



6. The case was listed again on July XX 2001, for the purpose of determining whether monies received by various companies could be treated as having been received by the appellant himself for the purpose of determining the amount on his benefit from the offences of which he had been convicted. On this occasion the appellant was represented by counsel (not those counsel who appear in the appeal). After submissions, His Honour Judge Gordon determined that monies received by the companies could be treated as having been received by the appellant for the purpose of confiscation.
7. After further mentions, the case was next listed on April 15, 2002. On this occasion submissions were made that the Crown Court had no jurisdiction to proceed with the confiscation inquiry on the ground in particular that the notice served by the Crown on May 21, 2001 was defective in that it did not comply with the requirements of the Criminal Justice Act 1988 section 72 (1). His Honour Judge Gordon accepted this submission, ruled that the notice was invalid, and further ruled that it was open to the Crown to serve a valid notice at this stage.
8. A further notice was served by the Crown on April 16, 2002, which complied with the requirements of section 72(1). Further submissions were made on behalf of the appellant to the effect that court had no jurisdiction to proceed with a view to a confiscation order on the basis of the new notice. His Honour Judge Gordon rejected the submission and held that he had jurisdiction to proceed with a view to confiscation order.
9. Following further submissions on the meaning of "benefit" in the Criminal Justice Act 1988 section 71(4), His Honour Judge Gordon ruled that the appellant had obtained property "as a result of or in connection with" the commission of the offence only if it was shown that monies had been paid by persons as a result of the false representations which had been made; the fact that false representations had been made to persons who had bought time shares was not in itself sufficient to establish that the monies had been obtained "as a result of or in connection with" the offences.
10. Further submissions were made as to the admissibility of the "IFS master schedule", a schedule listing details of all sales records in which there was evidence that false

representations had been made, and of the report of a survey of 500 of the persons whose transactions were recorded in the schedule (out of a total of 16,624). The Crown sought to rely on the results of the survey as evidence of the proportion of the 16,624 persons listed in the master schedule who were actually deceived by the false representations.

11. His Honour Judge Gordon ruled that survey was admissible and heard evidence relating to the reliability of the survey.
12. Further submissions were made on behalf of the appellant in relation to the standard of proof which it was appropriate for the judge to apply in determining the amount of the appellant's benefit, in the light in particular of Article 7 of the European Convention on Human Rights and The Human Rights Act 1998 section . Judge Gordon rejected these submissions.
13. On April 23, 2002, His Honour Judge Gordon assessed the appellant's benefit from the offence in count one at £32,815,241.76 and from the offence in count two at £504,918.70, and made two confiscation orders, one in the amount of £32,738,893.76 in respect of count one and the other in the amount of £504,918.70 in respect of count 2. He fixed terms of imprisonment in default of payment of eight years in respect of the first confiscation order and three years in respect of the second confiscation order, the term in respect of the second order to run consecutively to the first and both orders to run consecutively to the term of eight years' imprisonment imposed in May 2001.
14. His Honour Judge Gordon further ordered the appellant to pay a total of £2,039,899.14 in compensation to various identified complainants.

*Grounds of appeal:*

15. His Honour Judge Gordon certified two grounds of appeal as fit for appeal under the Criminal Appeal Act 1968 section . Those grounds are as follows:

(1) the learned judge was wrong to rule that the prosecutor was entitled to serve a valid notice under the Criminal Justice Act 1988 section 72(1) almost ten months after the date on which the defendant was sentenced, and that the learned judge had power to determine that the court ought to make a confiscation order on the basis of such a notice.

(2) The learned judge had no power to order a postponement of the determination of matters relevant to confiscation under the Criminal Justice Act 1988 section 72A(1) before the prosecutor had served a valid notice under section 72(1) and the learned judge had made a determination under section 72(2).

The appellant seeks leave to argue five further grounds as follows:

(3) The learned judge was wrong to admit in evidence the survey report, which was not admissible in evidence on the ground that it was secondary evidence of facts of which primary evidence was available.

(4) The learned judge should have disregarded any evidence adduced by the prosecution in the form of the survey report to the extent that the use of such evidence violated the appellant's right to a fair trial under the European Convention on Human Rights Articles 6(1) and 6(3).

(5) The learned judge should have directed himself that in determining the value of the appellant's benefit he should apply the standard that he was "sure and certain" of any disputed fact before including that fact in the determination of the appellant's benefit.

(6) The learned judge on May 21, 2002, in purporting to exercise the power to postpone the proceedings under the Criminal Justice Act 1988 section , failed to specify a period of postponement as required by the decision in R.v. Davies [2002] 2 Cr.App.R.(S.) 43 (at 177.)

(7) The learned judge had no power on April 23, 2002, to rescind the order for the payment of prosecution costs in the amount of £266,367 made on May 23, 2001, and to substitute an order for payment of prosecution costs in the amount of £342,249.

*Submissions in support of the grounds of appeal.*

#### *Ground 1*

*The learned judge was wrong to rule that the prosecutor was entitled to serve a valid notice under the Criminal Justice Act 1988 section 72(1) almost ten months after the date on which the defendant was sentenced, and that the learned judge had power to determine that the court ought to make a confiscation order on the basis of such a notice.*

The first modern statute empowering criminal courts to confiscate the assets of convicted defendants was the Drug Trafficking (Offences) Act 1986. Under this statute, in any case where a person was convicted of a drug trafficking offence within the meaning of the Act, the court was obliged to proceed with a view to confiscation. All other sentencing matters had to be postponed. The initiation of proceedings under the 1986 Act did not require the prosecution to take any steps, and the sentencing judge had no discretion. (See **Stuart and Bonnett (1989) 11 Cr. App. R. (S.)**)

89. ) There was no minimum amount. It was necessary to initiate confiscation proceedings even though there was no prospect of making a confiscation order in any significant amount.

The scheme introduced by the Criminal Justice Act 1988 in respect of offences which were not drug trafficking offences differed from that of the 1986 Act in several crucial respects. First, no confiscation order could be made for less than the minimum amount fixed by section 71 (7) at £10,000. Second, the 1988 Act provided that the court "shall not make a confiscation order" unless the prosecution has given written notice to the effect that it appears to the prosecutor that, were the court to consider that it ought to make an order, it would be able to make an order requiring the offender to pay at least the minimum amount. Third, the Crown Court was given a discretion in relation to the decision to proceed with a view to making a confiscation order; nothing in the Act imposed an obligation on the Crown Court to proceed with a view to confiscation. Fourth, in determining the amount of the order, the Crown Court was given discretion to fix the amount of the order, so long as it did not exceed the benefit in respect of which the order was made and was at least the minimum amount. Under the Drug Trafficking (Offences) Act 1986 the sentencing judge was allowed no discretion in fixing the amount of the order.

The Proceeds of Crime Act 1995 amended the Criminal Justice Act. The effect of the change was that if the prosecutor gave written notice to the court that he considered it appropriate for the court to proceed with a view to confiscation, the court was placed under a duty to proceed; in addition, the court was required to proceed with a view to confiscation if considered in its own discretion that it would be appropriate to proceed "even though it has not been given such a notice."

