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Edited by James Fletcher, barrister.

5 St Andrew's Hill is a leading set of barristers preeminent in the field of Proceeds of Crime, Confiscation, Asset Forfeiture, Fraud and Money Laundering. Visit our website at 5sah.co.uk

Please send any comments to jamesfletcher@5sah.co.uk

Case Law

Carol Angus v UKBA [2011] EWHC 461 (Admin)

In **cash forfeiture** cases brought under POCA 2002 it is not necessary for the applicant to point to particular unlawful conduct as the source of the seized cash, but the applicant must at least show that the cash was obtained through a kind or number of kinds of unlawful conduct.

Editorial Comment: Reliance can no longer be placed upon Muneka [2005] EWCA 495 (Admin) as authority that the applicant need not specify the unlawful conduct from which the cash has derived. Although the application must point to a kind or kinds of criminality that generated the cash, cases can still be proved by inference where there is no direct evidence of the kind or kinds of criminality. On a practical level, applicants will have to plead and specify the unlawful conduct in their Court paperwork. Previous cases under the Drug Trafficking Act 1994 (where there had to be a link to drug trafficking) and Civil Recovery cases under POCA Part 5 (which have the same test for proving

unlawful conduct) will be useful sources for practitioners wishing to see what types and extent of evidence have previously been accepted by the Courts.[1]

R v Clipston [2011] EWCA Crim 466

The case concerns the use of **hearsay evidence in confiscation proceedings**. The CA reaffirmed that confiscation proceedings were criminal in nature and that the Civil Evidence Act 1995 was the incorrect legislative framework to adduce hearsay evidence. Although the hearsay provisions of the Criminal Justice Act 2003 did not apply directly, hearsay evidence would be admissible in confiscation proceedings using a framework borrowed from the 2003 Act.

Editorial Note: The CA has adopted a sensible approach so that the hearsay provisions of the CJA 2003 can be applied to confiscation cases. A suggested approach for judges is set out at paragraph 64 of the judgment.

R v Takkar [2011] EWCA Crim 646

D **appealed against his confiscation order** which arose out of a VAT fraud. In relation to his benefit figure, D argued that S.76(5) POCA 2002 created a "rebuttable presumption". S.76(5) deals with D's benefit and states that if D obtains a pecuniary advantage as a result of or in connect with his criminal conduct, he is taken to have obtained a sum of money equivalent to the value of the advantage. The CA rejected D's argument. There was no unfairness or unreality about the application of the provisions. Other arguments as to fairness were also rejected.

Harrison v Birmingham Magistrates' Court [2011] EWCA Civ 332

A decision of the Magistrates' Court to grant a **forfeiture order was quashed** where the Court found that the respondent, who wished to contest the application, received no notice of the forfeiture hearing as it was sent to the wrong address. The Court expressed concern that there was no safeguard in cash forfeiture proceedings where a respondent learnt of a forfeiture hearing too late for an appeal to be made to the Crown Court. Hooper LJ, giving the judgment of the Court, suggested an amendment to the Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002

[1] Chambers and Andrew Bird of 5 St Andrew's Hill (who appeared for the UKBA in Angus), is holding a sell-out seminar on the implications of the case in May 2011. If you or your colleagues would be interested in Chambers providing you with a tailored seminar on Angus, please get your legal department to contact will@5sah.co.uk

so as to permit a person to show that the purported recipient of a notice had not received it. In the meantime the Court invited magistrates to be prudent about continuing a claim in the absence of someone who claimed the money (see paragraphs 55 and 56 of the judgment).

Editorial Note: An amendment as suggested by the Court should also include an obligation that the respondent notifies the Court of any change in address. To prove that they had not received notice, the respondent is likely to need to show they had moved address and had notified the Court and other parties of the change. The need for liaison in cases where there are parallel criminal proceedings is obvious and applicants for cash forfeiture should be especially careful in cases where respondents may be moving around the prison system. Potential problems can be mitigated if notification is sent by recorded delivery and records of service kept.

R. v McCreesh [2011] EWCA Crim 641

Although the judge had rejected D's argument that he was a mere lorry driver in a red-diesel laundering fraud, earning a small wage, the judge was wrong to immediately leap to the conclusion that D had benefited jointly with his co-defendant from the whole value of the fraud. The facts did not support such a conclusion. The **confiscation order was quashed** and remitted back to the Crown Court for fresh consideration.

Editorial Comment: The Court failed to appreciate that it is now necessary, in calculating benefit, to establish as a matter of fact what the defendant has actually obtained or "got out" of the crime.