

R v JOHN PALMER

SKELETON ARGUMENT IN SUPPORT OF THE APPEAL AGAINST THE CONFISCATION ORDER MADE IN THIS CASE

On the 23rd April 2002 His Honour Judge Gordon, being the judge who passed sentence on the Appellant, granted a certificate (copy herewith) under section 11 (1) (A) of the Criminal Appeals Act 1968, that the case is fit for appeal (Archbold 7 - 125).

His certificate confined itself to two specific grounds which had been put before him in written form. These appear below as grounds 1 and 2.

The Court is further asked to hear the following additional grounds, namely 3, 4 and 5 below, which were argued before Judge Gordon during the confiscation proceedings.

GROUND 1

1 On or before the 21st May 2001, following the Appellant's conviction, the prosecution served on the court a document headed "Notice to the Court pursuant to section 71 (1) (a) Criminal Justice Act 1988" (copy herewith).

2 It is very respectfully submitted, not by way of gratuitous criticism (I have very much in mind the learned judge's observation at p65, line 12, 15th April 2002 that "much of the problem which has arisen here is a direct result of the many changes to the confiscation legislation which have been made over the years"), that the mistake in the form of the "Notice" arose not out of inadvertence but out of a misunderstanding of the relevant law; namely that the Prosecution did not realise, until the first day of the full confiscation hearing (15th May 2002) when the defence made their submissions, that by virtue of section 16(5) of the PCA 1995 the whole of the indictment fell to be dealt with under the unamended 1988 Act. The transcript of the 18th May 2001 at page 28 line 17 shows counsel for the Crown stating that "the Crown will be making an application for confiscation"; that procedure was not available under the applicable law (the old law, copy annexed hereto - taken from the 1997 Archbold) but would have been under the new law (1995Act - Archbold 5-507). The transcript of the 21st May 2001 at page 3 line 12 shows counsel for the Crown referring to the notice under "Section 71 of the 1988" Act. The Prosecution's 'Note on Confiscation' and skeleton arguments thereafter plainly showed that they believed the old law to apply to count 1 and the new law to count 2. Therefore the form of the notice and the way that the matter was initiated before the learned judge were intentionally under the new regime and he is shown by the transcripts to have proceeded as guided, under the wrong law /procedure.

3 The said "Notice" was drafted in the form in which a notice would have been drafted under the 1995 Proceeds Of Crime Act.

4 The learned Judge found as a fact [p69 line 23 - p70 line 7; 15th April 2002] that "the notice is not a valid one" and that "the notice ... was invalid" [p39 lines 9 - 13; 16th April 2002].

5 It is submitted that that finding was one which, on all of the material, the learned Judge was perfectly entitled to make, indeed the Appellant would submit, bound to make; in making it he did not take into account anything that he ought not; he did not fail to take into account anything which he should have; he had listened for half a day to the carefully reasoned arguments of Counsel, following the submission of skeleton arguments on the issue; he had considered the relevant authorities that had been put before him [p72 line 7 - 12; 15th April 2002]. With great respect he put the matter accurately and concisely at p39 lines 9 - 13; 16th April 2002 when he said that "the notice was invalid as being under the wrong version of the Act and therefore dealing with a different regime".

6 In short it was submitted to the learned judge that the shortcomings in the 'notice' which was in fact served matters of both form and substance: A the notice states both in the heading and in the body that it is under section 71 (1) (a) of the Criminal Justice Act 1988; this was the wrong section; the notice should have stated that it was under section 72 (1); as the proceedings fell to be determined under the old law, pre the 1995 Act amendments, and since section 71 (1) (a) was enacted by the 1995 Act, then the notice purported to be under a section that was not, in effect, in force; B the notice invites the court "to proceed under this section". That was the wrong section. The court did in fact proceed under that section, following that notice, throughout (until the 16th April 2002 as to which please see paragraph 2 above); C the notice simply speaks of the Crown Prosecutor's consideration that it would be appropriate for the court to proceed whereas the correct notice under section 72 (1) requires the prosecutor to give written notice to the effect that it appears to him that, "were the court to consider that it ought to make such an order" it would be able to make an order requiring the offender to pay at least the minimum amount; ie the notice that should have been served requires the court abinitio to exercise its discretion in the commencement of the proceedings whereas the notice as served failed completely to put the judge on notice that it was a matter for his, not the prosecutor's, discretion; D the notice failed to make any reference to the minimum amount.