In the present case it has been determined that the matter of confiscation is governed by the original provisions of the Criminal Justice Act 1988, as amended by the Criminal Justice Act 1993 with reference to the standard of proof and postponement of determinations. It has also been determined that the notice originally served by the prosecution did not fulfil the requirements of Criminal Justice Act 1988 section 72(1) in that it did not contain a statement that it appeared to the prosecutor that if the court were to proceed with a view to a confiscation order, it would be able to make an order requiring the offender to pay at least the minimum amount.

The question for decision is whether the service by the prosecution in April 2002, almost eleven months after sentence, of a valid notice which complies with section 72(1) could empower the Crown Court to make a confiscation order.

It is submitted that a proper reading of sections 71, 72 and 72A of the 1988 Act make clear that it cannot. Taken in the context of the earlier legislation, it can be seen that the policy of the 1988 Act in its original form was to prevent the Crown Court from embarking on possibly protracted confiscation proceedings which at the end of the day would result in no order, or an order for a negligible amount, if the defendant was found to have no realisable assets. Section 71 sets out the powers of the court, and defines the principal terms; section 72 sets out the sequence of procedural steps which are to be followed. The first step is the service by the prosecutor on the court of a notice under section 71(1); if such a notice is served, the court is required to determine whether it ought to make a confiscation order. If it does decide to make an order, it must (subject to section 72A, introduced by the Criminal Justice Act 1993) proceed to deal with confiscation before dealing with sentence. The Act contemplates that normally sentence will follow the making of the confiscation order; the underlying reason for the requirement of notice is that embarking on confiscation proceedings is a serious step which should not be undertaken without a reasonable chance that an order of at least £10,000 will be possible.

If the court were empowered to make the decision to embark on confiscation proceedings without a notice, and proceed with a view to confiscation on its own initiative, the consequence which section 72(1) is designed to avoid would happen; the Crown Court would be able to proceed with a view to confiscation, and might at the end of the day find itself unable to make an order because the defendant had no realisable assets. A notice under section 72(1) given after confiscation proceedings had started would serve no purpose. The only function of section 72(1) would be to allow the prosecution to prevent the sentencing judge from making an order which he was otherwise disposed to make, by refusing to serve a notice after confiscation proceedings had begun.

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.

The only decision which appears to deal expressly with this issue is **Martin** [2002] 2 Cr.App.R.(S.) 34 (at 122) (sometimes referred to as *Brown*). The following passages from the judgment of Mantell L.J. are relevant:

Para 47: "The point is of considerable importance because His Honour Judge Elwen found as a fact that the letter of 9<sup>th</sup> December 1998 **did not trigger the proceedings** in the case of *Martin*. Although the heading includes a reference to "Operation Methuselah" (the codename given to the overall investigation,) the letter nowhere mentions *Martin* by name who could not be considered to be a defendant "whose trial for offences contrary to section 170 (2) ... is due to commence on 11<sup>th</sup> January 1999 the Crown Court." In His Honour Judge Elwen's view that letter was at best ambiguous and insufficient for the purpose. With that conclusion we agree. However His Honour Judge Elwen accepted Mr Mitchell's submission that the 1995 amendments applied and accordingly was able to justify the course of proceedings from 11<sup>th</sup> January onwards by his holding that the court had initiated the procedure of its own motion."

Para. 48: "It was the court's decision, therefore, that even where a conspiracy straddled the date of the 1995 amendments coming into force the Act did not apply even, as was the case, if overt acts were carried out after that date. The decision is exactly in point and, without more, binding on us. However Mr Mitchell has boldly sought to argue that *Ahmed* was wrongly decided. He has invited our attention to *In re C* (application no. 2268/93) a decision of the European Commission on Human Rights made on 6<sup>th</sup> April 1994. He submits that had *In re C* been cited to the court in *Ahmed* the conclusion might well have been different. We do not find it necessary to examine the case in detail save to note that it was a decision of the Commission and not the Court and related to admissibility. 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.**"

If the Court in Martin was not "invested with the power to initiate the confiscation procedure" in the absence of a valid notice under section 72(1), it is submitted that the same must apply in the identical circumstances of the present case. The Crown Court had no power, in the absence of a valid notice under section 72(1), to "initiate the confiscation procedure".

It is submitted that it must follow that the Crown Court had no power to act on the basis of a notice served eleven months after sentence.

A consideration of the transcript of the proceedings on May 21, 2001, indicates that His Honour Judge Gordon on that occasion was acting on the basis that the prosecution had served a valid notice, that he accordingly had jurisdiction to begin to act under section 71, and that he had therefore jurisdiction to postpone the determinations under section 72A:

"MR MATTHEW: The first thing that is required is the service of a notice from the prosecution. That has been served on both Mr Palmer and the Court today.

JUDGE GORDON: That is a notice under?

MR MATTHEW: Section 71 of the 1988 Criminal Justice Act.

JUDGE GORDON: Yes.

MR MATTHEW: That is a pre- condition to your Lordship considering the question of whether or not there will be a confiscation order between them.

JUDGE GORDON: That is a notice 71(1)A in this instance, ie at the instigation of the prosecution.

MR MATTHEW: Yes.

JUDGE GORDON: Once that notice has been served and --

MR MATTHEW: The court then has power to adjourn the hearing of any confiscation hearing until after sentence.

JUDGE GORDON: That is once, I am acting pursuant to section 72 I think it is, is it not?

MR MATTHEW: Yes, it is, my Lord.

JUDGE GORDON: So I first of all have the notice having been served at your invitation to start the process of determining whether or not the requirements have been shown to enable a confiscation order to be made.

MR MATTHEW: Yes.

JUDGE GORDON: Once I have started that process it is then these days open to me to delay the proceedings in relation to confiscation only if I need further information.

MR MATTHEW: Yes.

JUDGE GORDON: And once I have made that determination it is then open to me to proceed to sentence.

MR MATTHEW: Yes, it is. The power is under section 72 A of the Criminal Justice Act 1988."

It is submitted that this is a correct understanding of the law and that the ruling given by His Honour Judge Gordon on April 16 that it was open to him to proceed with a view to a confiscation order on the basis of a notice served by the prosecution on that day was incorrect in law.

*Ground 2. The learned judge had no power to order a postponement of the determination of matters relevant to confiscation under the Criminal Justice Act 1988 section 72A(1) before the*

*prosecutor had served a valid notice under section 72(1) and the learned judge had made a determination under section 72(2).*

This ground rests on the same basis as Ground 1. Sections 72 and 72A, it is submitted, lay down a mandatory sequence: the service of a notice under section 72(1), a discretionary decision by the judge to proceed with a view to making a confiscation order under section 71(1), and then a decision under section 72A(1) to postpone the determination of matters relevant to confiscation.

In this connection, the observations of Potter L.J. in *Ross* [2001] 2 Cr.App.R.(S.) 109 (at 484), on the equivalent provisions of the Drug Trafficking Act 1994, are helpful:

"18. In our judgment, section 2 and section 3 of the Act lay down **a clear and mandatory sequence** to be followed in a case such as the present when a defendant appears before the Crown Court to be sentenced in respect of one or more drug trafficking offences, and either the prosecution makes a request within section 2(i)(a), or the court considers it is appropriate to proceed under section 2. We say mandatory because of the first five words of section 2(2)."

Section 2(2) begins as follows:

"The court shall first determine whether the defendant has benefited from drug trafficking."

