Neutral Citation Number: [2012] EWCA Crim 391

Case No: 20104251 D1 & 201004252 D1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT NORTHAMPTON
FLAUX J
T20067108

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2012

Before :

LORD JUSTICE HOOPER
SIR CHRISTOPHER HOLLAND
and
RECORDER OF NOTTINGHAM
(SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

- -

Between :

(1) SHAKEEL AHMAD **(2) SYED MUBARAK AHMED**	**Appellants**
- and -	
THE CROWN	**Respondent**

- -
- -

REX TEDD QC appeared for the **Appellants.**
SIR D. SPENCER QC and MR J. KINNEAR appeared for the **Respondent.**

Hearing date: 14th July 2011

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Approved Judgment

Lord Justice Hooper:

1. This appeal concerns what is believed to be the largest confiscation orders ever made - two orders each in the same sum of £92,333,667. The confiscation proceedings were governed by the Criminal Justice Act 1988. Leave was granted by the Full Court.

2. The appeal concerns two principal issues. The first issue relates to benefit and the meaning of the words in "*in connection with its commission*" in section 71(4) which states that "a person benefits from an offence if he obtains property as a result of or in connection with its commission". Similar language is to be found in section 76(4) of the Proceeds of Crime Act 2002, which provides: "A person benefits from conduct if he obtains property as a result of or in connection with the conduct".

3. The second issue relates to realisable assets and the consequence of a conclusion that a defendant has hidden assets.

4. The statutory assumptions in section 72AA did not apply.

5. The judge, Flaux J, found that the prosecution had proved on the balance of probabilities that each appellant had benefited in the sum of some £72 million uplifted for changes in the value of money due to inflation to £92,333,667 being the sum that had passed through bank accounts under their control in furtherance of what was a massive carousel fraud[1]. The judge also found that they had not proved on the balance of probabilities that they did not have realisable assets in that sum.

6. None of the money has been paid and any sum eventually realised is likely to be far less than the £184,667,334 owed. The unpaid sum is presumably represented in the reported £1.26 billion of unpaid confiscation orders shown as an asset in the accounts of the Ministry of Justice[2] and for which the Minister has received public blame (see e.g. The Sun 23/11/2011 under the headline "SOFT JUSTICE SCANDAL" "YOU KEN NOT BE SERIOUS" and 24/11/2011, under the headline "KEN FINES RAP").

7. Both appellants claim that they have no realisable assets, a claim which was unsurprisingly rejected by Flaux J in a very careful and necessarily lengthy judgment. He described the appellants as unscrupulous and deeply mendacious, particularly about their assets. The evidence that the appellants gave to the effect that they were penniless was described by the judge as "frankly ludicrous". In so far as revealing their assets the appellants were "complete liars". Both appellants were very

[1] The Sentencing Guidelines Council Guidelines – Sentencing for Fraud Statutory Offences defines MT Missing trader intra-community fraud ("MTIC") and Carousel frauds in this way: *MTIC Frauds* involve traders importing goods from the European Union free from VAT, charging VAT when they sell the goods and then keeping the money rather than paying it to HMRC. *Carousel Frauds* are MTIC Frauds where the trader sells the goods to another trader who re-exports them and claims back the VAT paid to the first trader from HMRC. Usually the goods are passed along a chain of traders between the missing trader and the broker known as 'buffers', in order to disguise the fraudulent nature of the activity. Having been exported by the broker, the goods are typically re-imported by the missing trader and pass through the same circle of transactions again and again in rapid succession.

[2] See MoJ Resource Accounts, http://justice.cjs.gov.uk/downloads/publications/corporate-reports/MoJ/2010/moj-resource-accounts-2010.pdf , page 114, para.22.3. The figure for unpaid confiscation orders has reportedly increased since the period covered by this Report.

uncooperative throughout the confiscation proceedings. The judge comprehensively rejected submissions that the confiscation proceedings were an abuse of process. He was fully entitled to reach all of these conclusions.

Background

8. On 28th March 2007 in the Crown Court at Northampton (H.H.J. Alexander Q.C. and a jury) the appellants were each convicted of conspiracy to cheat the public revenue (count 1). On 30th March 2007 before the same constitution, they were each sentenced to seven years' imprisonment. Each was disqualified from acting as a company director for 12 years under section 2 of the Company Directors Disqualification Act 1986. To avoid confusion, the appellant Ahmad will be referred to as Shakeel and the appellant Ahmed as Syed.

9. On 11th June 2007 in the Court of Appeal Criminal Division Shakeel's renewed application for leave to appeal against conviction was refused. His renewed applications for leave to appeal sentence and for an extension of time (two weeks and three days) were adjourned. On the same date Syed's renewed conviction application was abandoned with the leave of the Court and his renewed application for leave to appeal sentence was refused.

10. On 31st October 2008 the Court of Appeal Criminal Division granted Shakeel the appropriate extension of time and leave to appeal sentence. The appeal was refused.

11. On 5th July 2010 in the Crown Court at Leicester Flaux J, after a hearing which had lasted 31 days, gave a 110 page judgment in which he made a confiscation order (in identical terms for each appellant) under s.71 of the Criminal Justice Act 1988 in the sum of £92,333,667 to be paid within two months and in default to serve ten years' imprisonment consecutive to the sentence for the substantive offence. Having dispensed with his counsel Shakeel ultimately represented himself at the confiscation proceedings and Syed was ultimately represented under a representation order by Mr Ken Berry, an ex-police officer with no legal qualifications employed by Burton Copeland Solicitors. This made the judge's task even more difficult than it already was.

12. On 16th June 2011 the full Court granted the appellants leave to appeal against the confiscation order on grounds relating to the benefit and realisable assets and referred to the Court the application for leave to appeal the order that in the event of non-payment of the total amount within two months, the 10 years' term of imprisonment would have to be served consecutively. The period of two months was not chosen because it was realistically expected that the full amount could be paid in that time but because it was feared that the appellants might abscond if released on licence.

13. Sir Derek Spencer QC submits, emphatically, that the confiscation orders made by Flaux J were the orders which he was required to make by virtue of the confiscation legislation and that the result corresponds to the intention of Parliament in passing that legislation. Mr Tedd QC disagrees.