7 The learned judge was respectfully repeatedly reminded of the words of Wright J in Phillips [2001] EWCA Crim 2790, which though concerning the Drug Trafficking Act must, it is submitted, apply equally to the CJA 1988: "This is a penal statute and its provisions are to be strictly construed against the Crown". [para21]

8 On the 16th April 2002, following further submissions from Counsel the learned judge ruled at page 39 line 9 to page 42 line 19 that the prosecutor was entitled to serve a valid notice at any time so long as it was before he determined whether to make a confiscation order and accordingly one was served on that day.

9 IT IS THAT RULING THAT IS SUBJECT OF THE FIRST GROUND OF APPEAL. 10 The ruling comprised of several reasons which are specifically given at pages 41 line 23 to page 42 line 12. It is submitted that several of these reasons are flawed and appealable in their own right.

11 At page 41 line 23 he states: "firstly, the Court has the power to make an order under section 71". It is plain that section 71 sets out the court's powers. It is further plain that section 72A(1) states: "Where a court is acting under section 71 above .." But it is submitted that the critical section is section 72(4) which reads as amended and as applicable to this case: "If the court determines that it ought to make an such order, the court shall determine the amount to be recovered in his case by virtue of this section and make a confiscation order for that amount specifying the offence or offences". It would therefore appear that the power to make the order comes from section 72 (4) and not section 71.

12 At page 41 line 23 he states: "secondly, the court can, as a matter of law, embark upon confiscation procedures without a notice - if parliament had wished to prohibit this happening, it could easily have done so". It was submitted before Judge Gordon and is again respectfully submitted before My Lords that the case of Brown (sometimes referred to as Martin) [2002] Cr. L. R. 228, [2001] EWCA Crim 2761 (copy herewith) is binding authority on this matter. At paragraph 48/9 His Lordship states "We consider that we are bound to follow Ahmed with the consequence that the 1995 amendments did not apply and the Court was not invested with the power to initiate the confiscation procedure. For that additional reason it seemed to us that in making the order the court acted without jurisdiction." (Emphasis added) It is therefore submitted that the learned judge was wrong in law on this matter.

13 At page 42 line 4 he states: "fourthly there is now a valid notice under the correct legislation; fifthly, it is therefore now open to me to determine whether to make a confiscation order. There is no timescale provided in the Act requiring this to be done at any particular stage and it is noticeable that what is required by section 72(2) is not a determination as to whether to proceed

with a confiscation hearing but a determination as to whether to make a confiscation order." In so ruling it is respectfully submitted that the learned judge contravened both the scheme of the Act itself and the precedent upon that scheme.

14 It is submitted that the judge can only be treated as "acting under section 71" for the purposes of section 72A(1) if the sequence of steps indicated in section 72 has been followed in the order stipulated. The court can be treated as "acting under section 71" only if it has determined in principle to make a confiscation order, subject to the determination of the amount to be recovered. If the court is waiting to see whether the prosecutor will serve a notice under section 72(1), it cannot be treated as "acting under section 71" as it will have no power to make an order under section 71 (2) unless the prosecutor serves a notice under section 72(1). It cannot have been the intention of Parliament either in 1988 or 1993 to allow the judge to initiate confiscation proceedings, postpone the determination for varying periods, and then allow the prosecution to frustrate the proceedings by failing to serve a notice.