The Criminal Justice Act 1988 section 78(4) is substantially similar in effect:

"If the court determines that it ought to make such an order, the court shall, before sentencing or otherwise dealing with the offender in respect of the offence or, as the case may be, any of the offences concerned, 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 is submitted that this provision, taken in the context of section 72 as a whole, lays down a "clear and mandatory sequence": the service of a valid notice under section 72(1), a determination that the court ought to make a confiscation order, and then and only then a determination to postpone under section 72A. In this case, Judge Gordon's ruling on April 16, 2002, implies that the sequence can be reversed; a decision to postpone under section 72A, the service of a valid notice long after the normal period of postponement had expired, and then the making of a discretionary decision under section 72(2).

It is submitted that the only possible interpretation of the provisions is that a court cannot be considered to be "acting under section 71" for the purposes of section 72A unless and until a valid notice has been served under section 72(1) and a discretionary decision has been made under section 72(2). It would follow that Judge Gordon had no power to postpone the proceedings on May 21 and that all subsequent orders in relation to confiscation are without jurisdiction.

### *Ground (3)*

*The learned judge was wrong to admit in evidence the survey report, which was not admissible in evidence on the ground that it was secondary evidence of facts of which primary evidence was available*

It is submitted that as a general principle the duty of the prosecution is to adduce the best evidence which is reasonably available to support any assertion which the prosecution makes. The survey of a small selection of persons who had been involved in the transactions is not the best evidence available of the whole number of persons who were actively deceived by the false representations alleged to have been made to them. It is submitted that it was the duty of the prosecution to obtain evidence from each of the persons whose loss was to form the basis of the calculation of the appellant's benefit from the offences. While the costs of doing so would have undoubtedly been considerable, and they would have been a very much less than the amounts sought by the prosecution in respect of each respondent. The judge calculated the appellant benefit from the offences on the basis that 70% of the total number of persons listed in the IFS Master Schedule had been deceived by the representations and calculated on that basis that the total benefit received by the appellant was in excess of £32 million. The average amount of loss suffered by each person who was assumed to have been deceived by the representations appears to have been in the order of £2,850, although in some cases the amount was very much greater than this. It is submitted that the cost of sending a questionnaire to each person included in the IFS Master Schedule would have amounted to very much less per head than this figure; perhaps a total amount including the cost of printing postage return postage and collating of the order of £10 would be realistic. In calculating this amount, perhaps some further cost should be allowed for the fact that a significant number of the persons would have replied in the negative, but even allowing for this figure it seems that a total of £15 per head would not have been unrealistic.

It is submitted that given the size of the order the Crown were seeking, it was the duty of the prosecution to carry out a full inquiry rather than rely on a hypothesis formulated on the basis of a survey which was self-designed by counsel rather than a professional survey researcher.

It was conceded by the prosecution that one of the objects of the survey was to prevent the appellant from requiring the attendance of all the respondents and cross examining them (see the comments of Mr. Matthew on April 18, 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."

It is submitted that the court has a general duty to prevent a defendant from being unfairly treated and that in the performance of this duty His Honour Judge Gordon should have refused to allow the survey to be admitted in evidence.

#### *Ground 4*

*The learned judge should have disregarded any evidence adduced by the prosecution in the form of the survey report to the extent that the use of such evidence violated the appellant's right to a fair trial under the European Convention on Human Rights Articles 6(1) and 6(3).*

It is established in the case law that confiscation proceedings form part of the criminal trial and are therefore subject to Article 6 of the European Convention on Human Rights. The following passage is found in the judgment of Lord Woolf C.J. in **R.v. Benjafield and others** [2001] 2 Cr.App.R.(S.) 47 (at 221):

"Yet undoubtedly, Article 6(1) would apply to the process leading up to the making of a confiscation order. The confiscation order is made in criminal proceedings. It is accepted by all the parties that it is penal. It must therefore be regarded for the purposes of Article 6(1) as at least part of the determination of a criminal charge since there is no other option for which Article 6(1) provides. The fact that a defendant who does not comply with a confiscation order, which may not be based on criminal conduct proved at the trial, may be ordered to serve a substantial sentence in default underlines this fact."

Similarly, in *R.v. Rezvi* (January 24, 2002, [2002] UKHL 1) Lord Steyn made the following observations:

"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."**

The decisions in *R.v. Benjafield* and *R.v. Rezvi* are otherwise not relevant to the present case. They were concerned with the narrower question whether the making of the assumptions required by the Drug Trafficking Act 1994 section 4, or permitted by the Criminal Justice Act 1988 (as amended by the Proceeds of Crime Act 1995) section 72AA) involved a violation of Article 6(2). No such issue arises in this case.

Article 6(3) reads as follows:

"Everyone charged with a criminal offence has the following minimum rights:

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him... "

It is submitted that the adduction by the Crown of a survey based on the responses of unidentified witnesses to a questionnaire, and the use of those answers to construct a hypothesis as to the answers which would have been given by other witnesses if they had been asked similar questions, plainly violates the appellant's rights under Article 6(3)(d) of the Convention.

It follows that it was unlawful for judge Gordon to admit the survey into evidence, or to take it into account in determining the amount of the appellant's benefit, by virtue of the Human Rights Act 1998 section 6(1), which provides that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right." It is submitted that it is clear that Judge Gordon could have acted differently and that the excepting conditions in section 6(2) do not apply, as he was not obliged to admit the survey in evidence.

It is submitted accordingly that in determining the amount of the appellant's benefit, Judge Gordon should have limited himself to the total amount calculated in respect of those complainants who gave evidence at the trial, or who were otherwise identified as applying for compensation.

#### *Ground 5*

*The learned judge should have directed himself that in determining the value of the appellant's benefit he should apply the standard that he was "sure and certain" of any disputed fact before including that fact in the determination of the appellant's benefit.*

It is clear that before the amendments made to both the Drug Trafficking Act 1994 and the Criminal Justice Act 1988 by the Criminal Justice Act 1993, the burden of proving benefit lay on the prosecution and that the standard was the criminal standard. The leading authority was Dickens (1990) 12 Cr.App.R.(S.) 191) where the following comment was made by Lord Lane C.J.:

"The prosecution have the task of proving both the fact that the defendant has benefited from drug trafficking and the amount of such benefit. *In our judgment the context of the Act and the nature of the penalties which are likely to be imposed, make it clear that the standard of proof required is the criminal standard, namely proof so that the judge feels sure or proof beyond reasonable doubt.* The evidence upon which that judgment is based will come in part from the trial, if there has been one, in part from the statements tendered by the parties to the court under section 3 of the Act (with which we shall deal later in this judgment) and in part from evidence adduced before the court. "

It appears to have been assumed that the same rule applied to orders under the Criminal Justice Act 1988, as the following passage from the judgment of Kennedy L.J. in Ghadami [1998] 1 Cr.App.R.(S.) 42 indicates:

"The judge then continued: "I, of course, have heard the evidence and it seems to me, that when dealing with the application, I have to decide what benefit the defendant obtained and it is for me to determine that issue, and of course I have to do so to the criminal standard of proof. I have come to the conclusion, without rehearsing all the evidence in the case, that I can be sure that the defendant so benefited to the sums set out in the schedules."  
.... Having adopted an approach to the matter which in our judgment cannot be faulted the judge concluded that the appellant's benefit amounted to £123,280.01, and Mr Irshad Sheikh rightly does not contend that the judge did not have before him evidence to support those conclusions."