The facts- a broad overview

14. The appellants were directors and shareholders (Syed 51% and Shakeel 49%) of MST (Associates) Limited (hereafter "MST") which was incorporated in 1997 and registered for VAT. It operated as a computer parts broker dealing mainly with central processing units (CPU's). The conspiracy concerned 32 transactions which took place between 13th and 30th April 2002, MST acting as a second line 'buffer' company. Unsurprisingly the judge held that MST had engaged in no lawful trade and "pierced the corporate veil".

15. The fraud involved five companies in Ireland purporting to export large quantities of CPU's to a "missing trader" (five in total) in the UK. The goods were zero rated on import to the UK. The missing trader was either a registered company which went "missing" or a genuine company the identity of which was hijacked by the fraudsters.

16. The missing trader then ostensibly sold the goods to GW224, the first line buffer company which then sold the goods to MST.

17. GW224 was an apparently genuine company interposed to make it more difficult for the authorities to identify the fraud. On paper the missing trader sold the goods to GW224 at a loss enabling everyone else in the supply chain ostensibly to sell on at a profit. The missing trader issued a VAT invoice to GW224 enabling it to deduct the amount shown as VAT as input tax from the amount due from GW224 to Customs in respect of output tax on the onwards sale to MST, a second line buffer company. Notwithstanding that GW224 was purporting to sell the goods to MST, on nine occasions MST paid the company in Ireland directly thus by-passing GW224.

18. MST then sold the goods on to an exporting company, usually Harringtons, for an amount which included VAT. The exporting company then exported the goods back to the company in Ireland which had originally sold the goods. In many cases the whole chain of transactions took place on the same day.

19. No VAT was payable on the export. The exporter however then reclaimed the VAT which it had paid to MST. The amount of the VAT which was fraudulently reclaimed by the exporter was £12,662,822 (which we shall call for convenience £12.6 million). If the transactions had been genuine and there had been no missing trader then there would have been no loss to HMRC. The fraudulently obtained £12.6 million was used to fuel the fraud or laundered through various accounts and withdrawn in cash or used to buy gold bullion, none of which could be traced.

The benefit

20. The judge having pierced the corporate veil held that the benefit obtained by MST was the benefit of the appellants and, following now well-established authority, that the benefit for each appellant was therefore the amount of the benefit obtained by MST. He was right to pierce the corporate veil.

21. It is undisputed (on the law as it now stands) that where a benefit is obtained jointly, each of the joint beneficiaries has obtained the whole of the benefit and may properly be ordered to pay a sum equivalent to the whole of it. See *R. v. May* [2008] 1 AC

1028, para. 43. This is subject to one possible exception which Lord Bingham referred to in paragraph 45:

> "There might be circumstances in which orders for the full amount against several defendants might be disproportionate and contrary to article 1 of the First Protocol, and in such cases an apportionment approach might be adopted, but that was not the situation here and the total of the confiscation orders made by the judge fell well below the sum of which the Revenue had been cheated."

22. The total amount of VAT loss to HMRC on the 32 MST transactions was £12.6 million. On the judge's findings the appellants obtained that amount as result of the commission of the offence. That was not the appellants' profit, but the confiscation legislation is not concerned at the benefit stage with profit, although the amount of the profit may well be relevant when considering a person's realisable assets. The judge said that about the £12.6 million (para. 6):

> "[It] was divided, part of it being used to discount the sales through the carousel and part of it laundered into so-called cashing-up accounts of entities which were not concerned with the carousel transactions but which allowed their accounts to be used for these purposes. The money which went into these accounts was withdrawn in cash or used to buy gold bullion, neither of which could be traced."

23. On the face of the accounts of the buffer companies, the "profit" is, as we understand it, usually in the region of between 1 and 2% of the VAT of which HMRC is to be defrauded. However, such was the role of MST and the appellants in the fraud, the benefit represented the total loss to the HMRC on the 32 transactions, that loss being property obtained by the principal conspirators as a result of the commission of the offence.[3]

24. The appellants, at an earlier stage of the proceedings and whilst represented, had accepted £12.6 million as the benefit. Later they resiled from that position and argued that the benefit was only £1.3 million. Mr Tedd QC accepted the correctness of the figure of £12.6 million. He was, in our view, right to do so.

25. In the light of *May*, each appellant had benefited in the sum of £12.6 million, subject to the possible exception identified in paragraph 21 above, an exception which seems unlikely to apply in this case given the difficulty of obtaining any money from the appellants.

26. Stopping at this point the benefit figure would have been £12.6 million for each appellant.

27. In the past many judges would have stopped at this point and have treated the VAT, which HMRC has paid out as a result of the fraud, as the only benefit. In this case

[3] It does not follow from the fact that a person is a conspirator that conspirator is to be taken as having jointly obtained the whole benefit obtained by "the conspiracy": see e.g. *Allpress* [2009] 2 Cr App Rep (S) 58**.** para. 31.

Flaux J took a different view. He held that the benefit was the total amount of money which had passed through the MST bank accounts in furtherance of the fraud, concluding that that was property obtained *in connection with the commission of the offence*. To commit an MTIC fraud it is, as the judge found, a necessary part of the deception on HMRC that an amount representing the value of the goods and the VAT thereon should pass through the accounts of the buffer companies.

28. Thus, in so far as benefit is concerned, the appeal therefore concerns the meaning of "*in connection with the commission of the offence"*. Mr Tedd argues that an over wide interpretation should not be given to these words.

Obtains property in connection with the commission of the offence

29. We give a number of examples of the issues raised by these words, assuming that D buys 10,000 genuine cigarettes for £1,000 in Belgium, smuggles them into England and sells them wholesale for £1,200, the retail price being £3,500. Let us assume that no statutory assumptions apply. He is convicted of cheating the Revenue of the excise duty and VAT. His benefit is certainly £1,200 (he obtained £1,200 as a result of the commission of the offence) and he cannot offset the costs, e.g. of the purchase of the cigarettes and of the transport. In addition he has, on the authorities, obtained a pecuniary advantage, namely the evaded duty, which we shall assume to be £1000,[4] and the evaded acquisition VAT which we shall assume to be £400. His benefit is therefore £2,600. If the cigarettes which he bought in Belgium can be said to have been obtained "in connection with the offence" then the value of those cigarettes would also form part of the benefit. That would be a further £1,000, in the light of section 74(6)). Thus not only is D unable to deduct the costs, but a significant part of those costs would be added to make up the benefit figure. D's benefit for a fraud that cost the Revenue £1,400, would be £3,600.

