namely the sum recoverable from the defendant. In view of our decision on the second issue, strictly speaking it is unnecessary for us to decide the third. However, as the issue has been fully argued and is important, we go on to explain our conclusion and

reasons.

122. Article 4 of the 1999 Law is headed " Amount to be recovered under confiscation order ". By Article 4(1) the starting point for the amount to be paid (referred to as " the penalty ") is the assessed value of the defendant's benefit from the relevant criminal conduct (referred to as " the assessed value "). In the present case that was taken to be the value of the drugs seized from the Appellant's garage on 9 November 2017. Article 4(2), however, provides that where the Court is satisfied that the " the amount which might be realised at the time when the confiscation order is made is less than the assessed value, the penalty shall be the amount which appears to the Court might be so realised (or, if that amount is nil, a nominal amount)." 123. A feature of Article 4(2) of the 1999 Law is that the realisable amount (that is " the amount which might be realised ") is to be decided upon at the time when the confiscation order is made. In the present case the hearing was on 30 July 2019 and the actual making of the order was 10 January 2020, when judgment was handed down. 124. Article 4(3) of the 1999 Law allows the Court to order a reduced penalty in cases where there are to be proceedings against the defendant for compensation arising in connection with the defendant's criminal conduct. This paragraph is of no application in the present case. 125. The 1999 Law explains, in Article 2 (headed " Meanings of expressions relating to realisable

property"), how among other things "the amount that might be realised at the time a confiscation order is made" is to be calculated (Article 2(3)). Broadly speaking, it is the amount realisable from the defendant's property (as defined in Article 2(1)). This definition is central to the operation of Article 4(2) of the 1999 Law in arriving at the potentially lesser amount than the amount in Article 4(1) (namely, the value of the defendant's benefit). 126. In the present case the value of the Appellant's benefit was taken to be £79,500, as we have mentioned. The value of the benefit was arrived at, we take it, by reference to Article 2(5) of the 1999 Law. This required the value of the cannabis to be arrived at as its value "when the [Appellant] obtained it, adjusted to take account of subsequent changes in the value of money" down to "the material time" (see Article 2(5)). Had the cannabis not been seized but remained in the Appellant's garage down to the material time, the value would have been the value of the cannabis at that time (see Article 2(6)). For the purposes of Article 4, however, the material time is the date of the confiscation order, that being the time prescribed by that Article as the relevant time for valuation. 127. The issue raised on this appeal concerns the calculation of "the amount which might be realised at the time when the confiscation order is made" (i.e. the realisable amount) under Article 4(2), as defined in Article 2(3). The calculation of that amount, as directed by Article 2(3), allows for certain deductions to be made from the gross value of the realisable property. The contentious issue relates to one of the deductions, a deduction to reflect tax liabilities which the Appellant contends was either not made or was wrongly made. 128. Article 2(3) is, in full, as follows: "(3) For the purposes of Part 2, the amount that might be realised at the time a confiscation order is made is the total of the values at that time of all the realisable property, including - (a) the total value of any property to which the defendant is beneficially entitled, less - (i) any amount due in respect of a fine or other order of the Court or the Court of Appeal or the Magistrate's Court or the Youth Court, imposed or made on conviction for an offence, where the fine was imposed or the order was made before the making of the confiscation order, (ii) any sum in respect of which the person to whom it is due would, if the defendant had become bankrupt before the making of the confiscation order, be entitled to claim preference ("préférence") or privilege ("privilège"), as the case may be, (iii) any sum the payment of which is secured on all or any of the realisable property by a simple conventional hypothec or a judicial hypothec created in accordance with the Loi (1880) sur la Propriété Foncière] before the making of the confiscation order, and (iv) any sum the payment of which is secured on all or any of the realisable property by a security interest created before the making of the confiscation order, being a continuing security interest to which, as referred to in Article 1A of the Security Interests (Jersey) Law 1983, that Law applies or a security interest within the meaning of the Security Interests (Jersey) Law 2012; and (b) the total of the values at that time of all gifts caught by Part 2." 129. Leaving aside the subparagraph which is at the heart of the present appeal (namely Article 2(3)(a)(ii)), the permitted deductions under Article 2(3)(a) are all to liabilities incurred "before the making of the confiscation order", in other words incurred before the date as at which the realisable property is to be valued. 130. Subparagraph (a)(ii) of Article 2(3) of the 1999 Law engages the law of bankruptcy: making the assumption that before the making of the confiscation order the defendant had been made