15 It is therefore respectfully submitted that the scheme of section 72 is clear: ss(1) makes notice a pre condition of the making of an order; ss(2) requires the court, following receipt of such a notice to "determine whether it ought to make a confiscation order" (this provision therefore permitting a judge to short circuit the procedures in appropriate circumstances, even though activated by the Crown); ss(3) permits the court to take into account certain material concerning a victim's intention to sue "when considering whether to make a confiscation order" (again giving the judge the opportunity to short circuit the procedures for those reasons even though activated by the Crown); ss(4) concerns the next stage in the proceedings namely the stage when "the court determines that it ought to make such an order"; it is only at that stage that the court is required to "determine the amount to be recovered" and "make a confiscation order for that amount". Plainly section 72 is sequential and the notice requirement appears before the court determines "whether it ought to make a confiscation order" under ss(2). The learned judge's interpretation, following prosecuting counsel's argument, requires section 72 to be interpreted as requiring the notice to be given after the determination under ss(2) "whether it ought to make a confiscation order" but before the court makes an order under sub-section (4). That is, with respect, wrong.

16 The following extracts from Martin (supra) are relied upon. At paragraph 42 Mantell LJ states: "On the 9th December 1999 His Honour Judge Elwen held that the letter of 9th December 1998 was not a good notice in Martin's case and failed to trigger the procedure." His Lordship went on to consider an issue relating to the postponements in the case before stating at paragraph 45 "So leaving aside whether or not the confiscation procedure had been initiated which is the pre-condition for making an order postponing consideration of the confiscation question we find ourselves unable to accept his conclusion that there had been a valid postponement for exceptional circumstances to a date beyond the date of sentence." At paragraph 47 His Lordship states, when considering the issue of whether the court had power in itself to initiate proceedings: "The point is of considerable importance because His Honour Judge Elwen found as a fact that the letter of the 9th December 1998 did not trigger the proceedings in the case of Martin". (Emphasis added).

17 It is therefore submitted that notice in the correct form must be given at the outset in order to trigger the proceedings and all of the powers under the 1988 Act (eg the power to postpone the confiscation proceedings beyond the passing of the sentence, the power in exceptional circumstances, to postpone the determination beyond 6 months following sentence, the power to order him to respond to the prosecutor's notice etc) and it cannot be given almost 10 months after the accused has been sentenced during which time the court had purported to be acting under those said powers.

18 In conclusion on this ground of appeal it is submitted that the learned judge's finding that the original notice was invalid is unimpeachable; that all of the proceedings there under therefore fail as the court was without jurisdiction; that his ruling that the prosecutor was entitled to serve a

valid notice 10 months after sentence was wrong; that his ruling that he could move to act upon that notice was wrong.

GROUND 2

1 Although overlapping somewhat with the first ground of appeal it is submitted that the powers that the judge purported to use in the first instance in postponing the confiscation proceedings beyond sentence and in the second instance in postponing them beyond the 6 month time limit are statutory powers which the judge was not in fact empowered to use by reason of the invalid notice that had been served; accordingly in so proceeding the court was acting without jurisdiction and all proceedings flowing there from are invalidated.

2 It is respectfully submitted that the learned judge rightly acknowledged the statutory basis for the said powers of postponement where he stated as follows at page 42 line 3 [16th April 2002]: "thirdly, once the court is acting under section 71, it has the power to postpone by virtue of section 72(A)"

3 The issue once again is, had those powers been triggered? For all of the reasons outlined above it is submitted that they had not. That is to say that the learned judge was wrong in finding that he was "acting under section 71" because that finding was based upon his second reason, namely that "the court can, as a matter of law, embark upon confiscation procedures without a notice" (supra). 4 A discreet aspect of this ground of appeal follows from argument raised before Judge Gordon.

