16 December 2015

PRESS SUMMARY

R v Harvey (Appellant) [2015] UKSC 73
On appeal from [2013] EWCA Crim 1104

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Reed, Lord Hughes, Lord Toulson

BACKGROUND TO THE APPEAL

The appellant's company hired out items of machinery. Following an arson attack orchestrated by the appellant on a competitor's premises, the police raided the premises of the appellant's company and discovered that a significant proportion of the machinery present had been stolen. The appellant was convicted of handling stolen goods, and sentenced to 15 months imprisonment. Following this conviction, there was a hearing pursuant to section 6 of the Proceeds of Crime Act 2002 ("POCA"). The appellant conceded he had a "criminal lifestyle" and thus the judge had to decide whether and to what extent he had benefited from this. Not all of the machinery hired out by the appellant's company had been stolen. The judge assessed the benefit obtained by the appellant at £2,275,454.40, comprising £1,960,754.40 from general criminal conduct and a further £314,700. Of this, the £1,960,754.40 was calculated on the basis that the proportion of stolen items to the total stock over the relevant period was 38%, and the company's aggregate turnover for the relevant period was £5,159,880 (inclusive of VAT). A confiscation order was made in the sum of £2,275,454.40. The appellant was given six months (later extended to 12 months) to pay, and was ordered to serve ten years (reduced to eight years by the Court of Appeal) in default of payment.

This appeal considers whether the judge was right to make the confiscation order on the basis that the VAT had been obtained by the appellant for the purposes of POCA, in circumstances where the appellant's company had already accounted for the VAT to HMRC. Before the Court of Appeal, the appellant argued that to include VAT in the amount of the confiscation order would involve an unacceptable degree of double counting. The Crown argued that a benefit is "obtained" for the purpose of POCA if it has been received by a defendant, even if he has subsequently had to account to a third party for some, or even all, of it. The Court of Appeal accepted the Crown's case.

JUDGMENT

The Supreme Court allows Mr Harvey's appeal by a majority of 3:2. Lord Neuberger and Lord Reed give the leading judgment. Lord Mance writes a concurring judgment. Lord Hughes and Lord Toulson each write dissenting judgments.

REASONS FOR THE JUDGMENT

Lord Neuberger and Lord Reed find that the VAT for which a defendant has accounted to HMRC is in a different category from either income or corporation tax, and from expenses incurred in connection with acquiring money or an asset **[24]**. First, income and corporation tax are computed on a taxpayer's overall or aggregate income. They cannot be invoked to reduce the value of the property or money obtained from criminal activity when assessing what has been "obtained" for the purposes of POCA. VAT liability on the other hand arises on each taxable supply, and can be directly and precisely related to the obtaining of the property in question. In a case where the VAT on a transaction

has been accounted for to HMRC, then the Court of Appeal's approach would lead to the UK government enjoying double recovery of the VAT: once under POCA and once through the Value Added Tax Act 1994 **[25-26]**. Secondly, VAT is intended to be neutral in its impact on taxable persons: where money is paid to a defendant as a result of a transaction which is liable to VAT, the defendant is regarded as collecting the VAT element on behalf of HMRC. It is difficult to regard VAT which has been collected and accounted for to HMRC as forming part of the economic advantage derived from criminal offences **[27]**. Thirdly, it would be particularly harsh, where a defendant has accounted to HMRC for all the VAT for which he is liable, not to allow him credit for that sum, but this would be the effect of his being rendered liable to a confiscation order in respect of the output tax on his transactions. He would then be treated in the same way regardless of whether he had paid the tax or not **[28]**. Fourthly, the possibility of double recovery has been recognised, and avoided by extra-statutory means, in the context of excise duty: HMRC does not seek to recover the excise duty due in respect of smuggled goods where a confiscation order has been made in the same sum **[29]**.

Lord Neuberger and Lord Reed acknowledge that these factors give rise to a powerful argument that when VAT has been accounted for to HMRC, it has not been "obtained" by the defendant. However, they reject the appellant's submission that this conclusion follows from the wording of POCA, because of the principle enunciated in *R v Waya* [2012] UKSC 51 that property obtained as a result of or in connection with crime remains the defendant's benefit whether or not he retains it **[30]**. Nonetheless, these factors are relevant to consideration of whether the effect of the Crown's interpretation of POCA breaches Article 1 Protocol 1 of the European Convention on Human Rights ("A1P1"), the right to peaceful enjoyment of possessions **[31]**.

Although a provision effecting double recovery is not forbidden by A1P1, it is at risk of being found disproportionate, given that sums payable pursuant to POCA are intended to be deterrent and not punitive **[32]**. *Waya* made clear that where the proceeds of crime are returned to the loser it would be disproportionate under A1P1 to treat such proceeds as the "benefit obtained". That situation is similar to the collection of VAT, and the policy underlying the principle is in part that a defendant who makes good a liability to pay or restore should not be worse off than one who does not **[33]**. In *R v Ahmad* [2014] UKSC 36 it was held that it would be disproportionate for the same sum to be recovered from two co-conspirators in respect of the same property which had been jointly obtained. The observations made in these cases are applicable in relation to VAT which has been accounted for to HMRC **[34]**. Although the burden may be on the Crown to establish the gross value of the benefit obtained by the defendant, the burden of establishing any sum which should be deducted to reflect the VAT accounted for to HMRC lies on the defendant. There is nothing disproportionate about a judge taking a broad brush approach where the evidence is confusing, unreliable or incomplete **[35]**. Thus, where VAT has been accounted for to HMRC, it would be disproportionate under A1P1 to make a confiscation order calculated on the basis that the VAT, or a sum equivalent, was "obtained" by the defendant for the purposes of POCA. The position in relation to VAT for which a defendant is liable but has not accounted to HMRC is left open **[36]**.

Lord Mance agrees with Lord Neuberger and Lord Reed and writes a concurring judgment **[38-48]**. Lord Hughes would have dismissed the appeal. He states that POCA is not designed to restore money to the state, which in most cases is not the loser, but is designed to deprive the offender **[55]**. When the defendant was paid a VAT inclusive sum by his customers, he "obtained" the VAT element, and this is not affected by his obligation to declare it **[66]**. It is not disproportionate to confiscate the gross proceeds of offending without giving credit for taxes paid to the state **[76]**. Lord Toulson would also have dismissed the appeal **[102]**. He finds that it would not be disproportionate under A1P1 to treat the entirety of the company's receipts from its criminal conduct, ignoring associated outgoings such as tax liabilities, as having been obtained by the appellant **[125]**.

References in square brackets are to paragraphs in the judgment