The position was changed by the Criminal Justice Act 1993 section 27, which inserted into the Criminal Justice Act 1988 a new subsection 71(7A), which reads as follows:

"(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 this case by virtue of section 72 below, shall be that applicable in civil proceedings."

The commencement of this provision was subject to the general commencement provision of the 1993 Act, section 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(6) was subsequently amended by the Criminal Justice and Public Order Act 1994, section 53, which reads as follows:

"Section 78(6) of the 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."

The clear intention of this subsection was to allow the sections affected, which include section 27 of the 1993 Act, to apply to offences committed before the commencement of the section in respect of which proceedings were instituted after the commencement of the section.

In January 1995, the European Court of Human Rights decided the case of *Welch v. United Kingdom*. This case established that a confiscation order made under the Drug Trafficking Offences Act 1986 was a "penalty" for the purposes of Article 7 of the Convention, and that to a power to impose a confiscation order in respect of an offence committed before the commencement date of the relevant legislation violated the defendant's rights under Article 7.

The relevant words of Article 7 are:

"Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

It is established by *Welch v. United Kingdom* that a confiscation order is a "penalty" for this purpose. The question of when a penalty is to be regarded as "heavier" than the penalty previously applicable does not appear to have been considered in any decision of the European Court of Human Rights of the Court of Appeal, Criminal Division.

It is submitted that a penalty can be considered to be "heavier" for this purpose if the procedural conditions which surround its application are significantly relaxed, or the effect of a relaxation in the procedural conditions can or does lead to the imposition of a greater penalty than would have been capable of being imposed under the more restrictive conditions.

This submission does not have any relevance to changes in the law of evidence or procedure relating to the trial itself. The words of Article 7 on which the submission is based are specific to the sentencing process. It is not argued that a change in the law of evidence, making evidence admissible in the trial which was previously inadmissible, would violate Article 7, and a decision to the effect that procedural changes relating to specifically to penalties can violate Article 7 would

not have the logical consequence that procedural or evidential changes relating to the trial itself would have the same effect.

The change made by the Criminal Justice Act 1993 section 27, which purported to be made retrospective by the Criminal Justice and Public Order Act 1994 section 53, substantially affected the position of a defendant facing a confiscation order. By reducing the standard of proof which the prosecution must meet, it significantly facilitates the making of an order against the defendant. By the same process it enlarges the amount which the court is likely to find to have been his "benefit" from the offence. If the standard required were the criminal standard, the judge would be able to assess the defendant's benefit only by reference to those facts which he found to be established to the criminal standard. This amount will inevitably in many cases and in this case in particular, be significantly smaller than the amount which the judge could find on the basis of facts established to the civil standard. If this would not so, there would have been no purpose in making the change in the legislation in the first place.

It is accordingly submitted that in so far as the combined effect of the sections cited is to lower the standard of proof in respect of a confiscation order made in respect of offences committed before the commencement date of the amending provisions (February 3, 1995) it amounts to the imposition of a heavier penalty than the one that was applicable at the time the criminal offence was committed and potentially violates the defendant's convention rights under Article 7.

The supposed distinction between procedural changes and substantive changes in the law relating to sentencing is not borne out by a consideration of legislative practice since the decision of the European Court of Human Rights in *Welch v. United Kingdom*. Almost all changes in the law affecting sentencing have been subject to specific provisions to the effect that they did not apply to offences committed before the commencement of the relevant provision, whether or not they are procedural. In any event, the difference between a substantive and a procedural change in this context is not easy to apply.

Examples of changes which might be considered procedural include the following:

*The Criminal Procedure and Investigations Act 1996*

Section 58 empowers a court to restrict publication of matters mentioned in a speech in mitigation. The power applies only to speeches made in relation to offences committed after the commencement of the section (see section 61(1).)

*The Crime (Sentences) Act 1997.*

The provisions of section 2, 3 and 4 requiring mandatory sentences to be imposed in certain cases were not applied to pre-commencement offences. The mandatory penalties themselves were no heavier than the penalties which could have been applied in the exercise of judicial discretion; The provisions of section 9, which related to the treatment of time spent in custody on remand, which gave the court a discretion to allow time to count, would have applied only to post-commencement offences (see s. 9(1)(a));

The provisions relating to release supervision orders were not to apply to sentences imposed for pre-commencement offences (see section 16(1)(a));

The provisions abolishing the requirement of consent to the making of a community service order or a probation order applied only to orders made in respect of post-commencement offences (see The Crime (Sentences) Act 1997 (Commencement No. 2 and Transitional Provisions) Order 1997 (S.I. 1997 no. 2200).

### *The Crime and Disorder Act 1998*

Extended sentences (section 58) applied only to pre-commencement offences (see the ...)

The power to make a confiscation order (section 83) on a committal for sentence was limited to pre-commencement offences (see Schedule 9 para. 8)

Amendments relating to the recall of short term prisoners applied only to those sentenced for post-commencement offences (see sections 103, 104 and 105, and Sched. 9 paras. 12, 13 and 14).

While this is not a comprehensive list of changes in sentencing powers since 1995, it is sufficient to indicate a Parliamentary assumption that the concluding words of Article 7 apply to procedural as well as to substantive changes in relation to sentencing powers.

Given that the application of a standard of proof lower than the criminal standard would contravene the defendants rights under the section limb of Article 7(1), it was the duty of the sentencing judge under the Human Rights Act 1998 section 3(1) to give effect to section 71(7A) "in a way which is compatible with the Convention rights."

It is submitted that it was open to Judge Gordon to do this by directing himself that in this context and for the purposes of this case, the expression "The standard of proof ...applicable in civil proceedings" in section 71(7A) was a variable and flexible standard, which might include in appropriate circumstances a standard broadly equivalent to the criminal standard.

The flexibility of the expression "standard of proof... applicable in civil proceedings" has been recognised in the discussions of the Proceeds of Crime Bill at present before Parliament. The Bill will substitute for that expression the expression "on a balance of probabilities" (see clause 6).

The following explanation for the change was given by the Parliamentary Under Secretary to the Home Department to Standing Committee B of the House of Commons on November 20, 2001:

"I come now to amendment No. 31. The hon. Member for Beaconsfield draws our attention to the current legislation, which stipulates

``the standard applicable to civil proceedings", and observes that we have changed that wording to ``a balance of probabilities". The reason for the change is straightforward. In some civil proceedings, such as proceedings for contempt, the standard of proof is beyond all reasonable doubt. We wish to make it clear that that does not apply to confiscation proceedings. To avoid any doubt, we used the balance of probabilities formula in the Bill.

**Mr. Nick Hawkins (Surrey Heath):** I understand the Minister's point. Does he propose that the Home Office use the term ``a balance of probabilities" in all future legislation, whenever it intends to use what we traditionally regard as the civil standard? My hon. Friend the Member for Beaconsfield pointed out that in other recent legislation the Government have used the wording of the civil standard.

**Mr. Ainsworth:** I do not want to give an assurance off the top of my head that we shall use a particular form of words on all occasions. If the hon. Gentleman bears with me, we shall explore whether changing the wording of the Bill makes any difference to the level of proof required. On Thursday, the hon. Member for Beaconsfield suggested in Committee that by referring to the balance of probabilities rather than the civil standard of proof in clause 6, we intended to make a substantive change to the standard of proof that will be applied in confiscation proceedings. That is not so.