5 By reason of the matters referred to at paragraph 2 (Ground 1) above the case was presented to the judge by the Crown on the basis that it was an application by the Crown under the new law. The transcript of the 21st May 2001 clearly shows that Judge Gordon proceeded on that basis. In his ruling of the 15th April 2002 at page 70 line 18 onwards the learned judge makes clear that on the 21st May 2001, when he postponed the confiscation proceedings to beyond sentence, he was "following a procedure that had been instigated by the prosecution." He then went on: "However, that related to procedural matters and was not concerned with my future exercise of a discretion under section 72(2)." In those circumstances it is respectfully submitted that the case of Woodhead [2002] EWCA Crim 45 (copy attached) is of direct application.

6 In paragraphs 17 and 18 of Woodhead Goldring J states that "It is agreed that when deciding whether to sentence before confiscation proceedings and postpone the confiscation proceedings under section 72A, a judge is exercising a judicial discretion. It is agreed that if in this case the judge did not exercise a discretion he had no jurisdiction to make the order or orders he made". In paragraphs 32 and 33 he continues: "First, no particular form of words is required in the exercise of the judge's discretion. It must however be plain that when he is considering whether to exercise a discretion, that is what he is doing. Second, the judge in this case did not receive the help he should have had, particularly from the Crown. No one ever suggested to him that he had a discretion; no one suggested to him that it was necessary for him to consider the applications being made to him."

7 It is submitted that those pronouncements apply a fortiori to this case wherein the Crown positively misled (bona fides) the learned judge as to the relevant law and the learned judge has by his own ruling shown that he was not exercising a discretion at that time.

8 Moreover the following transcripts show that the judge was not "acting under section 71" for the purposes of s72A when ordering the postponement because he had not, under section 72(2) determined whether he "ought to make such an order". The relevant transcripts are: learned judge's own words at page 5, lines 6 to 17 - 21st May 2001 together with his ruling there on at page 71, lines 17 to 20 - 15th April 2002: "Clearly, in my view, from the words "I am going to have to consider the question of confiscation" I was indicating that I have not done so and therefore had not made any determination." It is submitted that the effect of the procedure erroneously embarked upon by the Crown is shown to have had the effect that the judge proceeded as he believed he had to, once the Crown had initiated the proceedings under the new Act. He did not apply his discretion as required under section 72(2) because he did not think that he had to. He did not put his mind to the issue. It is submitted that this is a fair reading of both the transcript of the 21st May 2001 and his ruling there on the 15th April 2002. It may seem overwhelmingly obvious that had he been asked to exercise his discretion as to whether or not to make a confiscation order under section 72(2) he undoubtedly would have done so but that is not the point; the point is that he did not do so because of the procedure embarked upon before him.

9 The power to postpone the determination under section 72A is not an open ended or unrestricted power. It is a strictly limited power. It is a power to postpone for the purpose of enabling information to be obtained in respect of one or more of the 3 categories specified at s72A(1)(a), (b) or (c). At no stage did the Crown indicate to the judge what category of information was to be sought although later in the transcript when the issue of piercing the corporate veil is discussed the issue of benefit is mentioned. It is therefore submitted that the postponement was in itself unlawful as it lacked the specificity required by the Act.

10 In those circumstances it is submitted, independently of and in addition to the notice point, that the learned judge was without jurisdiction in this case from 23rd May 2001 (date of sentence) onwards because: (a) he was not "acting under section 71" when he purported so to be doing because an invalid notice had been served upon the court; (b) he did not exercise discretion when postponing the confiscation proceedings under section 72A; (c) he was not "acting under section 71" when he purported to be doing so because he had not, by exercise of his own judicial discretion, determined whether to make an order; (d) the postponement was in itself invalid.

FURTHER GROUNDS THAT WERE ARGUED BEFORE JUDGE GORDON AND WHICH THE COURT IS ASKED TO HEAR

GROUND 3

1 The prosecution and conviction of the appellant was for conspiracy to defraud. The dishonest schemes were said to have been practised upon every relevant customer of the 16624 whose names appeared on a schedule which was proved before the jury, referred to as the 'IFS' master schedule.