30. To take another example, again assuming no statutory assumptions apply. D is convicted of cultivating cannabis and supplying it. He has sold cannabis which he has cultivated for £100,000. He has obtained that as a result of the commission of the offence and that is certainly a benefit. To cultivate that amount of cannabis he has had to buy equipment to the value of say £30,000. If he obtained the equipment "*in connection with the commission of the offence"* for the purposes of section 71(4), then his benefit would increase by £30,000. His benefit would then be increased by the value of at least some of the costs which he had incurred. As to expenditure on such things as wages and rent, see *James*, discussed below.

31. Whilst these two examples may not, on the face of it, seem similar to the facts of this case, they are in fact similar. In a carousel fraud the conspirators have to put up a significantly large sum of money to "prime the pump". That money then passes through the accounts of the buffer companies. As we have said, to commit an MTIC fraud, it is a necessary part of the deception on HMRC that an amount representing the value of the goods and the VAT thereon should pass through the accounts of the buffer companies. The fact that money has to be put up to prime the pump is part of the cost of committing the fraud. It may well be that the money used to prime the pump is itself a benefit from earlier VAT or other frauds but that would only be

[4] The evaded duty is calculated from the retail price.

relevant in the calculation of the benefit if statutory assumptions apply, which they did not in this case.

32. We add that, during the course of argument, we were concerned by the fact that it may have effectively been the "same money" passing through the accounts in each of the 32 transactions. Whilst the profit (the VAT of which HMRC was being cheated) was being siphoned off, it seemed to us likely that the money used to prime the pump was effectively the same money and that therefore the figure of £72 million was wrong for that reason. In the light of our decision it is not necessary to resolve that issue. If we had decided that the figure of £72 million was wrong or probably wrong for this reason, we would have sent this issue back to Flaux J.

33. It would, in our view, be surprising if Parliament intended the costs of committing an offence to form part of the benefit of the offence. In *Crown Prosecution Service v. Jennings* [2008] 1 AC 1046, Lord Bingham giving the considered view of the Committee said:

> "13. ... It is, however, relevant to remember that the object of the legislation is to deprive the defendant of the product of his crime or its equivalent, not to operate by way of fine. The rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent. He cannot, and should not, be deprived of what he has never obtained or its equivalent, because that is a fine." (Emphasis added)

34. In *R v Olubitan* [2004] 2 Cr App R(S) 14, May LJ said, at page 78:

> "The section [section 71(1A) of the 1988 Act, the precursor to s 6 of POCA] is not to be construed so that a person may be held to have obtained property or derived a pecuniary advantage when a proper view of the evidence demonstrates that he has not in fact done so."

This passage was cited with apparent approval by the House of Lords in *May*, at paragraph 19.

35. To make a confiscation order which includes within the benefit the costs of committing a crime seems to be contrary to the object of the legislation and that part of the confiscation order would, it seems to us, to operate by way of a fine.

36. It is noteworthy that in one of the leading cases it was never suggested that the costs of purchasing the smuggled cigarettes was part of the benefit. In *R v Smith* [2002] 1 Cr App R 35; [2002] 1 WLR 54 Smith the facts were as follows. Smith bought a motor vessel, *The Vertine*, with £55,000 provided by his co-defendant, John Marriott. In the words of the judge when imposing sentence, the respondent allowed himself to be used as Marriott's ship owner and captain. The boat was used in April 1998 on a run to Heligoland to buy cigarettes and to smuggle them into this country without paying duty. On 8 May 1998 the respondent, Marriott and another man, David Russell, set sail once more for Heligoland. Two days later, on 10 May, they sailed *The Vertine*, laden with cigarettes, into the Humber estuary, past the customs houses at Immingham and Hull and so on for some 50 miles up the River Ouse until she reached Ocean Lock at the entrance to Goole. There is no customs house at this point.

When the boat arrived at Goole, customs officers stopped and searched her. They found 1.25 million cigarettes on board. The excise duty payable on that quantity of cigarettes would have been £130,666.40. The House of Lords held, overturning the CACD, that an importer of uncustomed goods, in this case cigarettes, who intends not to enter them for customs purposes and not pay any duty on them, derives a benefit under section 74 of the Criminal Justice Act 1988 through not paying the required duty at the point of importation, where the goods are forfeited by HM Customs following importation, before their value can be realised by the importer. We note in passing in *Waya*, UKSC 2010/0088, which will be re-argued before the Supreme Court in March, the parties have been sent a note which, amongst other things, asks the question: "Did Parliament intend that confiscation proceedings should be brought in respect of property that has been restored by or recovered from the defendant." The note also states that "it may be that the Court should reconsider" whether *Smith* was correctly decided.

37. Whether *Smith* was or was not correctly decided on the evasion issue, it was never suggested at any stage of the proceedings that the 1.25 million cigarettes found on board were property obtained in connection with the commission of the offence.

38. At trial the prosecution claimed and the judge included within the benefit figure was the purchase value of *The Vertine* used for the smuggling. The Court of Appeal (Mance LJ, Newman and Burton JJ Friday 16 June 2000 No. 2000/00449/X4) quashed that finding saying:

> "36. So far as the second limb is concerned -- that is in relation to the £55,000 being the purchase value of the motor vessel -- this was hardly pursued by Mr Newbury [counsel for the Crown]. It appears clear to us that, quite apart from the issue whether it could be a benefit to the appellant 'as a result of or in connection with' the offence that a boat was purchased in his name to use in the offence, the fact is that any such benefit which might otherwise have been arguable under the Act was not obtained by him, and certainly at the date of the confiscation order he had no such benefit, because of the boat itself being forfeited. In those circumstances the entirety of the sum which formed the basis of the certified sum, which led on to the sum by way of realisable assets which formed the basis of the confiscation order, falls away."

