



The Chambers of  
Harendra de Silva QC

## PROCEEDS OF CRIME and FRAUD Newsletter Summer 2011

**SUMMARY: Confiscation - hearsay evidence in confiscation proceedings, right to a fair trial, pecuniary advantage (duty and VAT evasion), certificate of inadequacy, effect of abandonment of conspiracy on obtaining benefit, apportionment of benefit; Civil Recovery - “recoverable property” situated outside the jurisdiction; Enforcement Receivership Order.**

- **Confiscation – hearsay evidence – the CJA 2003 applies by analogy - *R v Clipston* [2011] EWCA Crim 446 (28.5.11) –** where a witness refused to give evidence a judge allowed hearsay evidence in confiscation proceedings under s 114(1)(d) CJA 2003 in the “interests of justice”. Confiscation proceedings are an extension of the sentencing proceedings and thereby criminal in nature [para 45]. But under s 134(1) CJA 2003 criminal proceedings were where “the strict rules of evidence apply” and confiscation proceedings were not where the strict rules of evidence (and so the CJA 2003) applied [e.g. paras 51-57]. Nevertheless hearsay was not inadmissible. At the post-conviction stage the procedure had to be flexible and fair [paras 64-65]: the judge should consider the following: (a) the CJA 2003 applied by analogy (b) where the real issue was weight rather than admissibility of the evidence or information the “checklist” contained in ss 114(2) and 116 CJA 2003 gave a “valuable...framework of reference”. In any event a judge must proceed judicially. The Criminal Evidence Act 1995 did not apply.
- **Confiscation – smuggling tobacco products – Obtaining a benefit - pecuniary advantage – evasion of duty - evasion of VAT - benefit (evaded VAT) based on calculation of duty due in EU (not whether it was paid) and calculation of VAT based on recommended retail prices (not ex factory prices) - POCA 2002 - Community Customs Code: Council Regulation 2913/92/EEC Chapter 3 (“Value of Goods for Customs Purposes”) Articles 28-33 – s 21 VAT Act 1994 - Sixth VAT Directive 77/388/EEC on Harmonisation of Turnover Taxes: Common System of VAT: Uniform Basis of Assessment - s 2 Tobacco Products Duty Act 1979 – *R v Redmond* [2011] EWCA Crim 20 (24.5.11) -** This appeal followed the decision in *R v Bell and others* [2011] EWCA Crim 6 [see below; for *R v White and Dennard*: see Newsletter Summer 2010]. R pleaded guilty to being knowingly concerned in the fraudulent evasion of duty. There had been an agreed confiscation order with benefit made up of evaded duty and evaded VAT. In December 2003 HMCE found, concealed under a “cover load”, over 2m cigarettes in R’s Inland Clearance Depot warehouse. An agreed basis of plea stated that prior to the raid R had agreed to take delivery of contraband cigarettes to his warehouse. It was not said with whom or when this agreement was reached or whether it preceded the importation. There was no direct

evidence when the importation took place. HMCE conceded (following *R v Bell*) that as R was not holding the cigarettes at the excise point nor had he caused them to reach it he was not liable to pay excise duty. There was no evidence R was or had ever been the owner of the cigarettes.

Was R liable for the VAT? Here the issue came down to had the prosecution established on a balance of probabilities that duty had not been paid on these cigarettes in the EU. If proved VAT would be payable (if proved to be due). If not proved VAT would not be payable. From the evidence the Court of Appeal inferred these were smuggled cigarettes and no duty was paid. By the time of the appeal R's evidence was he did not know where they came from. It was inferred duty was due and not paid within the EU and R was liable for the VAT. To calculate the VAT the value of the goods had to be known. The value had to be determined according to the Community Customs Code (s 21 VAT Act 1994): Council Regulation 2913/92/EEC Chapters 3 ("Value of Goods for Customs Purposes") at Articles 28-33. Some of the cigarettes were counterfeit. The prosecution contended they should be valued by reference to the known retail value of the "real" cigarettes. In the absence of evidence all cigarettes were valued at an ex-factory price of 5p per packet.

The question arose whether VAT due under s 21 VAT Act 1994 (due on the "Value of imported goods") included the duty that would have been levied if not smuggled into the EU. S 21 was designed to implement the Sixth VAT Directive 77/388/EEC. Regardless of whether duty had been paid or not (a) for the purposes of s 21(2)(a) ("all taxes, duties and other charges levied...within the UK (except VAT)...") (b) an excise duty was "levied" for the purposes of the VAT Act 1994 when the goods are charged by law with duty at importation (by virtue of s 2 of the Tobacco Products Duty Act 1979) (c) whether or not this duty was charged or levied [para 39]. Therefore the excise duty and VAT upon it were levied when the goods were smuggled into the UK.