The hon. Gentleman suggested that the flexibility that the courts claim attaches to the civil standard of proof would not be provided if we used the wording "a balance of probabilities". In my view, that is not correct, and our opinion is supported by case law. In the case of *Re H* in 1996, the Lords considered the standard of proof in a child care case. Lord Nicholls, when discussing flexibility, referred to the balance of probabilities rather than the civil standard. He went on to explain what is meant by the term "a balance of probabilities". He said:

"The balance of probability standard means that the court is satisfied that an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury . . . built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

From case law, we can be sure that the courts will continue to require the same sort of evidence as before in confiscation proceedings. I hope that the hon. Member for Beaconsfield is reassured by that, and is prepared not only to withdraw the amendment, but not to press amendment No. 31.

**Mr. Dominic Grieve (Beaconsfield):** If the state decides to confiscate someone's assets in the circumstances outlined in the clause, is it not being alleged that the person concerned has fraudulently, or at least dishonestly, acquired those assets? The draconian consequences of the confiscation order point to the fact that the civil standard of proof should be a high one. Is not that an argument for using the civil standard of proof rather than a balance of probabilities, which the Minister accepts was introduced to make confiscation easier?

**Mr. Ainsworth:** The hon. Gentleman may understand these matters better than I do, but I have shown clearly the accepted precedent in law that the required standard of proof for the balance of probabilities varies with the seriousness of the offence. I do not know whether he contests that. The purpose of our wording is clear. We reject the amendment because it would be a retrograde step to accept it. It would apply the criminal standard to all confiscation proceedings, and that would be difficult to implement and would render the legislation useless. A change of wording from the civil standard to the balance of probabilities is not intended to change the evidence that

is required. However, that is not the criminal standard. That standard applies in some civil litigation and that is potentially confusing. The standard is flexible. The more serious the allegation, the greater the degree of proof required by the courts under the balance of probabilities.

**Mr. Hawkins:** Let me take the Minister back to what my hon. Friend the Member for Beaconsfield said when moving the amendment. Conservatives understand the Minister's point about amendment No. 30. He said that he believed that it would be inconsistent with existing legislation to introduce the criminal standard of beyond reasonable doubt or satisfaction so that a court is sure. He pointed out the distinction between our proposal and previous legislation. We are not wholly persuaded. The Bill will give draconian powers, which troubles us—that is why we wanted to probe him—but I shall concentrate my remarks on amendment No. 31.

The Minister set out his reasons why the balance of probabilities is the Government's preferred option. However, he conceded in response to my hon. Friend that that standard is the lowest that we could have. The Government say that they do not want a terribly high hurdle that those who wish to use the powers must get over. We are worried about that. My hon. Friend rightly mentioned the draconian consequences of the Bill, and the Government should bear it in mind that the prosecution should not have a low and easy hurdle to get over. There should be proper safeguards.

The Minister is correct to discuss varying standards of proof in civil proceedings. However, as he conceded, there is a difference between the balance of probabilities and the civil standard of proof. The use of the civil standard formula would give the courts and all concerned a clear indication of the type of safeguards that are required. He and his advisers must reflect on the matter, because it will perhaps be addressed on Report, and certainly in another place.

The Minister extensively quoted the comments of Lord Nicholls, and the Law Lords will scrutinise the matter. He also referred to the manner in which the two different tests of balance of probability and the civil standard have been used in recent legislation. He must concede that the Government have used the words

“the standard of civil proceedings”

in legislation as recently as just before the general election. He has difficulty saying that we should not use the civil standard of proof in legislation because there are civil proceedings in which the criminal standard is used. Their Lordships will understand the signals that are intended to be sent by referring to the standard of proof in civil proceedings, as the Government have done in recent legislation.”

It is submitted that in the light of this argument His Honour Judge Gordon should have directed himself that in determining the amount of the appellant's benefit, he should require himself to be satisfied so that he was sure of any fact before basing his finding on that fact. This was a possible interpretation of section 71(7A) in the light of the authorities, and one that was required by the Human Rights Act 1998 section 3. If Judge Gordon had so directed himself, it is submitted that he would inevitably have disregarded the evidence of the survey as incapable of providing proof to the required standard.

*Ground 6.*

*The learned judge on May 21, 2002, in purporting to exercise the power to postpone the proceedings under the Criminal Justice Act 1988 section , failed to specify a period of postponement as required by the decision in R.v. Davies [2002] 2 Cr.App.R.(S.) 43 (at 177.)*

The Criminal Justice Act 1988, section 72A (as inserted by the Criminal Justice Act 1993) provides as follows:

(1) Where a court is acting under section 71 above but considers that it requires further information before -

(a) determining whether the defendant has benefited as mentioned in section 71(2)(b)(i) above;

(b) determining whether his benefit is at least the minimum amount; or

(c) determining the amount to be recovered in his case by virtue of section 72 above,

it may, for the purpose of enabling that information to be obtained, postpone making that determination for such period as it may specify.

The Drug Trafficking Act 1994, section 3, provides as follows:

(1) Where the Crown Court is acting under section 2 of this Act but considers that it requires further information before -

(a) determining whether the defendant has benefited from drug trafficking, or

determining the amount to be recovered in his case by virtue of that section,

it may, for the purpose of enabling that information to be obtained postpone making the determination for such period as it may specify.

The final words of the sections are identical.

The meaning of the words "postpone the making of the determination for such period as it may specify" have been considered by the Court of Appeal, Criminal Division in a number of cases.

The relevant passages are as follows:

**R.v. Steele, R.v. Shevki [2001] 2 Cr.App.R.(S.) 40 (at 178)**

"26 This limited degree of flexibility within the timetable arises in two distinct circumstances. The first is when the defendant appears to be sentenced, and the court requires further information to enable it accurately to determine whether the defendant has benefited from drug trafficking, or the amount to be recovered from him. *If so, postponement may be ordered for a specified period* which, unless there are exceptional circumstances, may not be extended beyond six months after the date of conviction. The court is required to make a positive decision postponing the determination. It does not follow from the fact that an order has not been made, when it might have been, that the order must have been postponed, or be deemed to have been postponed. Mere temporising, delay, or inaction, does not amount to postponement of a determination. In short, following an application from one side or the other, or as a result of the court acting on its own initiative, for the purposes of section 3, a judicial decision is needed, and unless made within the permitted period (whether for postponement, or for an extension in "exceptional" circumstances) the jurisdiction to make the order for postponement lapses."

"29. From time to time it has been said, and in both the cases before us it was said, or at least implied, that the confiscation order must be made within six months of the date of conviction. That, in effect, was what I said in *Cole* (a drug trafficking case), unreported, April 22, 1998: "Section 3 therefore creates a convenient code which permits the court to pass an appropriate sentence before having determined whether to make a confiscation order under section 2, and simultaneously maintains the necessary control over the process which could otherwise become protracted and ultimately unfair. Although the court is plainly able to fix a date for any subsequent hearing, the power created by this section is *to postpone the determination not to a date, but for a period*. The provisions are clear. The court should normally deal with the confiscation order within six months of the conviction. In exceptional circumstances this period may be exceeded . . . If an application is made within the six month period, and provided the circumstances are exceptional, an order made by the judge postponing the determination further is valid."