39. The certified question did not concern this conclusion. In the House of Lords Lord Rodger said:

> 31. In their judgment the Court of Appeal touched only briefly on a further issue which "was hardly pursued" by counsel for the Crown in the proceedings before them. This related to the value of The *Vertine* which had been purchased in the respondent's name with moneys provided by Marriott. The argument for the Crown was that this was property which the respondent had obtained in connection with the commission of the offence. The Court of Appeal held that, even if the respondent had obtained any such benefit, he no longer had it at

> the date of the confiscation order since The *Vertine* had been forfeited. Mr Emmerson did not seek to support this aspect of the reasoning of the Court of Appeal, which is plainly inconsistent with the terms of sections 71(4) and 74(5). Not surprisingly, in view of the lack of prominence given to the issue before them, the Court of Appeal did not certify it as one of public importance and the House did not give leave to appeal in respect of it.
>
> 32. Nonetheless during the hearing Mr Mitchell argued that the respondent had obtained the boat in connection with the commission of the offence and that he had accordingly benefited to the extent of its value. Since I would allow the appeal and restore the confiscation order for £46,250, which exhausts the respondent's realisable assets, this point is entirely academic. In these circumstances I would say only this. Even on the Crown approach, it was not entirely clear, on the available evidence, what the value of the boat would have been to the respondent at the time when he obtained it (section 74(5)). For that reason I should not be taken as necessarily accepting the Crown's submission that the respondent had obtained property worth £55,000 to him by virtue of the transaction involving The Vertine.

40. Whilst therefore no concluded view was expressed about the boat, it was not suggested at any point that the cost of purchasing the smuggled cigarettes was a benefit.

41. Although not referred to during the course of argument before us, *R. v Waller* [2008] EWCA Crim 2037 raises the issue whether goods bought in order to commit a crime are part of the benefit. The appellant was stopped at the Channel Tunnel by British customs officers, who found 250 kg of undeclared hand rolling tobacco in the boot of his car. The defendant admitted to buying the tobacco for himself, his family and his friends. He said that he had spent £2,000 of his own money and £12,000 given to him by others. The appellant had pleaded guilty to being knowingly concerned in the fraudulent evasion of the duty payable on the importation of 250 kilograms of tobacco. In the subsequent confiscation proceedings the Crown contended that the defendant's benefit amounted to £41,505, being the total of the evaded duty of £27,505 (applying *Smith*) and £14,000, being the cost of the tobacco. It was held on appeal that the judge had rightly decided that the cost of the tobacco was part of the benefit, notwithstanding that, at least in every day parlance, the appellant had obtained no benefit at all and the Revenue, unlike the appellant, had lost nothing and indeed had, presumably, confiscated the cigarettes.

42. The Court in *Waller*, in an unreserved judgment, gave six reasons for its conclusion. Giving the first reason Silber J relied upon passages in *May* and, in particular, the passage which states that a person ordinarily obtains property if in law he owns it, whether alone or jointly. In our view the fact that a defendant owned the tobacco cannot of itself be decisive of the issue of whether the purchase price of the tobacco is a benefit.

43. The second reason was expressed in this way:

> "18. The judge was correct for a second reason which is based on comments which were made by Lord Rodger of Earlsferry in Cadman Smith case. He said, first, at paragraph 21:
>
> > 'The measure of his benefit is the value of the property so obtained.'
>
> Lord Rodger then went on to say at paragraph 23:
>
> > '...the courts have consistently held that 'payments' received in connection with drug trafficking mean gross payments rather than net profit and that 'proceeds' of drug trafficking mean a gross payments rather than net profit after deducting the cost of the drug trafficking operation.'
>
> We accept that these comments relate to the proceeds of drug trafficking but, in our view, they are equally applicable to cases of evading duty and by analogy to circumstances such as those in the present appeal where the court is required to assess the benefit of criminal conduct involving importation of goods purchased abroad. In those circumstances, the court is not concerned solely with the duty evaded but, with the total value of the property involved. This value must include the purchase price of the goods."

44. Although the Court relied upon *Smith*, the fact that no-one suggested in *Smith* that the cigarettes in *Smith* were part of the benefit is not mentioned.

45. The third reason relied upon the words "benefit" and "in connection with". The Court said:

> "Our third reason for accepting the contentions of the respondent flows from the wording of the statutory provisions because the court has to ask itself two questions. The first is whether the defendant has benefited from his criminal conduct. In this case, the answer must be in the affirmative, as the appellant obtained tobacco which he purchased. The second question, based on section 76(4) is whether the appellant obtained property "as a result of or in connection with" the conduct of evading excise duty. In this case the answer must be that the appellant obtained property, namely the tobacco. This was the only property that he obtained and in reaching that conclusion, we have noted the width of the words used in the statutory provision because they talk about a person who obtains property "as a result of or in connection with his conduct". The words "as a result of" apply to any consequence, while the words "in connection with" widen that meaning. In our view, the acquisition of property and this tobacco falls clearly within both those categories."

46. Although the Court in this passage states that the appellant must have benefited from the offence, it is difficult to see how it can be said that he benefited other than by interpreting the words "in connection with" to reach that conclusion.

47. The fourth and fifth reasons were expressed as follows:

> "20. The fourth reason why we regard the respondent's submissions as being correct is the use of the word "property" in section 76(4). It is significant because the focus is not on the benefit which the appellant obtained as a result of his smuggling (namely the evasion of duty) but what "property" he received and again, that must be tobacco.
>
> 21. The fifth reason why we agree with the judge is that the submission of the appellant would mean that the statutory provision has to be re-written so that the word "profit" is introduced to define the word "property". That is not permissible and we have already stated that the Appellate Committee in May was saying that the words should be given their common sense meaning."

48. With all respect we do not follow these two reasons. The fact that the tobacco which he bought is "property" is, in our view, of little help in resolving the issue. As far as "profit" is concerned, it is one thing to say that in determining the benefit, the costs must be ignored and another thing to say that the costs can be added on to the benefit.

49. Giving the sixth reason, Silber J cited a decision from Northern Ireland, in which the judge reached the same conclusion as the Court in *Waller* reached.