Under s 1(4) VAT Act 1994, VAT arises on the importation of goods from outside the EU and is charged and payable as if it were a duty of customs and the liability continues after the importation. R remained liable for the VAT due on the excise duty. Excise value is not a percentage of the value of the tobacco products (e.g. a value simply based on the ex factory price of 5p per packet). It is set annually pursuant to Schedule 1 of the Tobacco Products Duty Act 1979 and based upon recommended UK retail prices (RRP) for the cigarettes matching the description in this case. *R v Varsani* [2010] EWCA Crim 1938 was referred to in support [See Newsletter Autumn 2010]. Applying s 2 and Schedule 1 of the TPDA 1979 the applicable duty rates (22% of the RRP) were a percentage of the "real" cigarettes RRP and, in this case, came to £304,007.26. VAT at 17.5% on that came to £53,201.27. R obtained a pecuniary advantage only in respect of the latter and the confiscation order was amended in accordance with this amount and the amount of VAT due on the cigarettes at the ex factory price of 5p per packet (£949).

- **Confiscation – obtaining a pecuniary advantage – evasion of duty – smuggled cigarettes - *R v Bell and Others*** [2011] EWCA Crim (18.1.2011) - the appellants had pleaded guilty to being knowingly concerned in the fraudulent evasion of the duty chargeable on cigarettes. However they had not been liable to pay the duty themselves and so had not obtained a pecuniary advantage. In none of the cases did anyone "apply their mind to whether the defendant had obtained a pecuniary advantage either directly because he was liable for the duty himself or indirectly because he had the necessary causal link with the non payment of the duty by another which the Court of Appeal Civil Division in *Jennings* [2005] EWCA Civ 746, [2006] 1 WLR 182 held (wrongly as it turned out) was sufficient." It was sufficient for the appeals, and in general terms, that a person is not liable for the excise duty on smuggled tobacco products unless he has a connection with the smuggled goods at the time of their importation, that being (in the case of smuggled goods arriving by sea) when the ship enters the port of destination in the UK. It was wrongly assumed by all concerned in these cases that the defendants having been knowingly concerned in the evasion of the duty must have been liable for the duty (in some way or another). The offence is a continuing offence and a person may commit the offence by becoming involved some time after the importation. But it does

not follow that a person committing the offence is himself liable for the duty and thus has obtained a pecuniary advantage.

- **Confiscation – conspiracy to evade duty - impossibility of completion – pecuniary advantage - import of cigarettes – (1) applicability of the lifestyle assumptions under section 75(2)(c) POCA 2002 (offence committed over a period of at least six months): an accused’s role must be for six months or more - (2) a person was only liable to pay excise duty on tobacco imported by sea if he was holding the goods at the excise point – establishing possession by means of a bill of lading - the appellants had caused the cigarettes to reach the relevant excise duty point - following arrest and seizure of the bill of lading the conspiracy was impossible to complete - the conspirators had abandoned any connection with the cigarettes and were not liable to pay duty when the vessel entered port - ss 5 and 43 CEMA 1979 - ss 1 and 2 Tobacco Products Duty Act 1979 (time of importation/importer) - s 1 Finance (No 2) Act 1992 (“excise duty point”: Tobacco Products Regulations 2001 (SI 1712/2001) - Council Directive 92/12/EEC - *R v Bajwa and Others* [2011] EWCA Crim 1093, 6.5.11 - See also *R v White and Others* [Newsletter Summer 2010]. The confiscation orders were set aside. “Joint culpability” or “joint interest” in bringing the counterfeit cigarettes (about 7m) into Felixstowe docks from China was not enough. Three of the five appellants did not commit an offence over a period of at least 6 months under s 75 (2) (c) [paras 41-42, 47-74]. Furthermore, following *R v Mitchell*, *R v White* and *R v Perry and Rowbotham*, a person cannot be liable to pay duty on tobacco imported by sea in a ship unless (a) he is “holding” the tobacco at the excise duty point or (b) he “caused” the tobacco products to reach the excise point and retained a connection to the goods at that point (all questions of fact) [para 39]. A bill of lading may ordinarily be relied upon as evidence but (i) here the bill of lading identified the container but not the cigarettes (ii) by the time the ship entered port none of the appellants was the lawful holder of the bill as it had been seized by HMRC and (iii) the appellants did not have control over the cigarettes at this point. Although the appellants caused the cigarettes to reach the excise point they did not “retain a connection” to the cigarettes: the bill of lading was seized and all appellants been arrested before this date and so the conspiracy had ended. The “obvious inference is that the appellants had abandoned any connection they had with the cigarettes” by the ship’s arrival in port (passing of the excise point). None of them were liable to pay duty. None of the appellants obtained a pecuniary advantage/benefit under POCA 2002.**
- **Confiscation - theft - obtaining benefit – equal apportionment following *R v Gibbons* - it did not follow that a defendant who had obtained some benefit from a robbery was jointly and severally liable for all the proceeds of the robbery – this may be the case even if he had disposed of a proportion of the proceeds to others responsible for the crime in payment for the crime - POCA 2002 - *R v Kinsella* [2011] EWCA Crim 1275 (22.3.11)**

