

The Court of Appeal receives evidence in order to vary a confiscation order (London Borough of Barnet v K)

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Gary Pons examines the case of *London Borough of Barnet v K* [2021] EWCA Crim 1170 on behalf of Lexis Nexis PSL

Corporate Crime analysis: How does the Court of Appeal resolve a successful prosecution appeal against a confiscation order once it has decided that it will not quash or confirm the confiscation order?

Its only option is to vary the confiscation order, but in order to do this it needs to have an established factual basis. *LBB v K* is an unusual case of a prosecution appeal against a confiscation order which succeeded but left the Court of Appeal unable to vary the confiscation order, because it lacked any factual findings about benefit and available amount.

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What are the practical implications of this case?

The practical implications are best assessed by looking at this decision in concert with the original appeal *LBB v K* [2021] EWCA Crim 543.

Two important principles emerge, both of which can be found in previous Court of Appeal decisions:

the importance of drafting the relevant charges correctly, because in the event that they are not, difficulties are likely to emerge in the calculation of benefit.

all the issues in a confiscation hearing should be dealt with together and not divided so that apparently crucial issues can be dealt with as a preliminary matter. See *R v Parveaz* [2017] EWCA Crim 873 at para [29], and *R v Bajaj* [2020] EWCA Crim 1111 at para [23].

This case is also a good example of transparent judicial analysis of the legal concepts involved in assessing an offender's benefit and available amount. It provides a good guide for Crown Court judges.

What was the background to the case?

Mr K purchased a five-bedroom property in July 2007 and converted it into nine separate flats, without planning permission. A planning enforcement notice was issued and eventually a summons was followed that alleged a breach of the enforcement notice. Mr K was convicted and a confiscation order was made against him in the sum of £270, on the basis that the summons only identified a single day upon which the offence occurred.

The prosecution appealed that decision, see *LBB v K* [2021] EWCA Crim 543.

The Court of Appeal determined that the summons did not confine Mr K's offending to a single day, because it identified the date for compliance and the offence continued thereafter.

The Court of Appeal set out that there is no statutory power to remit the case to the Crown Court following a successful prosecution appeal under section 31(1) of the Proceeds of Crime Act 2002 (POCA 2002), it can only vary, discharge, or uphold the confiscation order. As the prosecution has succeeded, it was not appropriate to either uphold or discharge the order. Its only option was the unusual course of hearing evidence with a view to determining the appropriate benefit and available amount figures so as to decide whether to vary the confiscation order. Although, as the Court of Appeal made clear, it was proceeding to vary the confiscation order, in many respects it was fulfilling a similar function to a Crown Court when it makes a confiscation order.

What did the court decide?

In relation to procedure, the court determined that it could only vary the order in a way which would be within the jurisdiction of the Crown Court. In practical terms this meant that it needed to apply (indirectly) POCA 2002, s 6, which deals with how to assess benefit.

Mr K's benefit from his criminal conduct was the rents received between the date on which the enforcement notice became effective and the date when the continuing offence ended. In order to determine that figure, the court needed to resolve two issues:

the point at which the enforcement notice became effective, and
the date at which the continuing offence came to an end for the purposes of the confiscation order.

In relation to when the enforcement notice had effect, the Court of Appeal decided that LBB, in an email dated 1 March 2013, gave notice, to expire on 1 June 2013, that unless the enforcement notice was complied with by 1 June 2013, Mr K would become liable to prosecution. Accordingly, 1 June 2013 was the start date.

Three possible end dates were suggested:

10 February 2015 because, as from that date, the defendant was no longer required to comply

with the enforcement notice, because he had carried out work in the property and was operating it as a House in Multiple Occupation (HMO) further to an offer from LBB that he could do this as an alternative to complying with the enforcement notice when the original confiscation order was made, or when it was varied by the Court of Appeal

The Court of Appeal decided that LBB did not represent or offer to Mr K the option of converting the property into a small HMO as an alternative to complying with the terms of the enforcement notice. Furthermore, any representation in the relevant email 'does not break the chain of causation between the criminal conduct and the benefit'. In any event, the relevant question in relation to assessment of benefit was to consider what would have happened 'but for' the failure to comply with the enforcement notice (ie if Mr K had created a dwelling for single use) and not what would have happened 'but for' the representation.

In relation to the HMO licence, the licensing regime is unconnected with the planning regime and exists for the protection of those who live in HMOs.

The Court of Appeal indirectly applied POCA 2002, s 8(2) which requires the court to take into account property obtained up to the date when it makes its decision and accordingly, because it was varying the confiscation order that was made in the Crown Court, the end date was taken as the date of the decision in the Crown Court. The effect of those findings is that the benefit figure was calculated with reference to the rents received between 1 June 2013 and 16 December 2019, which amounted to £499,363.00.

In relation to the available amount, the Court of Appeal did not accept Mr K's explanation as to why the sums paid out his father in each month vastly exceeded the rental income received. It also received no satisfactory answer to the question as to why he was paying tax on the rents received from his property if in fact they belonged to the bank. The court rejected his evidence that the available amount was nil and decided that Mr K had failed to prove that it is less than the benefit figure. The effect of that, was that the confiscation order was varied to

the sum of £499,363.

What lessons can be learnt?

The main cause of the difficulties in this case was the lack of an established evidential basis upon which to vary the confiscation order. The lesson to be learnt is that all of the issues in a confiscation hearing should be dealt with together.

Case details

- **Court:** Court of Appeal, Criminal Division
- **Judges:** Lord Justice Edis, Mr Justice Soole and Mr Justice Morris
- **Date of judgment:** 27 July 2021