bankrupt, liabilities which would be preferential or privileged (and therefore would rank in priority for distribution ahead of the general body of unsecured creditors) are deductible. One category of preferential liability is two years of income tax liability, this priority being given by Article 45(3)(a) of the Income Tax (Jersey) Law, 1961, taken with Article 32 of the Bankruptcy (Désastre) (Jersey) Law, 2003. The latter provision identifies certain income tax liabilities as preferential, these being described in paragraph (1)(c)(ia) in the following terms, namely "all amounts due as described in Article 45(3) of the Income Tax (Jersey) Law, 1961 and all amounts due as described in Article 47(8) of the Goods and Services Tax (Jersey) Law 2007". 131. We have set out paragraph (1)(c)(ia) of Article 32 of the Bankruptcy (Désastre) Law 2000 in full because the second item within the paragraph contrasts with the first as being readily understood and applied: to be within that item the amount must have been due and payable within 12 months before the triggering event. In the present case, therefore, only if an amount were already due and payable before 10 January 2020 would it have been deductible. 132. Article 45 of the Income Tax (Jersey) Law 1961 is in the following terms: "45. Arrears of tax (1) A tenant après décret or tenant après dégrèvement shall be liable for the payment of the income tax due in respect of the land foreclosed and having become due and payable within 12 months next before the date of the Act of the Court authorizing the décret or dégrèvement or at any time thereafter. (2) Where the Royal Court has granted - (a) an application made by any person to place his or her property under the control of the Court (de remettre ses biens entre les mains de la Justice); or (b) an application for the holding of a bénéfice d'inventaire on the estate of any deceased person, the autorisés or the Viscount, as the case may be, shall pay, out of the property of such person or the estate of such deceased person, any income tax due by such person or such deceased person at the time of the granting of the application and having become due and payable within 12 months next before that time. (3) In the event of any composition with creditors, désastre, dégrèvement, réalisation or other bankruptcy, the following amounts shall rank for payment *pari passu* with other privileged debts and in priority to all other debts - (a) the income tax due from the debtor for the year in which that event occurs and for the preceding year; (b) any amount deducted by the debtor in accordance with Article 41B(1) and due from the debtor, in the year in which that event occurs or in the preceding year, in accordance with Article 41B(5); (c) any amount deducted by the debtor in accordance with Article 41E(1) and due from the debtor, in the year in which that event occurs or in the preceding year, in accordance with Article 41E(5); (d) any amount deducted by the debtor in accordance with paragraph 3(1) of Schedule 3A, and due from the debtor, in the year in which that event occurs or in the preceding year in accordance with sub-paragraph (8) of that paragraph; and (e) any amount deducted by the debtor in accordance with paragraph 4(2) of Schedule 3A, and due from the debtor, in the year in which that event occurs or in the preceding year in accordance with sub-paragraph (8) of that paragraph." 133. A feature to note with this provision is that Articles 45(1) and 45(2) refer clearly to tax that is due, having become due and payable: contingent or future liabilities are not within the provisions. What would be required to make the tax due and payable would be an assessment. But Article 45(3)(a), which is central to the issue before us, is framed differently. While two years' worth of