*Comment:* the Court referred to the familiar decisions of *Jennings*, *R v Green* and *R v May* and *R v Sivaraman* and *R v Allpress* - a court should look at the facts etc – and, on the evidence relied upon by the judge in the Crown Court, relied on the equal apportionment of *R v Gibbons* [2003] 2 CAR (S) 169: “it is not possible to say on the evidence that the appellant did obtain the whole of the proceeds, the robust inference, as May LJ called it, and the fairest, is to conclude he obtained an equal proportion to that of the other three who were caught, namely one-quarter of the proceeds...” But the appellant in this case was fortunate. The evidence may have placed him “in a position to direct the disposition of the proceeds because he had obtained the whole of the proceeds”. See also *R v McCreesh* [2011] EWCA Crim 641, where although M was part of the scheme in question, it did not necessarily follow his benefit was the whole value of the proceeds (*R v Sivaraman*, applied). [Cf: *R v Spears and McAllister* Newsletter Winter 2009/10].

- **Civil Recovery – ss 266 and 316 and Part 5 of POCA 2002 - the court has power under Part 5 to make a recovery order in favour of the trustee for civil recovery in respect of “recoverable property” outside the jurisdiction – such an order gives the trustee a personal right against a person who is the subject of such an order to enforce it and any other right the trustee has under the law of the place where the property is situated (paras 3, 12-15 and**

156) - Part 5 is extraterritorial in effect - POCA 2002 - *Perry and Others v SOCA* [2011] EWCA Civ 578 (18.5.11)

- **Enforcement Receivership Order - s 50 POCA 2002 - application to vary an ERO by the Crown so as to exclude assets outside the jurisdiction – the defendant opposed and sought an order for the Enforcement Receiver to pursue out-of-jurisdiction assets (UAE and Tanzania) and incur costs in doing so (about £185,000) – the most (cost) effective method of realising the out-of-jurisdiction assets – the Crown could not sanction costs by the Enforcement Receiver absent a clear and detailed proposal of what could be achieved and wanted to use Letters of Request - a LOR may be effective but the “man of business” (the ER) had an advantage in finding and selling assets if discoverable (e.g. office in Dubai, conditional fee etc) – variation refused - *In re Johnson* [2011] EWHC 593 Admin (17.3.11)**
- **Confiscation – right to fair trial – absence or failure to give instructions due to chronic illness – confiscation order made in absence – Art 6(1) and not Art 6(2) applies: part of the sentencing process and not a separate “charge” – involuntary absence may not be decisive - fairness both to an accused and prosecution – appellant’s case was “sufficiently” before the court for proper consideration – the test was not was there a real potential for unfairness but did the appellant have a hearing that in all circumstances could properly be described as fair? - POCA 2002 – *R v Bhanji* [2011] EWCA Crim 1198 (13.5.11) – B was absent for the confiscation hearing for the above reason. Although *R v Tasie* [See Newsletter: Winter 2010] was noted the question was were the proceedings unfair in B’s absence? On the facts of the case it was not: e.g. compelling evidence of a dissipation of assets, failure to provide information when B was able to do so, failures due both to him and his advisors, absence of any misconduct by the prosecution.**
- **Confiscation – CJA 1987 - certificate of inadequacy – confiscation order made up of disclosed and hidden assets – certificate applied for on basis disclosed assets inadequate and no hidden assets – prosecution contended a failure to disclose hidden assets meant, as a matter of law, the defendant must fail – however such a strict rule could cause injustice and trammel the width of section 83 - there was no such rule of law and it was a question of fact - the starting point for consideration was the order itself – where a case involved hidden assets a defendant had to be allowed to try and persuade the court his identified assets had decreased in value and as a result he could not meet the confiscation order - *Glaves v CPS* [2011] EWCA Civ 69 (3.2.11) – In the Crown Court the judge declared the respondent could pursue an application for the certificate notwithstanding he asserted he had no hidden assets. The CPS appealed arguing as there had been no disclosure in respect of the hidden assets the respondent must fail as a matter of law. But it was question of fact. A defendant must be allowed to try and show his hidden assets had decreased in value so he could not meet the order. What was made of his evidence would be up to the court.**

*Comment:* Whether a defendant has adequate assets to meet a confiscation order must be a matter of fact. The route to challenge a finding of hidden assets is an appeal against an original finding of fact by the Crown Court judge. No finding of fact had (yet) been made in the present Crown Court proceeding (application for a certificate of inadequacy) and the Court of Appeal noted it would have been better it had. Given the finding of hidden assets in the original Crown Court confiscation proceedings it seems difficult to see how any order could be reduced below the level of hidden assets, as initially found by the Crown Court, regardless of what had happened to the disclosed assets since the confiscation order was made. It may be otherwise if those “hidden assets” were now disclosed and it was shown what had happened to them.