

# A ruling delivered in open court or in writing is capable of amounting to a confiscation order (*R v Westbrook*)

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**Corporate Crime analysis:** This appeal against a confiscation order on the basis that it was a nullity as a result of the court's failure to reduce the judge's ruling to writing was dismissed. The Court of Appeal ruled that, as with other orders, the judge's solemn pronouncement in court was the order and a failure to draw up a formal written document within the prescribed two-year period from the date of sentence did not invalidate it. In any event, the judge had provided written reasons, findings and figures which satisfied the statutory requirements of the Proceeds of Crime Act 2002 (POCA 2002). The Court of Appeal ruled that in the absence of prejudice or unfairness resulting from an administrative or procedural breach, it could not be argued that a failure to draw up the order rendered it invalid. The second ground of appeal (that the judge had wrongly concluded that there were hidden assets) was unarguable and leave to appeal was refused. Written by John Oliver, barrister, at 5 St Andrew's Hill.

*R v Westbrook and another* [\[2020\] EWCA Crim 1243](#)

## What are the practical implications of this case?

This case confirms that confiscation orders are like any other order of the court—it is the judge's pronouncement in court which constitutes the order; the written order simply reflects that pronouncement. It is clear that the Court of Appeal is likely to revert back to that which was said in court if issue is taken with the contents of a written order. Equally, a written judgment may amount to a written confiscation order if it addresses the requirements of [POCA 2002, s 6](#).

It would be good practice to take a note of the order pronounced by the judge in open court and for the written order to be checked against what was said.

Equally, practitioners may wish to consider inviting a judge who has provided a written ruling to summarise its contents in open court.

Any written or pronounced ruling should include the findings of fact, the benefit amount, the available amount, the term of imprisonment in default and the time to pay. Any administrative failure to reduce the order made in court to writing would not then invalidate the order.

## What was the background?

The appellants pleaded guilty to offences relating to their having stolen, transferred and disposed of monies (in excess of £450,000) from the bank account of a well-known photographer. Each appellant was sentenced to a term of imprisonment and confiscation proceedings were commenced. A confiscation trial took place between 2 and 5 October 2018 and the judge provided a written ruling setting out his reasons, his findings in relation to the benefit amount and the available amount, the term of imprisonment for default and the time to pay. The ruling stated that the total available assets were £248,657 and that the appellants were jointly and severally liable to pay that amount. The learned judge embargoed the judgment, allowing counsel time to deal with corrections or errors, which were to be provided by 7 October 2018. No representations were sent but the final confiscation orders were not drawn up.

One appellant lodged an appeal against the confiscation order on 8 November 2018. By 28 February 2019, the Crown Court realised that it had not drawn up the confiscation orders and provided a note to the Court of Appeal and the appellant. On 18 March 2019, the appellant withdrew the appeal.

The confiscation orders were then drawn up by the Crown Court on 30 August 2019. They incorrectly ordered the appellants to pay £124,328.50—that being half the sum specified in the judge's written ruling. The error was corrected on 3 September 2019. Both appellants later filed fresh applications for leave to appeal against the confiscation orders.

On behalf of the appellants, it was submitted that:

- the confiscation orders were made significantly after the two-year permitted period of postponement ([POCA 2002, s 14](#)), which expired on 19 January 2019
- there was no evidence that the case was listed on 30 August 2019 (when the orders were drawn up)
- the orders were defective because they bore an incorrect case number

### What did the court decide?

There was nothing in [POCA 2002](#) to suggest that a confiscation order not reduced to writing was a nullity. The order came into existence when uttered by the judge. Addressing the fact that the judge's ruling was not delivered orally but in writing, the court observed that, while [section 174](#) of the Criminal Justice Act 2003 requires sentences to be pronounced in open court, any failure to do so amounted to 'a failure of good practice' (see *R v Billington* [[2017](#)] [EWCA Crim 618](#)) and did not render a sentence or order a nullity. The judge's written confiscation order complied with [POCA 2002, s 6](#) insofar as it set out the relevant findings, decided the recoverable amount and that the judge was making a confiscation order.

It was clear to the court that there had been an administrative or procedural breach to the extent that the judge's order had not been reduced to a formal written order within the two-year prescribed period. The appellants and their representatives were at all material times fully aware of the judge's ruling and confiscation order. Not every administrative or procedural breach renders every sentence or order a nullity—only if the breach would give rise to prejudice or unfairness, which the Court of Appeal did not find in this case. Because the judge's written ruling was delivered within the two-year time period, the order was made within that time.

Finally, the court ruled that the defects in the written confiscation orders (which were later corrected) did not invalidate the order the judge had made.

### Case details

- Court: Court of Appeal (Criminal Division)
- Judges: Lord Justice Haddon-Cave, Mr Justice Jeremy Baker, Mrs Justice Moulder DBE
- Date of judgment: 29 September 2020

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