income tax is intended to be given priority, and this the parties agree on in the present case, it is not clear how the provision works and thus which years are to be the two years. Within Article 45(3)(a) a problem is the indication that the second year's tax is to be that due "for the year" in which the bankruptcy event occurs. 134. The area of dispute between the parties is, to summarise: (i) On the case for the Crown the relevant years are 2019 and 2020 (income tax being assessed by reference to calendar years), being the year in which the confiscation order was made (2020) and the preceding year (2019). As the Appellant was in prison from the end of 2017 and his income was from his work, he has no tax liabilities in respect of income from those years (or indeed from 2018). (ii) The case for the Appellant is that any two years can be chosen and that the years should be 2016 and 2017, when the outstanding income tax liabilities were £1,955.76 and £11,059.10 respectively. 135. The attraction of the Appellant's argument is that 2020 should be irrelevant, as the confiscation hearing was in July 2019, with judgment only being given several months later and during a new tax year, and his conviction was in July 2018. Had any confiscation application been dealt with expeditiously in the six months following his conviction the relevant years would have been (on the Crown's case) 2017 and 2018. 136. Subject to two points, we would consider the Crown's case on the relevant years to be unarguably correct. The 1999 Law does not give the Court any discretion to choose a valuation date for the purposes of either Article 4(1) or 4(2). The 1999 Law directs a process of valuation, including valuation dates. Only Article 4(3) gives a discretion, this discretion being irrelevant to the identification of the valuation date 137. Materially for present purposes, in arriving at the values of realisable property, as required by Article 2(3) of the 1999 Law, when determining the Article 4(2) amount, the valuation date is the date of the confiscation order; and, we would add, no other. That is clear. The permitted deductions in paragraph

- (a) of Article 2(3) all require the Court to take into account liabilities, as at the valuation date, which are extant at that date. In each case the focus is on a present which is taken to be the time when the confiscation order is made. 138. The crucial point in the present case is the time when, within paragraph (a)(ii) of Article 2(3), it is to be assumed hypothetically that the Appellant was made bankrupt. The reason for this is that the date of the assumed bankruptcy will set the two years of priority tax liability which may be deducted in arriving at values of realisable property at the time of the confiscation order. 139. Intuitively, one might think, the date of the assumed bankruptcy and the date of the confiscation order should be immediately consecutive, so that the most recent tax liability would be what counted in cases where there were several years of outstanding tax liability. A reason for this conclusion is that there is no other guide to the date of the assumed bankruptcy, and there is nothing in Articles 4(2) or 2(3) of the 1999 Law to suggest that the legislature intended to give the Court power to select as it thought fit the date which would result in the greatest, or alternatively the lowest or some intermediate, deduction. 140. Arguably against this position is a feature of the other parts of paragraph (a) which point away from this. In all of sub-paragraphs (i) to (iv), including the relevant sub-paragraph (a)(ii), the direction given by the legislature is to identify specified outstanding liabilities as at the confiscation order date, in

each case the identifying feature being that the liability is connected with something which happened "before the confiscation date". In sub-paragraph (i), (iii) and (iv) the precise time when the thing happened does not matter: it could be the day before or years before, so long as it was before. It is only in the case of sub-paragraph (a)(ii) that precise pre-confiscation order timing is critical; and that sub-paragraph differs also from the others in that the relevant pre-confiscation order event is a hypothetical one with no pre-confiscation order date being specified. 141. However, we do not consider that the way the three other sub-paragraphs in Article 2(3)(a) are framed is sufficient to undermine the point that sub-paragraph (ii) must be intended to have a fixed point of reference for the hypothetical bankruptcy. The only way of achieving this is to read the sub-paragraph, as one naturally does as a matter of first impression, as if the word "immediately" stood in front of the word "before". This, in our judgment, is what is to be understood as the legislature's intention with the wording used. 142. It follows that we reject a submission made by Advocate Bell, that it cannot have been intended by the legislature that in sub-paragraph (ii) of Article 2(3), in contrast with the preceding sub-paragraph and the two succeeding sub-paragraphs, the same expression "before the making of the confiscation order" has to be read and understood as if it included the word "immediately" at the start, when such word is obviously inappropriate for the other sub-paragraphs. The difficulty with the submission is that in each of the other sub-paragraphs the liabilities are associated with a definite event, while uniquely in Article 2(3)(ii) the relevant liabilities are to be identified by reference to a hypothetical event. The language of the other sub-paragraphs therefore cannot be assumed to be intended to be applied in Article 2(3)(ii) as it does in the other sub-paragraphs, even if it could sensibly be applied in the same way. 143. We note in passing, that the passage of time between the confiscation order hearing and the making of the order could in theory have increased the relevant liabilities: this would have happened if, for example, the Appellant had been fined or had borrowed money on the security of a hypothec in the intervening period. Conversely, of course, in that intervening period he might have acquired property which counted as realisable property; and the property values might have changed. 144. Advocate Bell has drawn attention to the distinction between the hearing date (30 July 2019) and the date of the confiscation order (10 January 2020), and has invited us to conclude that when the legislature referred to the date of the confiscation order it was really referring to the hearing date. We cannot accept this way out of the difficulty. In the usual case, and this must have been what the legislature had in mind, the date of the hearing and the date of the confiscation order would be the same or so close as to make no difference. A lapse of more than five months cannot have been anticipated. Further, the time when a confiscation order is made, not when a confiscation application is heard, is clearly specified as the relevant time in Article 4(2) of the 1999 Law: it is not only Article 2(3)(a) which repeatedly alludes to the making of the confiscation order. 145. There is, however, a further consideration in support of the Appellant's contention that the 2020 and 2019 tax years cannot be the relevant years for the purposes of Article 2(3)(a)(ii). Advocate Bell points out that income tax becomes due in the autumn following the end of the previous tax year. On this basis, so he submits, there could be no outstanding tax liability of the Appellant's for 2020 and 2019 in