50. *Waller* has been the subject of criticism both in Archbold, para. 5-1051 and in the Criminal Law Week, 08/35/30:

> "No sooner did it appear that the Court of Appeal was, at long last, prepared to countenance a measure of proportionality in its approach to the confiscation legislation (see *R. v. Sivaraman* [2008] 8 Archbold News 3, C.A. (CLW/08/34/19)), than it takes two steps backwards. There has been a long and sorry history to the Court of Appeal's treatment of this legislation, and this represents a new low.
>
> It is worth spelling out the practical effect of the decision. Had the offender succeeded in smuggling the tobacco into this country, he would have been in possession of tobacco for which he had paid £14,000 and he would have evaded paying the duty which he ought to have paid to the tune of £27,505. As it was, however, the goods which he had bought for £14,000 were forfeited, he was punished for the offence itself (18 months' imprisonment), and he was ordered to pay not only the duty notionally evaded (£27,500 - about which there was, and could be, no complaint: *R. v. Smith (David)* [2002] 1 W.L.R. 54, H.L. (CLW/01/45/10)) but also the £14,000 which he had

> already paid over again. And this, the court seemingly regarded (see [23]), as a 'proportionate response'. How was it possible for the Court of Appeal to arrive at this conclusion? It purported to rely on the legislation itself, and on the decisions of the House of Lords in *Smith (David)* and *R. v. May* [2008] 2 W.L.R. 1131, H.L. (CLW/08/19/9). Anybody familiar with the Act and with those decisions will be bemused as to how they could lead to this result. As to *Smith (David)*, the allegation was an identical one of smuggling tobacco. It was held by the House of Lords that the appellant had obtained a pecuniary advantage as a result of, or in connection with, his offence, even though the contraband had been recovered by Customs and Excise, the value of the pecuniary advantage being the amount of duty evaded. Under the legislation he was then to be taken to have obtained a sum of money equal to the value of the pecuniary advantage (see now s.76(5) of the 2002 Act (*Archbold*, 2008, § 5-637)). It was never once suggested in that case that the appellant actually obtained property (as opposed to being treated as if he had done so), and, certainly, it was never once suggested that he obtained the tobacco itself as a result of or in connection with the offence (*i.e.* as "property" within section 71(4) of the *Criminal Justice Act* 1988 (now s.76(4) of the 2002 Act)). On the contrary, Lord Rodger (at p.63A) contemplated the situation as it would have been had the appellant and his companions been successful in smuggling the tobacco. He said that had they been able to sell the cigarettes, 'then the money which they received from selling them would have been 'property' in terms of section 71(4). In that situation, they would not only have derived a pecuniary advantage in terms of section 71(5) from evading the duty but would also have obtained property in terms of section 71(4) in the form of sales receipts. Their benefit from the commission of the offence would have been made up of two elements.' According to the Court of Appeal in this case, however, the benefit was made up of two elements even where the contraband was seized before there was any opportunity for onward sale. Were there any substance to this proposition, it would surely have been made by the House of Lords in *Smith (David)*.

51. We see considerable force in this criticism (albeit that we would not have adopted the same tone).

52. The same issue arose in *R. v James and another* [2011] EWCA Crim 2991 (decided after the hearing in this case). Edwards-Stuart J, giving the judgment of the Court, distinguished *Waller* (albeit saying that the result was unsurprising). In *James* the appellant had bought items to assist the process of converting raw tobacco into hand rolling tobacco. The judge had held that the items purchased were part of the benefit and that the rent and wages which he had paid were a pecuniary advantage and also

part of the benefit. The Court quashed that part of the confiscation order which encompassed these items. The appellant did not obtain the items *in connection with* any criminal conduct. His criminal conduct in participating in the conspiracy formed no part of the transactions by which he acquired the various items. Their acquisition was by way of lawful purchase for value. We accept that these transactions were entered into *for the purpose of* criminal conduct, but that is not necessarily a state of affairs caught by section 76(4).

53. In our view there are a number of central flaws in the reasoning in *Waller*. First, *Smith* does not assist the conclusion that the purchased tobacco was part of the benefit and, although the Court in *Waller* did not say this, *Smith* points very much the other way. Secondly, in *May*, Lord Bingham pointed out that if the total of the confiscation orders made by the judge exceeded the sum of which the Revenue had been cheated, then an issue of proportionality would arise (see para. 21 above). In this case the Revenue was cheated of £12.6 million but the judge made two confiscation orders in the sum of £72 million (before uplift). Thirdly we refer to the passages from *Jennings* and *Olubitan* which we have already cited (paras. 33 and 34 above). Fourthly, as *James* shows, the words "in connection with" must be construed with the word "benefit" in mind. To say that in assessing the benefit the Court does not take into account the costs incurred by the criminal in committing the offence is very different from saying that the costs should be added on to the benefit. The robber's benefit is what he steals, the robber cannot deduct the costs of undertaking the robbery but surely those costs should not be added on to the benefit?

54. In our view *Waller* was clearly wrong. Are we bound by it?

55. The principles can be found set out in *R v Rowe* [2007] EWCA Crim 635; [2007] QB 975 by the then Lord Chief Justice, Lord Phillips:

> "22. Giving the judgment of the court [in *R v Simpson* [2003] EWCA Crim 1499], Lord Woolf CJ started by setting out the established situations in which the Court of Appeal could depart from one of its previous decisions, as summarised in *Halsbury's Laws of England* 4th Ed Vol 37 para 1242:
>
> > '(i) where the Court has acted in ignorance of a previous decision of its own court or a court of coordinate jurisdiction which covered the case before it. If this is the case the Court must decide which case to follow;
> >
> > (ii) where the Court has acted in ignorance of a decision of the House of Lords;
> >
> > (iii) where the Court has given its decision in ignorance of the terms of a statute or a rule having statutory force; or
> >
> > (iv) where in exceptional and rare cases, the Court is satisfied that there has been a manifest slip or error and there is no prospect of an appeal to the House of Lords.'

None of these was applicable. Lord Woolf then commented at paragraph 27:

> '…the paragraphs in *Halsbury* should not read as if they are contained in a statute. The rules as to precedent reflect the practice of the courts and have to be applied bearing in mind that their objective is to assist in the administration of justice. They are of considerable importance because of their role in achieving the appropriate degree of certainty as to the law. This is an important requirement of any system of justice. The principles should not, however, be regarded as so rigid that they cannot develop in order to meet contemporary needs.'

Lord Woolf then referred to two statements made by Lord Diplock. The first, as Diplock LJ in *R v Gould* [1968] 2 QB 65 at p. 68 was to the effect that the Criminal Division of the Court of Appeal is not rigidly bound by the doctrine of *stare decisis.* The second, in *DPP v Merriman* [1973] AC 584 at p. 685 stated that the liberty of the Criminal Division to depart from precedent which it was convinced was erroneous was restricted to cases where the departure was in favour of the accused.