"58. The result of this over-lengthy analysis of the authorities can be summarised in a few sentences. Confiscation orders should normally form part of the ordinary sentencing process. For lack of appropriate information, this will often be impractical. If the conditions in section 3(1) or section 3(4) are satisfied, and within six months of conviction, the court may decide *that the determination should be postponed*. Unless the circumstances are exceptional *this should not extend beyond six months* after conviction. These decisions involve the court's discretion, judicially exercised when the statutory conditions are present, taking full account of the preferred statutory sequence as well as the express direction in the statute that save in exceptional circumstances confiscation determinations should not be postponed for more than six months after conviction. So far as practicable, adjournments which would have the effect of postponing the determination beyond that period, or in exceptional cases, beyond the period envisaged when the decision to postpone was made, should be avoided. Nevertheless when the circumstances in an individual case compel an adjournment which would have this effect, then whether or not the information gathering process has been completed, it may be ordered, for example, to take account of illness on one side or the other, or the unavailability of the judge, without depriving a subsequent order for confiscation of its validity."

Although neither case turned on whether it was necessary to specify a precise period of postponement of the determinations, as opposed to the beginning of the confiscation proceedings, the language used appears to indicate that what must be postponed is the "determination".

**R.v.Gadsby [2002] 1 Cr.App.R.(S.) 97 (at 423)**

"4. At the conclusion of the trial, at the invitation of the Crown, the court determined to exercise its powers under section 2(1)(a) of the Drug Trafficking Act 1994 ("the Act") to consider whether and to what extent the appellant had benefited from drug trafficking. It is common ground that the court considered that it required further information in order to proceed under section 2 of the Act. Accordingly it postponed its determination of that question in accordance with the provisions of section 3(1) of the Act. *The court did not, however, specify the period of postponement as provided in section 3(1). On the other hand, neither party asked it to do so.* The court exercised its powers under section 12(2) of the Act by ordering that the appellant serve an affidavit of his means within 28 days.

5. Section 3(3) of the Act provides:

"Unless it is satisfied that there are exceptional circumstances, the court shall not specify a period of postponement which exceeds six months beginning with the date of conviction."

6. The conviction having occurred on April 23, 1989, the six-month period expired on October 23. *In fact when the court postponed the determination it did not specify the period of postponement but no one asked it to do so.* By section 11(1) of the Act where, as here, the prosecutor has asked the court to proceed under section 2, he shall give the court, within such period as it may direct, a statement of matters which he considers relevant in connection with the determination of the confiscation order. That is known as a "prosecutor's statement". In fact the court did not specify such a period, but again no one asked it to do so.

23. The sole ground of appeal is that on October 15, 1999 H.H. Judge Hutchinson Q.C. should not have postponed the determination beyond the period of six months because the circumstances were not exceptional. The judge held that they were exceptional. Whether they were or not was essentially a matter for the judge.

26. In our judgment, the judge was entitled so to conclude. The position may be summarised as follows:

1. On the day of the conviction, April 23, 1999, the judge directed an affidavit from the defendant within 28 days. In our judgment that was a sensible first step since in principle at least it should include information which the prosecution will have the duty of considering and checking.

2. *Neither party suggested at that time that there should be a particular period of postponement.*

3. Neither party suggested at that time that the prosecutor's statement should be served within a particular period.

29. For the reasons we have given, we take the view that there was good service of that statement. It was an exceptional circumstance that the solicitors chose not to act upon it. It is of no assistance either to the solicitors or indeed to the appellant as their principal that they, it appears, had given instructions to a person in the office that she was not to accept service of

documents. The documents were left with the solicitors and they could have acted upon them. It was thus open to the judge to hold that there were in these circumstances exceptional circumstances. It follows that this appeal must be dismissed."

This decision does not support the argument that a postponement must be for a specified period.

**R.v. Ross [2001] 2 Cr.App.R.(S.) 109 (at 484)**

18. In our judgment, section 2 and section 3 of the Act lay down a clear and mandatory sequence to be followed in a case such as the present when a defendant appears before the Crown Court to be sentenced in respect of one or more drug trafficking offences, and either the prosecution makes a request within section 2(i)(a), or the court considers it is appropriate to proceed under section 2. We say mandatory because of the first five words of section 2(2).

19. In the interests of clarity we leave out of account for present purposes the provisions of section 2 and section 3 relating to appeals.

20. Section 2(4) requires the determination of the amount to be recovered *before* sentencing or otherwise dealing with the defendant in respect of the offence. However, if the court considers that it requires further information before making either of the determinations referred to in section 3(1)(a) and (b), and if it postpones making the determination for such period as it may specify (see section 3(1)), the court may nevertheless proceed to sentence without making its determination: section 3(7). Where the court has so proceeded, but not otherwise, section 3(8) modifies section 2(4) appropriately.

21. In our judgment, the words of section 3(7) and (8) make it clear that it is only if the court has exercised its power under section 3(1) that it may proceed to sentence without making a determination of the amount to be recovered by virtue of section 2. The word "nevertheless" in section 3(7) seems to us unequivocal.

22. The exercise by the court of its power under section 3(1) involves the making of a judicial decision. That decision must be made expressly. In that respect the statement of Judge L.J. in *Shevki and Steele* cited at paragraph 16 above puts the matter clearly in words upon which we could not improve.

23. In a later passage in the judgment in *Shevki and Steele* at para 59, Judge L.J. said:

"Confiscation orders should normally form part of the ordinary sentencing process. For lack of appropriate information, this will often be impractical. If the conditions in s3(1) or s3(4) are satisfied, and within six months of conviction, the court may decide that the determination should be postponed. Unless the circumstances are exceptional this should not extend beyond six months after conviction."

24. Mr Convey relied on that passage as laying down that an order for postponement of a determination may be made for the first time at any time within six months of conviction. We are satisfied that in that passage Judge L.J. referred to six months after conviction as the time during which a postponement can operate 'unless the circumstances are exceptional'. He was not suggesting that the initial order for postponement may be made after sentence.

25. Mr Convey's reliance on the fact that the court has a duty to act once the conditions mentioned in section 2(1)(a) or (b) are satisfied, so that the court is thereafter necessarily "acting under section 2" for the purposes of section 3(1), ignores the fact that section 3(1) confers a discretion on the court to postpone making a determination. It is only if that discretion is exercised, by making an order for the postponement of a determination, that sections 3(7) and (8) permit sentence to be passed before the determination is made. As Judge L.J. said, the exercise of that discretion requires a judicial decision. *No particular form of words is required, but the*

*decision to postpone must be made manifest and, in particular, it must specify the period of the postponement, which cannot go beyond six months from the date of conviction unless the circumstances are exceptional.*

The closing words of para. 25 may be considered obiter.

**R.v. Davies [2002] 2 C r.App.R.(S.) 43 (at 177).**

26. Before sentence is passed the court must, if asked by the prosecution, or of its own motion if it considers it appropriate, act under section 2 to determine whether the defendant has benefited from drug trafficking, and, if so, determine the amount to be recovered from the defendant under section 5 (see section 2(1) to (4)).

27 Where the court is acting under section 2 but considers it requires further information before making either determination, it may postpone the determination for such period as it may specify (see section 3(1)).