January 2020, much less in July 2019; and the point is reinforced by the fact that 2020 had only just begun on 10 January: it would have been impossible on that date for the Court to have quantified the prospective tax liability falling due for payment in late 2021 in respect of income from the 2020 tax year. Thus, submits Advocate Bell, the relevant years for the purpose of the Article must be 2018 and 2017, those being the most recent years for which there was or could be a presently due and payable liability at the date of the confiscation order. 146. The response of Crown Advocate Thomas is that in principle third party creditor claims (including those for income tax) are to be disregarded when determining the value of the realisable property in relation to a defendant, that where deductions are to be made from that value they are carefully identified and defined, and that in case of ambiguity the 1999 Law should be construed purposively to enable the proceeds of crime to be confiscated with a view to removing a criminal's ill-gotten gains. 147. The problem with these submissions, as it seems to us, is that the ambiguity lies not in the drafting of the 1999 Law so much as in Article 45(3) of the Income Tax (Jersey) Law 1961. The issue with that drafting goes much further than the 1999 Law. That is, accepting (as we do) Crown Advocate Thomas' submission concerning the way in which the expression "become bankrupt before the making of the confiscation order" is to be understood, still the problem remains of understanding what is captured in a bankruptcy as a priority debt by the operation of Article 45(3)(a) of the 1961 Law. 148. The answer to this question, in our judgment, is that the relevant words in Article 45(3)(a), "the income tax due from the debtor for the year in which the event occurs", are referring to the tax that is payable in the year (that being the force of the words "due for the year") rather than referring to tax for income earned and yet to be earned in that year, which will only become due in the following year. In other words, the income tax due for the year 2020 is the income tax which is to be assessed and payable in October 2020 (but by reference to the income earned in 2019). Having regard to the practical difficulty of quantifying tax due in respect of income during a year in which a bankruptcy occurs, when the assessment is only to be made and tax is to become due late the following year, we consider that the words quoted above must be referring to the income tax payable in the year of the bankruptcy, that being perfectly well described as the income tax due "for" the year. 149. If this is the correct interpretation of the Article, in the present case the tax permitted to be deducted is to be the Appellant's tax due in 2020 and 2019, that being measured and assessed by reference to his income earned in 2019 and 2018 respectively. This is because the confiscation order was made in 2020. 150. We are clear, however, that this would be an unfair outcome. We have some sympathy for the Royal Court, which was at no stage alerted to the possibility of the date of its decision on the confiscation application having such material consequences for the amount of the confiscation order. However, all that was required from the Court was a timely decision: its detailed reasons could have waited. A material delay on the part of the Court in communicating its decision and making the confiscation order would have led the Appellant to lose the benefit of a deduction of over £11,000 to which he would have been entitled, by the express provisions of the 1999 Law, had there been a timely decision and order. 151. Anticipating the difficulty that the literal application of the 1999 Law might lead to an unfair and unintended result, Advocate Bell

submitted that this result could and should be avoided by a reference to Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1") as incorporated into Jersey law by the Human Rights (Jersey) Law 2000 . Advocate Bell supported this submission by reference to the case of *R v Waya*