23. Lord Woolf commented:

> '34. There is nothing to suggest in *Merriman* that Lord Diplock was reminded of what he said in *Gould*. We appreciate that there may be a case for not interpreting the law contrary to a previous authority in a manner that would mean that an offender who otherwise would not have committed an offence would be held to have committed an offence. However, we do not understand why that should apply to a situation where a defendant, as here, wishes to rely upon a wrongly decided case to provide a technical defence. While justice for a defendant is extremely important, justice for the public at large is also important. So is the maintenance of confidence in the criminal justice system. If the result in the *Palmer* case had to be applied to other cases even though the Court of Appeal had acted in ignorance of the appropriate approach this would indeed, reveal a most unattractive picture of our criminal justice system's ability to protect the public.
>
> 35. Here we prefer the approach indicated in *Bennion on Statutory Interpretation* (4th ed, 2002) at p. 134 which states:
>
> > 'The basis of the *per incuriam* doctrine is that a decision given in the absence of relevant information cannot be safely relied on. This applies whenever it is at least probable that if information had been known the decision would have been affected by it.'"

56. We bear in mind that this Court is not rigidly bound by the doctrine of *stare decisis*. If we were to depart from *Waller* then our decision would be in favour of the two appellants serving a long sentence with a ten year sentence of imprisonment to be served consecutively. It cannot realistically be suggested that the appellants have the means each to pay £92 million, a figure that, if unpaid, is also subject to interest at the rate of 8%. The mere fact that a loss to the Revenue of £12.6 million leads to two confiscation orders in the sum of twice £72 million (before uplift) shows, we believe, that something has gone wrong. We also infer from the fact that *Waya* is being reargued and from the questions being asked that there is concern about how the law of confiscation has developed.

57. Our view is much strengthened by the fact that, as we understand it, Flaux J was the first judge in a carousel fraud (and there have been many of them) to take the approach which he did. In *Sangha* [2008] EWCA Crim 2562 (discussed by Flaux J), another carousel fraud, the very experienced judge who heard the confiscation proceedings, HHJ McCreath, explicitly rejected the submissions made by the prosecution in that case that the benefit was the total value of each sale by the buffer company. He held that the benefit was the VAT element only. In the Court of Appeal the issue was mentioned but left open.

58. Sir Derek Spencer supports the judge's reasons for reaching the conclusion that he did and argues that Parliament intended that the words "in connection with the commission of the offence" were intended to cover the obtaining of property (or pecuniary advantage) in the circumstances of this case. We do not agree.

59. He submits[5] that this case differs from both *Waller* and *Smith* in that this case is concerned with money received by the appellants in connection with the goods that were sold or were purportedly[6] sold in furtherance of the commission of the conspiracy. Sir Derek points to a passage in *Smith* at paragraph 27 in which Lord Rodger said that if the cigarettes had been sold, then the money received would have been property in terms of section 71(4). As we have already said in the example we gave in paragraph 29 above, the sale price of the smuggled cigarettes would be a benefit. Sir Derek submits that the appellants' sales or purported sales of the goods are analogous to the cigarettes. We do not agree. On the assumption that the goods in this case existed then, if the appellants had obtained the goods by theft or by fraud and sold them on, the resulting sale price would be a benefit. In this case the offence was cheating the revenue of the VAT, the selling or purported selling of the goods was a mechanism by which the fraud was committed and the necessary costs involved in the selling or purported selling were the costs of committing the offence. We stress again that if any statutory assumptions applied (because, for example, the criminal lifestyle provisions in the Proceeds of Crime Act 2002) then the expenditure on committing the fraud would be assumed to be a benefit, being property obtained as a result of general criminal conduct.

60. In our view the benefit for each appellant should have been set in the sum of £12,662,822, to which will be added the necessary uplift to reflect the changes in the value of money as at the date of the confiscation orders made by Flaux J.

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[5] Because we had referred in our draft judgment to two cases not cited in oral argument, we gave the parties an opportunity to both see the draft and make further submissions, which they did.

[6] At para. 99 Flaux J pointed out that it was not a necessary part of the Crown's case that the goods existed.

Realisable assets

61. We turn now briefly to the issue of realisable assets. The judge rightly found that MST and therefore the appellants had been involved in carousel fraud over a period commencing in early 2001. Also involved in the fraud was another company Alldech Ltd, the appellants being involved in that company in the same way as they had been involved in MST. The profits of the two companies together were over £30 million and the net profits were calculated by the prosecution in the first prosecutor's statement to be in the region of at least £24 million. The judge accepted a later figure of in excess of £25 million. The judge meticulously traced, in so far as he was able to do so given the obduracy of the appellants, where the money had gone.

62. Flaux J rightly concluded that the appellants had hidden assets. They had both failed to disclose their assets and, to the extent to which there had been disclosure, they had not done so in such a way as to enable the true value of the assets to be determined. The judge rightly concluded that the appellants had failed to discharge the burden on them of demonstrating that their realisable assets were less than the value of the benefit (para. 137). Applying, in particular, a passage in the judgment of Moses LJ *Telli v. Revenue and Customs Prosecution Office* [2007] EWCA Civ 1385, [2008] 2 Cr App R (S) 48, paras. 10-11 and 30 Flaux J concluded (para. 138) that:

> "the court must make a confiscation order for the full value of the benefit and has no discretion to order confiscation of a lesser sum."

63. Sir Derek Spencer submits that that is the correct approach. Mr Tedd submits that the judge was wrong particularly in the light of a later judgment given by Moses LJ in *R. v McIntosh and Another :* [2011] EWCA Crim 1501; [2011] 4 All ER 917. In this judgment Moses LJ sets out the statutory provisions, the competing approaches and concludes that, in a hidden assets case, the court *may* conclude that a defendant's realisable assets are less than the full value of the benefit on the basis of the facts as a whole. He said:

> "6. These appeals concern the proper approach the court should take where a defendant is found not to have told the truth about his realisable assets. The essence of the appeals of both appellants is that the judge failed correctly to apply the provisions of s.71(6) of the 1988 Act. The appellants contended that they had no realisable assets. The judge disbelieved both of them. He concluded that they had concealed their assets. It was at that point, so it was argued, that he misdirected himself in law: the judge regarded his finding that the appellants had hidden assets as compelling him to make a confiscation order in the full sum of the benefit figure. On the contrary, submitted the appellants, a court is not required to make an order in the full amount of the benefit figure merely because it concludes that a defendant has not told the truth about his realisable assets. A court may reject a defendant's evidence that he has no assets or reject his evidence that he has some assets, but of insufficient value to meet the full benefit figure. In neither case,

so it was argued, is the court bound to make an order in the full amount of the benefit.