28 *The second use of the word “may” in section 3(1) means, in this context, “must” (see R v Ross at page 490). The Court in Ross did not give reasons for its opinion that this is the proper construction of section 3(1) and Judge LJ did not deal specifically with it in paragraph 58 of his judgment at page 194 in Steele and Shevki. In our view the mandatory nature of the requirement is established by reading section 3(1) together with section 3(3). The latter reads:*

“Unless it is satisfied that there are exceptional circumstances, the court shall not specify a period under subsection (1) which--

(a) by itself; or

(b) where there have been one or more previous postponements under subsection (1) above or subsection (4) below, when taken together with the earlier specified period or periods

exceeds six months beginning with the date of conviction.”

29 *The plain purpose of the section is to place time limits on the determination proceedings. Had Parliament intended merely to set a period within which, subject to exceptional circumstances, the determination must be made, it could, and in our view would, have explicitly so provided. The whole section, particularly subsection (3), is structured upon the assumption that the setting of a period or periods for postponement will take or has taken place. Without the setting of a period under subsection (1), the limitation imposed by subsection (3) does not bite. It follows that either Parliament intended that there should be no limitation when the court chooses not to specify the period, or it intended that the court should specify a period in every case. In our view the latter construction is inevitable.*

30 In expressing its decision under section 3(1), no particular form of words is required, provided that the decision of the court is made before sentence and that the decision of the court is manifest.

31 In R v Keith Ross, the Court was concerned with facts which made it abundantly clear the trial judge specifically did not make a decision whether to postpone his determination before passing

sentence. On the contrary, the learned judge there held, when asked to review his decision, that he had decided to proceed to sentence in order at leisure to consider a question of abuse of process and the question whether there should be an inquiry under section 2 Drug Trafficking Act 1994. In those circumstances it was clear on authority, particularly Steele and Shevki, that further proceedings to advance the determination were doomed. In his discussion section in paragraph 25 of his judgment Potter LJ said:

“No particular form of words is required, but the decision to postpone must be made manifest and, in particular, it must specify the period of postponement, which cannot go beyond six months from the date of conviction unless the circumstances are exceptional.”

32 If no particular form of words is required provided the decision is manifest then that which is required to be manifest is a decision in compliance with section 3(1), including the period of postponement.

33 We proceed to examine the announcement of His Honour Judge Fox of his decision on 16th March 2001. We agree that his remarks at the close of sentencing cannot be read in isolation in order to determine what was the manifest decision of the court. It is clear that the form of words used by the judge was chosen in consequence of the application made to him and the absence of challenge on behalf of the appellant. The fact that counsel may have agreed the order to be sought is not for these purposes material since that agreement did not take place in court.

34 It must, in our view, have been abundantly plain to anyone sitting in court on 16th March that the judge had decided before sentence to postpone the determination in order that the further information in accordance with his timetable could be obtained. The fact that the judge's decision was announced immediately after, rather than immediately before, the passing of sentence is in our judgment of no consequence. What matters is that the judge did reach a decision before passing sentence and, by the form of words that he used contemporaneously with passing sentence, made that decision manifest. We make clear that the position would have been different if nothing had been said until a further application had been made to him on some subsequent occasion. The Court has already warned of the dangers of attempts, ex post facto, to rationalise the judge's thoughts and intentions when the statutory moment has passed (see Kelly [2000] 2 Cr App R (S) 129 at page 138 per Laws LJ).

35 Finally, we turn to the question whether the judge made an order on 16th March which complied with the second requirement of section 3(1). By the terms in which he expressed himself on 13th August, the judge, it is clear, was struggling to recall and to reconstruct exactly what period he had been intending to specify, if any. He concluded that he had intended to postpone the determination for the sum of the three periods of 28 days which he had set by way of timetable. The prosecution did not identify in its application the period it wished the judge to specify for the purposes of section 3. Mr Robertson indicated only that the timetable he proposed would enable the determination to be some time within the statutory maximum of six months. *The judge did not himself specify a period, nor did he adopt the six month limit. He specified only a timetable for the exchange of information.*

36 Although the judge five months later thought he had meant the period should be 84 days, we have reached the conclusion it is impossible to find that decision was reached on 16th March, still less that it was a decision which was manifest. One obvious difficulty with such a construction of the words used is that it makes no allowance for consideration by the prosecution of any statement delivered by the appellant by way of reply before the matter was listed for hearing. It seems to us that simply as a result of oversight no one applied his mind to specification of the period. Everyone

assumed, understandably perhaps, that the timetable would bring about a hearing and determination well before the statutory maximum had expired.

37 We have sympathy for the predicament in which the judge found himself on 13th August. We appreciate and are grateful for his careful attempt to analyse the transcript of the earlier proceedings to distil from it what his decision must have been. It is a pity, on reflection, that his attention was not drawn during counsel's opening on 16th March to *the necessity to specify a period* under section 3(1), since it is clear that the judge intended to make an order which complied with the statute. We must conclude, however, that the appellant's submissions are, to the extent we have indicated, well founded and the appeal must succeed. The order to proceed to determination must be quashed."

The ratio of this decision is that the court, on postponing determinations under the Drug Trafficking Act 1994, section 3, must specify an overall period within which the determination is to be made; postponement on the basis of a timetable is insufficient.

### **R.v. Copeland March 8, 2002 [2002] EWCA Crim 736**

"14 Mr Rudolf relies, as we have said, on passages of the judgment of Potter LJ in the case of Ross and the references that the learned Lord Justice made to the judgment of Judge LJ in another case Shevki and Steele. In particular at the foot of page 490 at the top of page 491, paragraph 25 of the judgment, Potter LJ said this:

“As Judge LJ said, the exercise of that discretion requires a judicial decision. No particular form of words is required, but the decision to postpone must be made manifest and, in particular [and these words were the ones Mr Rudolf relies upon] it must specify the period of the postponement which cannot go beyond six months from the date of conviction unless the circumstances are exceptional.”

15 We are bound to say that having looked at the judgment of Judge LJ, to which reference was made, we find no warrant for that proposition. We look at the words of the statute, section 3 of the relevant Act and we find these words:

“Postponed determinations

3. (1) Where the Crown Court is acting under section 2 of this Act but considers that it requires further information before-

- (a) determining whether the defendant has benefited from drug trafficking, or
- (b) determining the amount to be recovered in his case by virtue of that section,

it may for the purpose of enabling that information to be obtained, postpone making the determination for such period as it may specify.”

16 There is no mention there of must; no mandatory provision. If it had been thought desirable then the statute could have been worded in words such as “for such period as the court shall specify”. Those are not the words of the statute.

17 We are troubled by the reference in Ross to the fact that the court must specify the period in light of the fact that the statute makes no such requirement and that it did not, as we would observe, provide that the court shall specify such a period. The decision in Ross was of course based on facts very different to the facts of the present case. In that case before sentence the Crown originally said there would be no inquiry. It subsequently said that there might be a request for an inquiry and the whole matter was left in the air whether there would be any inquiry at all. That is quite different from the facts of the present case. We do not feel constrained by the words used in the case of Ross to conclude that there must be a specified period.

18 Nevertheless, it is clear that since that decision courts should take care in dealing with any postponement of the inquiry to ensure that no argument of the kind that has been raised in this court become available. We take the view in the present case that there was a postponement; it took place before sentence; it was perfectly clear to everyone that there was to be a postponement and that the period of postponement was between three and six months. We take the view that there is no merit in this appeal and it is dismissed."