[2012] UKSC 51 ,

[2013] 1 AC 294 , a case decided in the UK Supreme Court in relation to the comparable UK confiscation laws. Rightly, in our judgment, he did not submit that the Royal Court should have used the discretion as to the making of any confiscation order at all, given by Article 3(4) of the 1999 Law (cf *AG v Warren* supra at [8]), to refuse altogether an order against the Appellant. Rather, his submission was that the amount of the tax liability should be taken in reduction of the amount ordered by the Royal Court in the Confiscation Judgment. 152. *R v Waya* concerned a confiscation order in the context of a mortgage fraud. In 2003 Mr Waya had purchased a flat in London for £775,000, of which 40% was paid from his own resources and 60% by a mortgage lender on the basis of false statements that he made about his employment record and earnings. He was convicted in 2007 of obtaining a money transfer by deception, and sentenced to 80 hours' community work. Applying what he took to be the provisions of the Proceeds of Crime Act 2002 ("POCA"), the judge made a confiscation order for £1.54m, amounting to the increased market value of the flat at that time less the £310,000 paid by Mr Waya at the time of the initial purchase. The Court of Appeal in 2010 reduced the order to £1.1m, based on 60% of the flat's current market value. 153. The Supreme Court held in its judgment of 2012 that POCA had been applied in such a way as to result in a confiscation order that was so disproportionately high as to amount to a violation of A1P1. The true benefit of Mr Waya's fraud was " so much of any appreciation in value as was attributable to the mortgage obtained by his dishonesty " ([78]), which after adjustments amounted to £392,400. The provisions of POCA read on their own were incapable of reaching that result: but applying section 3 of the Human Rights Act 1998, a nine-judge Supreme Court, unanimously on this point, "read down" the obligation strictly to apply the confiscation provisions of POCA and by a majority substituted an order for £392,400 which they described (at paragraph 81) as "not disproportionate". 154. That course was urged upon the Supreme Court by both Counsel for the Crown (David Perry QC) and Counsel for the Home Secretary (Lord Pannick QC). The Court described in paragraph 14 of its judgment as " plainly correct " their joint submissions: "(a) that POCA must be read and given effect in a manner which avoids a violation of A1P1; (b) that a confiscation order which did not conform to the test of proportionality would constitute such a violation; (c) that it is incumbent upon the domestic court to provide a remedy for any such violation; and

(d) that the appropriate remedy lies in the duty of the Crown Court judge not to make an order which involves such a violation." Any such violation could be avoided, the Court concluded, by applying to POCA , and in particular to its section 6, the rule of construction required by section 3 of HRA. 155. In determining whether to follow and apply the principle in *R v*

Waya , two questions arise: whether the principle is applicable in Jersey, and whether it should be applied in the circumstances of this case. We answer both questions in the affirmative, for the reasons that follow. 156. As a matter of simple precedent, the first of the two questions has been decided already in the case of *R v Arthur* , supra, where this Court varied a confiscation order made by the Royal Court, allowing an appeal by the Attorney General to increase the amount ordered beyond the nil order made by the Royal Court. But the increased amount still was less than the full amount which would have been arrived at under Article 4 of the 1999 Law had the principle in *R v Waya* not been applied, as it was both by the Royal Court and the Court of Appeal (see paragraph [36] of the Court of Appeal's judgment). 157. We have nevertheless considered the first question as a matter of principle and are satisfied that that the principle in *R v Waya* should be applicable in the context of the 1999 Law. 158. In material respects there are strong similarities between POCA (as summarised at paragraphs 2-8 of the Supreme Court's judgment in *R v Waya*) and Part 2 of the 1999 Law with which this appeal is concerned. Although there are certainly differences of detail between the two regimes, as explained at para [18] in Sir Richard Collas' judgment in *R v Arthur* , the description at paragraphs 7-8 of the Supreme Court's judgment has an obvious resonance in the Jersey context: "7. The other structural feature is that the making and quantum of a confiscation order involve three stages. The first stage is the identification of the benefit obtained by the defendant: sections 7(4), 8 and 76 of the [Proceeds of Crime Act]. The second stage is the valuation of that benefit. It may fall to be valued (sections 79 and 80) either at the time when it is obtained, or at the date of the confiscation order ("the confiscation day"). Intermediate events may be relevant, especially for the tracing exercise that may be required under section 80(3), but the valuation date must be either at the beginning or at the end of the process. The third stage is the valuation as at the confiscation day of all the defendant's realisable assets (designated in section 9 as "the available assets"). This value sets a cap on the amount ("the recoverable amount") of the confiscation order: section 7. In *R v May*