7. S.71(6) provides:-

> 'Subject to subsection (1C) above the sum which an order made by a court under this section requires an offender to pay shall be equal to –
>
> (a) the benefit in respect of which it is made; or
>
> (b) the amount appearing to the court to be the amount that might be realised at the time the order is made,
>
> whichever is the less.'

This provision requires the court to assess what amount *appears* to the court to be realisable. It is now settled that the burden of proving that the amount that might be realised is less than the benefit rests on the defendant. In *R v Barwick* [2001] 1 Cr App R (S) 129 the rationale advanced by Auld J in *Rees* (19 July 1990, unreported) was adopted: the nature and value of his assets are essentially within a defendant's personal knowledge. But it should be noted that in *Barwick* the judge, at the confiscation hearing, disbelieved the defendant but nevertheless concluded that his realisable assets were less than the amount of the full benefit figure ("doing as broad a justice in this case as I feel able to do", cited paragraph 8). While this court counselled against any assumption that a defendant would invest the proceeds of crime (paragraph 39), it upheld the factual conclusions of the judge and thus his acceptance that the realisable assets were less than the full amount of the benefit, notwithstanding that the defendant's evidence hid the truth.

8. In *May* ... Lord Bingham, in giving the opinion of the Committee, identified the objective of the statutory scheme: to deprive defendants of the benefit from their criminal conduct, "within the limits of their available means" (paragraph 48 B). It would, he said, be unjust to imprison a defendant for failure to pay a sum he cannot pay (paragraph 35). But Lord Bingham stressed the need to focus on the statutory regime in which no discretion survived, save in relation to the application of the statutory assumptions (paragraph 43). Accordingly, although he acknowledged Lord Steyn's reference in *R v Revzi* [2002] 2 Cr App R 2 to the need for "standing back and deciding whether there is or might be a risk of serious injustice", that approach could only be adopted within the confines of the statute itself (paragraph 43). Lord Bingham made it clear that the injustice in ordering a defendant to pay more than he was able was recognised by and catered for in the provisions of the statute itself:

> 'It has also been *recognised* that it would be unjust to imprison a defendant for failure to pay a sum which he cannot pay. *Thus* provision has been made for assessing the means available to a defendant and, if that yields a figure smaller than that of his aggregate benefit, making a confiscation order in the former, not the latter, sum.' (our emphasis) (*May*, paragraph 35)

9. Accordingly, there is no room, outwith the statute, for any residual discretion in the court to relieve a defendant, who has failed to prove that his assets are less than the full amount of the benefit. Mr Farrell QC, on behalf of McIntosh, argued that the court should always bear in mind the injustice of ordering a defendant to pay more than his resources permitted. He drew attention to Lord Steyn's dicta in *Revzi* (cited above) and Toulson LJ's emphasis, in *Alan Glaves v Crown Prosecution Service (q.v. supra*) on the need for justice and proportion (paragraph 56). Toulson LJ drew on Pill LJ's reminder in *Re O'Donoghue* [2004] EWCA Civ 1800, that however uncooperative or dishonest a defendant may be, the court must retain a sense of justice and proportion.

10. But that approach can only be deployed within the statutory scheme. The court must strive to achieve justice and proportionality within the confines of the statutory scheme. The court can and should exercise those judicial virtues at the time when it answers the statutory question posed by s. 71(6), namely, whether it appears to the court that the realisable amount is less than the amount of the benefit.

11. When Toulson LJ recognised that a defendant may be ordered to pay more than he has, he was not imposing a third, extra-statutory test for assessing the realisable amount. On the contrary, he was recognising that the statutory scheme may lead to a result where:-

> 'a confiscation order is *properly* made in a larger sum than the defendant in truth is able to pay.' (paragraph 52)

12. *O'Donoghue* and *Glaves* were cases in which an appellant sought a certificate of inadequacy, but the courts' dicta were relevant to the statutory scheme in relation to confiscation. *Telli* was also such a case but Mr Farrell suggested that courts had been applying dicta of mine in a rigid and unlawful manner, in those cases where a court concluded that a defendant had failed to disclose the true extent of his current assets. In *Telli*, a case under the Drug Trafficking Act, 1994, I said:

> '10. *Prima facie*, the court is required to order recovery of the full value of the defendant's proceeds of drug trafficking. The court has no power to make an order for any lesser sum

> unless it is satisfied that the total of the values at the time the confiscation order is made of all the property held by the defendant is less than the value of his proceeds as assessed according to s.4.
>
> 11. If a defendant fails to satisfy a court of the value of that realisable property then the court is bound to make a confiscation order in the full value of his proceeds. This is of significance in the instant appeal. A defendant should not, if the statutory scheme is properly followed, be able to avoid an order recovering the full value of his proceeds unless he identifies the realisable property he holds. If he refuses to do so then the court has no option but to order the full amount.
>
> ...
>
> 30. I should stress the significance, in the statutory scheme, of the Customs officer's conclusion that by no means all of Telli's realisable assets had been identified. As has so frequently been observed, the extent of realisable assets at the time of conviction is likely to be peculiarly within a defendant's own knowledge (see Lord Lane C.J. in Dickens [1990] 2 A.C 102 at 105E). The statute requires a defendant, if he can, to prove, for the purposes of s.5(3) that the amount which might be realised at the time the confiscation order is made, is less than the amount to be assessed to be the value of his proceeds of drug trafficking. Accordingly, if a defendant is found not to have disclosed the nature and extent of his realisable assets, a correct view of the statutory scheme is that he cannot satisfy a court that the total value of all his realisable property is less than the value of the proceeds of his drug trafficking. The court ought not, therefore, issue any certificate pursuant to s.5(3).'

This rigid statement of principle was qualified at 31:

> 'For the reasons I have given, absent identification of all the realisable property held by him, a defendant normally will be unable to satisfy the court that the amount that might be realised at the time the confiscation order is made is less than the amount assessed to be the proceeds of his drug trafficking.'

13. The dicta in *Telli*, so Mr Farrell told us, have been adopted as the source of a requirement to make a confiscation order in the full amount of the benefit in any case where a defendant fails to persuade the court that he has revealed the true current extent and true value of his assets. In any case where a defendant has been found to have lied and diminished or hidden their true value, the court is bound to make an order in the full amount of the benefit.