2 For the purpose of quantifying 'benefit' for the confiscation proceedings the Crown devised a method of ascertaining from those upon whom they averred the dishonest schemes had been practised whether they had in fact been affected or influenced by the particular dishonest scheme.

3 This method is outlined fully in the Crown's Financial Statement dated 24th August 2001.

4 In short it involved sending a questionnaire, in section 9 CJA 1967 form, to approximately 500 of the customers who had completed deals on the said IFS schedule and then extrapolating by statistical analysis from the results of that survey a result for the entirety of the completed (and cancelled) deals on that schedule.

5 It is submitted that this statistical analysis, or extrapolation, should not have been admitted into evidence or accepted by the learned judge. It is submitted that statistical analysis should never be admitted into evidence when its effect is to speculate about that which is reasonably discoverable by direct evidence. When its use is sought in such circumstances it can never be the best evidence and it can never be more than speculation.

6 When information is reasonably discoverable by direct evidence then the expert statistician's evidence is inadmissible because it cannot be said to relate to something outside the comprehension of the lay person, whether judge or jury.

7 It is submitted that the real position in respect of those upon whom the fraud had been practised was reasonably discoverable in this case. The cost of the postage would not have been in excess of £4000. The collation of the responses would not have taken an inordinate length of time. The court would then have direct evidence upon which to act and no need for resort to statistical speculation.

8 It is submitted that the only place for statistical analysis in these proceedings may have been, following a full survey of all those with completed deals on the IFS schedule, to inform, by expert statistical analysis, as to the significance of non - response to the survey, because that is an otherwise unquantifiable area upon which there could be no direct evidence.

9 The procedure embarked upon by the Crown in these proceedings was in effect a short cut which may or may not have led the court to the correct destination. Given that the default sentences imposed in this case in respect of the confiscation orders exceed the actual prison sentence that the appellant is serving by almost 50% it is submitted that, as a matter of natural justice, the Court should not countenance the prosecution's approach.

10 The statistical analysis / extrapolation should further not have been admitted or accepted by Judge Gordon because of the motives of the Crown in embarking upon that procedure. In his response to the defence submissions on this matter counsel for the Crown stated [page 69, line 7 et seq, 18th April 2002]: "If we were to carry out a census as opposed to a survey, that would have meant that the defence would have been entitled to require each and every person who have answered a questionnaire to attend court. There was nothing in the conduct of the two trials to suggest a defendant would be willing to co-operate and avoid perhaps the prospect of calling some 6, 7 or 8000 witnesses. So what your Lordship has got instead is evidence of the surveys."

11 In that disclosure it is respectfully submitted that the Crown deliberately violated one of the fundamental rights of an accused whether under English or European law (as to the applicability of which please see ground 4 below), namely the right to question his accuser. By proceeding as they did the Crown deliberately sought to circumvent this right in order, for their own purposes, to make the hearing more manageable. Worse than that they effectively deprived him of the chance even to be able to identify who his accuser was because over 15000 customers were never asked.

12 It is respectfully submitted that in deliberately proceeding in this way the Crown's procedure amounts to an abuse of the process of the court by depriving the Appellant of his right to a fair confiscation hearing.

13 For completeness it is respectfully pointed out that history in fact exposed the flaws which follow when the Crown try to pre-empt the defence as they did in this case because not one of the 305 living responders to the survey was in fact required by the defence to attend court.

GROUND 4

1 It is submitted that Article 6(3)(d) ECHR (the right to have examined witnesses against him) [Archbold 16-576] applies to confiscation proceedings and therefore was plainly breached by the procedure embarked upon by the Crown as aforesaid. Accordingly the learned judge should not have admitted the statistical analysis / extrapolation.