[2008] AC 1028 , para 8, the House of Lords emphasised that the Crown Court must proceed through these three stages in a systematic manner, and not elide them. 8. Because [the Proceeds of Crime Act] covers a wide range of offences, Parliament has framed the statute in broad terms with a certain amount of what Lord Wilberforce (in a tax case) called "overkill". Examples of this are the apparently loose causal test in section 76(4) ("as a result of or in connection with the conduct") and the rather puzzling definition ("property is obtained by a person if he obtains an interest in it") in section 84(2)(b). Although the statute has often been described as "draconian" that cannot be a warrant for abandoning the traditional rule that a penal statute should be construed with some strictness. But subject to this and to the [Human Rights Act], the task of the Crown Court judge is to give effect to Parliament's intention as expressed in the language of the statute. The statutory language must be given a fair and purposive construction in order to give effect to its legislative policy." 159. Closer still are the similarities between the Human Rights Act 1998 and the Human Rights (Jersey) Law 2000 . Both give effect in domestic law to Articles of

the ECHR including A1P1, which was described by the Supreme Court in para 12 as follows: "It is clear law, and was common ground between the parties, that this imports, via the rule of fair balance, the requirement that there must be a reasonable relationship of proportionality between the means employed by the state in, inter alia, the deprivation of property as a form of penalty, and the legitimate aim which is sought to be realised by the deprivation. That rule has consistently been stated by the European Court of Human Rights ..." 160. The Supreme Court went on to explain the strong duty of interpretation contained in section 3 of the Human Rights Act 1998, and its potential application: "A1P1 is one of the Convention rights to which the HRA applies: section 1(1)(b) of HRA. That means that section 3(1) requires that so far as it is possible to do so, legislation must be 'read and given effect in a way which is compatible' with it." Section 3 has an exact comparator in Jersey, in Article 4 of the Human Rights (Jersey) Law 2000 . 161. The mechanism by which the principle in *R v Waya* could take effect in Jersey is Article 3(4) of the 1999 Law. In the same way as the Supreme Court at paragraphs 14-16 interpreted the equivalent UK provision (section 6(5) of the Proceeds of Crime Act 2002), and for the reasons that it gave, we consider that pursuant to the strong duty of interpretation in Article 4 of the Human Rights (Jersey) Law 2000 , Article 3(4) of the 1999 Law should be read as if it concluded, at the end of sub-paragraph (b) with the words: " or such lesser amount which would not be disproportionate and thus a breach of Article 1, Protocol 1 ". 162. It remains to ask whether the principle in *R v Waya* should be applied in the present case. Advocate Bell submits that a confiscation order in an amount which failed to give the Appellant credit for the £11,000 deduction he should have had if the confiscation order had been made in 2019 would be incompatible with A1P1. It would be arbitrary and disproportionate to visit the Appellant with the consequences of a delay in the making of a confiscation order which, had it been made before the end of 2019 (the issue having been argued in July 2019) would have given the Appellant credit for deduction. 163. We emphasise, as the Court in *R v Waya* was at pains to do, that the control which needs to be read into the 1999 Law is not the same as a general discretion. It is there to make sure confiscation orders do not exceed the generous bounds within which the public authorities may operate regimes for confiscation of the proceeds of crime without violating A1P1. This was explained at paragraph 24 of the judgment: "24. ... it must clearly be understood that the judge's responsibility to refuse to make a confiscation order which, because disproportionate, would result in an infringement of the Convention right under A1P1 is not the same as the re-creation by another route of the general discretion once available to judges but deliberately removed. An order which the judge would not have made as a matter of discretion does not thereby ipso facto become disproportionate. So to treat the jurisdiction would be to ignore the rule that the parliamentary objective must, so long as proportionately applied, be respected." 164. In other words, a defendant cannot and should not expect that the 1999 Law is to be "read down" to give the Court a generalised discretion as to the amount of a confiscation order, when that is not what has been provided for by the legislature and such a discretion is not necessary for the 1999 Law to meet and to be applicable in compliance with A1P1. As stated in paragraph [33] in