> 14. The Crown submitted in *Glaves* that it was not open to a defendant to persuade a court that his assets were inadequate once it had been found that he had failed to disclose their full extent. This submission was rejected on the basis that *Telli* does not go that far; it must be confined to the circumstances of that case where it was plain that the assets which Telli had failed to reveal may, for all the court knew, have been ample to meet the full value of the benefit despite the loss of the statue of Dionysus.
>
> 15. In the light of *Glaves* and *May* there is no principle that a court is bound to reject a defendant's case that his current realisable assets are less than the full amount of the benefit, merely because it concludes that the defendant has not revealed their true extent or value, or has not participated in any revelation at all. The court must answer the statutory question in s.71(6) in a just and proportionate way. The court may conclude that a defendant's realisable assets are less than the full value of the benefit on the basis of the facts as a whole. A defendant who is found not to have told the truth or who has declined to give truthful disclosure will inevitably find it difficult to discharge the burden imposed upon him. But it may not be impossible for him to do so. Other sources of evidence, apart from the defendant himself, and a view of the case as a whole, may persuade a court that the assets available to the defendant are less than the full value of the benefit."

64. We agree with this comprehensive analysis.

65. If *McIntosh* had been available to Flaux J, we doubt very much whether he would have reached the conclusion that the confiscation order should be in the sum of the total benefit as found by him.

66. We add this. It seems to us that a confiscation order which, due to its magnitude, exceeds by far the likely assets of the defendant may operate as a disincentive to co-operate. In the present case even if the appellants produced say £25 million, the default period would have to be served (unless a certificate of inadequacy could be obtained, which would be difficult, see *Glaves v CPS* [2011] EWCA Civ 69 and *McKinsley v Crown Prosecution Service* [2006] EWCA Civ 1092).

67. Given our conclusion that the benefit figure for each appellant should now be £12,662,822 uplifted to reflect changes in the value of the money as at the date of the confiscation orders made by Flaux J, we have no doubt, given in particular the profits made by the appellants through the two companies, that the confiscation figures should be in the same amount and to that extent we allow the appeals.

Third and other grounds

68. We turn to the third ground on which leave is sought. Mr Tedd submitted that a period of two months to pay the sum was too short given the complexity of unwinding the assets. Sir Derek Spencer had asked that the judge give no time to pay, given the deliberate flouting of court orders. As we understand the situation, the period of two months would have expired shortly before the appellants were due to be released from

their sentence. If released there seemed little doubt that they would leave the country, given, in particular, the scale of their assets abroad as found by the judge. In the unusual circumstances of this case it is unarguable that the judge was not entitled to set a very short period and we refuse leave to appeal on that ground.

69. Finally the appellants themselves have submitted grounds of appeal and some 100 pages of documentation in support. Mr Tedd declined to argue any of them but had no authority to abandon them. The three principal grounds may be summarised in this manner:

> A. Conduct of the prosecution. It is submitted that the prosecution misled the court by use of PII material; it continually served material late; the prosecution changed its case; failures in disclosure.
>
> B. Disparity of the Crown's witnesses with the crown's own case. The witnesses John Hughes and Christine Harris gave evasive evidence and changed their accounts.
>
> C. Conduct of the Judge The Judge failed to understand the facts of the original trial particularly the role of MST as a broker (not principal); the earning of interest on customers' monies and alleging other criminal conduct e.g money laundering. The Judge misdirected himself. He continually interrupted the appellants' cross-examination of witnesses and exaggerated the strength of the evidence against them in his judgment. The Judge misapplied the case law. He prevented the appellants from raising crucial evidence by threatening them with contempt of court. He took every opportunity to undermine them by referring to them as convicted criminals. He failed to consider the individual circumstances of each appellant. He incorrectly summed up the evidence. He failed to determine the correct source of documentary evidence.

70. In refusing permission to both appellants the single judge wrote:

> Your Grounds of Appeal/handwritten comments on the judgment
>
> I have considered these matters in conjunction with what is said about them in the Respondent's Notice at paragraphs 13.41.
>
> Decision
>
> The judge analysed the evidence at length and with care. He gave detailed reasons for each of the conclusions he reached. These conclusions were clearly ones that were open to him to draw, on his findings of fact. The findings of fact were for him to make having heard and considered the documentary and oral evidence, including from you in the witness box, and were ones he was entitled to make on the material before him. He also set

> out the procedural issues which arose, and how and why he dealt with them, as he did.
>
> Nothing I have seen, and nothing said in either the Grounds of Appeal against Defendant's Confiscation Order or in the handwritten comments on the judgment/Detailed Grounds of Appeal gives me any reason to doubt that you had a fair hearing or that the findings made by the judge were not ones that were open to him on the facts or that he made any material error whether of fact or law.
>
> None of the grounds you have advanced are remotely arguable in my view and I am not persuaded your requests for transcripts is justified. Your grounds consist to a considerable extent of assertion, and seem to me to be for the most part, a vexatious attempt to re-run and re-argue the hearing before the judge in toto or to re-open matters determined against you at the substantive trial or to raise matters which are simply irrelevant.

71. To the extent to which the single judge is dealing with the points not argued by Mr Tedd, we agree wholeheartedly with these comments and reject the renewed applications on the grounds not the subject of submissions by Mr Tedd.

72. In conclusion we quash the two confiscation orders of £92,333,667 and substitute for them confiscation orders for each appellant in the sum of £12,662,822 uplifted to reflect changes in the value of the money as at the date of the confiscation orders made by Flaux J. That uplifted amount is £16,145,098.00.

73. Given that the maximum period of imprisonment in default is a period of ten years for an amount exceeding £1 million, we leave in place the default period ordered by Flaux J, namely ten years to be served consecutively to the sentence of imprisonment of seven years passed by HHJ Alexander on 30 March 2007. Given our rejection of the third ground and given the failure to pay any money, we will leave in place the order made by Flaux J that payment had to be made within two months of the confiscation order.

74. We certify that the following point of law of general public importance is involved in our decision:

> Is the total amount of money received into a bank account controlled by a defendant, as a result of the sale or purported sale of goods by a buffer company in the furtherance of an MTIC carousel fraud, property obtained by him as a result of or in connection with the commission of the offence, as defined by section 71(4) of the Criminal Justice Act 1988, so as to constitute his, or part of his, benefit?

75. We refuse the respondent leave to appeal.