2 Rezvi [2002] UKHL 1 and Phillips v UK (transcripts herewith) are not authority for the proposition contended for by the Crown before Judge Gordon that the Convention rights, particularly Article 6(1) and (3) have no application to confiscation proceedings. They are however conceded to be authority on the narrow issue of whether the presumption of innocence at Article 6(2) applied where the assumptions in section 72AA were made – see Rezvi, paragraph 7. That is not the issue in this case. Firstly the said assumptions have no application in this case as they were introduced by the 1995 PCA. Secondly this is not a case where the presumption of innocence has any relevance. Thirdly neither of these two cases can be said to have deprived the defendant in confiscation proceedings of his right to a fair trial generally under Article 6. Indeed, of direct relevance to all of these submissions, is the following: Lord Steyn, in Rezvi, at paragraph 10, cites Bingham LCJ with approval as follows: The Privy Council categorised the confiscation order as "a financial penalty (with a custodial penalty in default of payment) but it is a penalty imposed for the offence of which he has been convicted and involves no accusation of any other offence": para 25, p 118. This is an accurate description of the confiscation procedure under the 1988 Act. Lord Bingham observed in conclusion on this aspect (para 28, p 119): "In concluding, as I do, that article 6(2) has no application to the prosecutor's application for a confiscation order, I would stress that the result is not to leave the respondent unprotected. He is entitled to all the protection afforded to him by article 6(1), which applies at all stages, the common law of Scotland and the language of the statute. If the court accedes to the application of a prosecutor under section 1(1) of the 1995 Act, it will order an accused to pay 'such sum as the court thinks fit'. In making a confiscation order the court must act with scrupulous fairness in making its assessment to ensure that neither the accused nor any third person suffers any injustice." These observations apply mutatis mutandis to confiscation under the 1988 Act.

GROUND 5

1 It is submitted that the learned judge ought to have applied the criminal standard of proof in count 1 to the assessment of 'benefit' for the reasons set out at paragraphs 2 to 5 below and ought in any event, for the reasons set out at paragraph 6 below, to have applied the level of the civil standard of proof to both counts which falls only just short, if at all, of the criminal standard to that assessment.

2 The 1988 Act as originally enacted did not alter the standard of proof required of the Crown to prove their evidence as to the confiscation order; ie. the criminal standard applied. That alteration came about by the insertion of section 71(7A) into the CJA 1988 by section 27 of the CJA 1993:

Part III PART III

PROCEEDS OF CRIMINAL CONDUCT

Confiscation orders

27.-(1) Section 71 of the [1988 c. 33.] Criminal Justice Act 1988 (confiscation orders) shall be amended as follows.

(2) The following subsection shall be inserted after subsection (7) - "(7A) The standard of proof required to determine any question arising under this Part of this Act as to- (a) whether a person has benefited as mentioned in subsection (2)(b)(i) above; (b) whether his benefit is at least the minimum amount; or (c) the amount to be recovered in his case by virtue of section 72 below, shall be that applicable in civil proceedings."

3 This section was brought into force by section 78(6) CJA 1993 which read as follows:

PART VII

SUPPLEMENTARY

Commencement etc.

78.(6) Where a person is charged with a relevant offence which was committed before the coming into force of a provision of Part II, Part III, or (as the case may be) Part IV, that provision shall not affect the question whether or not that person is guilty of the offence or the powers of the court in the event of his being convicted of that offence.

Section 78 came into force on the 15th Feb 1994 - Statutory Instrument 1994 No. 700 (C.12) The Criminal Justice Act 1993 (Commencement No. 6) Order 1994

Section 27 came into force on the 3rd February 1995 –Statutory Instrument 1995 No. 43 (c.3)

Section 78 (6) was further amended by section 168(1), Sch 9, para 53 of the Criminal Justice and Public Order Act 1994 which came into force on the 3rd February 1995.

Application of 1993 Act powers to pre-commencement offences

53. Section 78(6) of the [1993 c. 36.] Criminal Justice Act 1993 (application of Act to pre commencement offences) shall have effect, and be deemed always to have had effect, with the substitution, for the words from "or the powers" to the end, of the words "and, where it confers a power on the court, shall not apply in proceedings instituted before the coming into force of that provision."