**Pisciotta 27 June 2002 [2002] EWCA Crim 1592**

It is to be observed that the constitution of this court in *Copeland* does not appear to have been referred by counsel to the earlier decision of *Davies*. There is no mention of it in the judgment and, given its obvious relevance, one would have expected the court to have dealt with it if it had been cited. It would appear therefore that the decision in *Copeland* was taken in ignorance of the decision in *Davies*.

Nonetheless, this court has to make up its mind which of these authorities is to be preferred. It seems to us that the reasoning in *Davies* is highly persuasive and to be preferred to that in *Copeland*. The other provisions of section 3 make it clear that a period has to be specified, for without that having been done, provisions such as subsection (3), (9) and (10) do not make sense. In particular, it is of the greatest importance that the normal six months time limit on the length of postponement of the determination only arises by way of subsection (3) of this section. Yet the wording of subsection (3) indicates that such a time limit only arises if a period has been specified, since the wording is that "the court shall not specify a period under subsection (1) above which...exceeds six months beginning with the date of conviction." If a court could simply postpone a determination without specifying any period of postponement, subsection (3) would not be breached and the time limit of six months could therefore readily be circumvented. A court could simply postpone without reference to any period and could then conduct a determination hearing after six months had expired. This in our view was clearly not what was intended by Parliament. It therefore demonstrates the importance of a period being specified whenever there is a postponement under section 3(1).

Like the court in *Davies*, we do not regard the second use of the word "may" in section 3(1) as indicating that the court has a choice as to whether or not it specifies a period. It is more likely that that word is used there to indicate that the court has a discretion as to the length of the period to be set, subject to the normal six months maximum. It does not relieve the court of its obligation to specify the period of postponement whenever section 3 is used.

We accept the submissions of Mr Bealby that the penal nature of the Act when dealing with confiscation orders justifies a strict interpretation of the language of section 3 and also indicates why it was that Parliament considered such a specification of the period of postponement to be necessary. It is likely that the legislature did not wish to leave the offender in such a case in ignorance of the period of time for which he would have this financial threat hanging over him. While it would normally not exceed six months, he would be entitled to know what particular period was in fact envisaged.

Applying that interpretation of the Act to the present case, this court cannot see that the judge complied with the statutory requirements of section 3. The judge did not even set a timetable for the disclosure of information and the serving of statements. The question of the length of the postponement was left entirely at large at the end of the hearing of 25 January 2001. That failure to specify means that, as a matter of law, the power to postpone the determinations under section 3 of the Act was not properly exercised. It follows that there was no jurisdiction in the Crown Court to make the determinations which it did in December 2001.

Judges dealing with drug trafficking cases should be alert to the need to comply carefully with the terms of section 3(1) when postponing a determination. This case is yet another instance of a failure to do so. We emphasise that no particular form of wording is needed so long as the judge at the time of passing sentence (1) makes clear that he has exercised his discretion to postpone and (2) makes clear the period for which the determination is postponed. If at that stage a judge sets out a time-table for service of prosecution and defence statements and also specifies a hearing date for the determination (or even a band of dates within which the determination hearing is to take place, provided that the band of dates falls within the 6 month period beginning with the date of conviction) that doubtless would suffice: although we think that it would even then be greatly preferable for the judge first to have specified the precise period he has selected. What is not acceptable, however, is for the judge either to fail to specify any period at all (as happened here); or for the judge to give directions in such a way that it cannot clearly be discerned what period, if any, has been specified (as happened in *Davies*). If the sentencing judge fails to specify a period, or if he expresses himself ambiguously, it is the duty of prosecuting counsel to remind the judge of the statutory requirements. Indeed that is also the duty of defence counsel: it is not appropriate that silence should be maintained, leaving a defendant uncertain as to the length of the period in which the determination may occur, with the uncertain prospects and delay occasioned by a possible subsequent appeal on what (on one view) would be a technicality. Similar considerations may apply where a Court is proposing to exercise its powers under section 72A of the Criminal Justice Act 1988.

#### *The position on the authorities*

It is submitted that the observations on the need to specify a period of postponement of the determinations in **Steele**, **Shevki** and in **Ross** are strictly obiter; the point was not apparently argued in **Gadsby**; it was the ratio of **Davies**; **Davies** was not cited in **Copeland**, and to that extent the decision to the contrary in **Copeland** is *per incuriam*. If **Davies** had been cited in **Copeland**, the Court in **Copeland** would have been bound to follow **Davies**, whether or not it agreed with the

decision of the Court in **Davies** (see the observations of Buxton L.J. in **Pope** [2002] 1 Cr.App.R.(S.) 8 (at 25), at para. 35.) **Pisciotta** follows **Davies**.

It is submitted that the correct position on the authorities is that **Davies** is currently the binding authority on this point. The fact that most of the decisions were made on the terms of the Drug Trafficking Act 1994 rather than the Criminal Justice Act 1988 does not affect their application to the Criminal Justice Act 1988, in view of the similarity of the relevant provisions.

On the assumption that **Davies** and **Pisciotta** are correct and binding in this appeal, it is submitted that the terms in which Judge Gordon postponed the confiscation proceedings on May 21, 2001 did not satisfy the requirements of section 72A that an overall period should be specified for the purpose of "determining the amount to be recovered in his case". It is clear from the transcript as a whole that what was postponed was the first stage in the proceedings, after which there would be a further postponement for an unspecified period: "I will review the position on 2<sup>nd</sup> July. I will determine on that date any issue, if there is one, as to whether the corporate veil should be lifted, whether the company's assets should be treated as yours, and assuming that there is to be a full hearing on compensation and confiscation I will fix a date for it then."

At the end of the judgment in **Pisciotta**, it was indicated that the Crown would consider an application for a certificate under the Criminal Appeal Act 1968 section . The last date for making such an application would be Thursday July 11.

#### *Ground 7*

*The learned judge had no power on April 23, 2002, to rescind the order for the payment of prosecution costs in the amount of £266,367 made on May 23, 2001, and to substitute an order for payment of prosecution costs in the amount of £342,249*

This Ground depends on the assumption that the court accepts the submissions made in connection with Grounds 1 and 2. On May 23, 2001 Judge Gordon made an order requiring the defendant to pay the costs of the prosecution in the amount of £266,367. This order would have been a valid order, if it had not been for the purported postponement of the confiscation proceedings. It is clear that if the confiscation proceedings had been validly postponed, the Crown Court had no jurisdiction to make an order for the payment of prosecution costs by virtue of section 72A(9) (see **Threapleton** [2002] 2 Cr.App.R.(S.) 46 at 198). It would follow that this order was void, and that

Judge Gordon would have had power on April 23, 2002 under section 72A(9A) to make the order for the payment of prosecution costs in the amount of £342,249. On the assumption that the postponement of the confiscation proceedings was invalid for the reasons set out in connection with Grounds 1 and 2, Judge Gordon had no jurisdiction on April 23, 2002 to rescind the earlier order under the Powers of Criminal Courts (Sentencing) Act 2000 section 155, and to make a further order in the amount of £342,249.

If the court accepts the submissions made in connection with grounds 1 and 2, it is submitted that the court should also quash the orders made on April 23, 2002, rescinding the original order for the payment of prosecution costs and restore the order made on May 23, 2001.