the judgment of this Court given by Sir Richard Collas in *R v Arthur* , above, " The Court ... does not have a wholly unfettered discretion and must act in a manner that is consistent with the statutory purpose which is to deprive a criminal of the benefit of his crime" . 165. In the present case, however, an order made on the basis of the provisions of the 1999 Law, read without reference to the Human Rights (Jersey) Law 2000 , would in our view have been unconscionable in its effect. The Royal Court's delay in determining the application for a confiscation order had the effect of increasing the ordered amount by some £11,000 over and above what would been the amount if it had reached a timely decision. In those circumstances, applying the principle as it was summarised in paragraph 12 of the Supreme Court's judgment in *R v Waya* , it cannot be said that there was a " reasonable relationship of proportionality between the means employed by the state in, inter alia, the deprivation of property as a form of penalty, and the legitimate aim which is sought to be realised by the deprivation " . 166. Accordingly, had the point arisen for decision before us, we would have read down Article 3(4) of the 1999 Law in the manner indicated above, and reduced the confiscation order accordingly.

Conclusion

167. For the reasons explained in the second main section of our judgment, the section concerned with the second issue sought to be raised by the Appellant on appeal, we give him leave to appeal and, pursuant to Article 26(3) of the Court of Appeal (Jersey) Law 1961 , quash the confiscation order made against him. It follows that the saisie judiciaire in respect of the Appellant's assets should be discharged, and the Viscount should return to the Appellant all his seized assets held by her. Authorities Court of Appeal (Jersey) Law 1961. AG-v-O'Connor Smitton Arrowsmith Howes Heskin Templeton-Brown

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[2020] JRC 006 . *R v Soneji*

[2005] UKHL 49 ,

[2006] 1 AC 340 . *Burby & Burby v Thompson & Betram*

[2008] JCA 204 . *AG v Arthur*

[2019] JRC 113 . *Loi (1880) sur la Propriété Foncière dealing with proceedings for degrevement Revenue & Customs Prosecution Office v Iqbal*

[2010] EWCA Crim 376 ,

[2010] 1 WLR 1985 . *Arthur v AG*

[2020] JCA 016 . *R v May*

[2008] UKHL 28 ,

- [2008] AC 1028 . Warren v AG
- [2014] JCA 080 Drug Trafficking Offences (Jersey) Law 1988. R v Ahmed
- [2014] UKSC 36 ,
- [2015] AC 299 . R v Jennings
- [2008] UKHL 29 ,
- [2008] 1 AC 1046 . R v Green
- [2008] UKHL 30 ,
- [2008] 1 AC 1053 . R v Allpress
- [2009] EWCA Crim 8 ,
- [2009] 2 Cr App R S 58 . R v Lambert [2012] 2 Cr App R(S) 90. R v Clark and Severn
- [2011] EWCA Crim 15 ,
- [2011] 2 Cr App R S 55 . Ahmed v R
- [2012] 1 WLR 2335 . MacKenzie v AG
- [1995] JLR 9 . Prest v Petrodel Resources Limited
- [2013] UKSC 34 ,
- [2013] 2 AC 415 . R v Inland Revenue Commissioners, Ex p TC Coombs & Co [1991] 2 AC 283, 300. Income Tax (Jersey) Law, 1961. Bankruptcy (Désastre) (Jersey) Law, 2003. Human Rights (Jersey) Law 2000 R v Waya
- [2012] UKSC 51 ,
- [2013] 1 AC 294 Page Last Updated: 21 Aug 2020 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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Prepared on 23 October 2026 · Esheria