This amendment is therefore intended and deemed to be retrospective in effect.

It is therefore submitted that section 78(6) above, read so far as it is relevant to this case, before the CJPO Act 1994 amendment was follows:

"Where a person is charged with a relevant offence which was committed before the coming into force of a provision of Part III, that provision shall not affect the powers of the court in the event of his being convicted of that offence."

However section 78(6) above, read so far as it is relevant to this case, after the CJPO Act 1994 amendment is as follows:

"Where a person is charged with a relevant offence which was committed before the coming into force of a provision of Part II, Part III, or (as the case may be) Part IV, that provision shall not affect the question whether or not that person is guilty of the offence and, where it confers a power on the court, shall not apply in proceedings instituted before the coming into force of that provision."

4 It is respectfully submitted that the original terms of section 78(6), before amendment by the CJPO Act 1994, reflected precedent and anticipated the Human Rights Act and particularly Article 7 thereof: Article 7

7.

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. [my emphasis added]

Archbold comments [16-100]: "The second limb of Article 7(1) prohibits a retroactive increase in the penalty applicable to an offence. The term "penalty" has an autonomous meaning, defined by reference to criteria analogous to those which apply to the term "criminal charge" in Article 6: *Welch v. U.K.*, 20 E.H.R.R. 247, at paras 27-35. The measure must be one that is imposed following conviction for a criminal offence. Other factors to be taken into account are the nature and purpose of the measure; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity. Thus, in *Welch* a confiscation order was made under the Drug Trafficking Offences Act 1986 in respect of an offence committed before the Act entered into force. In deciding that the confiscation order was an additional penalty, and therefore in violation of Article 7(1), the Court noted that the measure had punitive as well as preventative and reparative aims; that the order was calculated by reference to "proceeds" rather than profits; that the amount of the order could take account of culpability; and that the order was enforceable by a term of imprisonment in default."

5 It is respectfully submitted that the CJA 1994 amendment effectively falls foul of the law against retrospectivity. There is no authority on the meaning of "heavier penalty" but it is submitted that the effect of the change in the standard of proof required of the Crown in proving benefit is to lead to confiscation orders in greater amounts than was the case under the criminal standard of proof. The effect of that is that higher maximum default sentences will be imposed. The sure intent of the change in the standard of proof was to confiscate greater amounts from the convicted offender; that brings in its wake the imposition of heavier default sentences; that must, it is submitted, amount to the retrospective imposition of a heavier penalty. It was open to the judge to interpret S71(7A) as proposed because of the matters referred to at paragraph 6 below.

6 The use of the words in S71(7A) "The standard of proof required ...shall be that applicable in civil proceedings" is presumed to be deliberate. This is in contrast to the anticipated Proceeds of Crime Act which it is understood specifically puts the standard of proof as "the balance of probabilities".

7 It is anticipated that this reflects precedent in that the case of *Hornal v Neuberger Products Limited* [1957] 1 QB 247 makes clear that there is no absolute standard of proof in civil proceedings and no great gulf between proof in criminal and civil matters for in all cases the degree of probability must be commensurate with the occasion and proportionate to the matter. It is submitted that nowhere could it be clearer that something approximating to the criminal standard of proof is required than when the criminal standard imposed on the Crown is reduced to the civil standard in proceedings which result in a default sentence that exceeds the offence

imposed for the offences of which a man is convicted, as has happened here.

11 It is submitted that the learned judge's own finding on this matter is of assistance: "I have considered carefully whether the fact that the change may well lead to an increase in finding of benefit, and therefore an increased penalty against a defendant, whether that changes that initial view of mine. But having considered that, it does not." (emphasis added)

PETER JOHN KELSON QC 26.05.02 ALEX DOS SANTOS CATHERINE PATTISON