Neutral Citation Number: [2021] EWCA Crim 543

Case No: 20200698 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE HARROW CROWN COURT
His Honour Judge Cole
S20150033

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2021

Before :

LORD JUSTICE EDIS
MR JUSTICE SOOLE
HER HONOUR JUDGE TAYTON QC,
sitting as a judge of the Court of Appeal Criminal Division

- -

Between :

THE LONDON BOROUGH OF BARNET	**Appellant**
- and -	
HAMID KAMYAB	**Respondent**

- -
- -

Andrew Campbell-Tiech QC and Richard Heller (instructed by **HB Public Law**) for the **Appellant**
Nathaniel Rudolf QC (instructed by **Janes Solicitors**) for the **Respondent**

Hearing date: 17 March 2021

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Approved Judgment

Lord Justice Edis:

Introduction

1. This is an application by the prosecutor (London Borough of Barnet: 'LBB') pursuant to s.31(1) Proceeds of Crime Act 2002 (POCA) for leave to appeal the Confiscation Order in the sum of £270 imposed on the respondent, Mr Hamid Kamyab, by HHJ Cole in the Crown Court at Harrow on 16 December 2019 following his ruling against LBB on a preliminary point.
2. We give leave. The appeal is clearly arguable, and the case raises two important issues. They are:-
    a. The scope of the decision of this court in *R. v. Panayi* [2019] EWCA Crim 413; and
    b. The powers of this court when determining a prosecutor's appeal against a confiscation order made in the lower court. These are a matter of statute, and there is currently a Law Commission Consultation in progress considering the current provisions, see *Confiscation of the Proceeds of Crime After Conviction, Consultation Paper 249*, published September 2020. We consider that there is a lacuna in these powers which requires consideration, and this is an opportune moment at which to analyse the current prosecutor's appeal. That Paper points to the problems in the current approach to confiscation proceedings, of which this case may be another example, see especially Chapters 7 and 10. The sixth anniversary of Mr. Kamyab's conviction in the Magistrates' Court has recently passed. The fifth anniversary of the failure of his appeal against conviction and the setting of a confiscation timetable is a few months ahead.

Facts

3. On 10 June 2014 LBB issued a summons against the respondent which alleged an offence of failure to comply with an enforcement notice, contrary to the provisions of s.179(2) Town and Country Planning Act 1990 as amended. This read:

> "…you the Defendant, being the owner of 24 Llanvanor Road, London NW2 2AP ('the Land') did fail to comply with an enforcement notice served on 1 April 2010 by [LBB] pursuant to part VII of the Town and Country Planning Act 1990 as amended ('the Notice'). The Notice took effect on 5 May 2010 requiring compliance by 5 September 2010. A new compliance date was set by the Planning Inspector of 27 September 2011. [LBB] subsequently extended the compliance period to 1 June 2013 to meet the requirements of the Notice. On or before the 4 February 2014 you failed to take steps required by the Notice, namely:
>
> 1. Cease the use of the land as nine units of residential accommodation.
>
> 2. The permanent removal from the house of all but one set of kitchen facilities, all but three bathrooms and locks from all separation doors."

4. The respondent had purchased 24 Llanvanor Road in July 2007 for £612,500 as an investment property from which he intended to derive rental income. At some point the

property was converted from a 5-bedroom single dwelling into 9 separate flats. The respondent has always maintained that this conversion took place before his purchase, but this was not accepted by LBB.

5. The change of use having come to its attention, and following various exchanges with the respondent, LBB issued and served the planning enforcement Notice referred to in the summons. The respondent appealed the Notice to the Planning Inspectorate. The appeal was allowed to the extent that the deadline for compliance was extended to 27 September 2011, as also stated in the summons. The respondent's subsequent application for a Certificate of Lawful Existing Use or Development ('CLEUD') was refused; and other steps taken by him were unsuccessful. LBB ultimately advised the respondent that he had until 1 June 2013 to comply with the Notice, failing which he would be prosecuted.
6. On 3 June 2013 a Planning Enforcement Officer from LBB attended the property and was satisfied the Notice had not been complied with. After various further exchanges between the parties, on 29 October 2013 LBB advised the respondent that in the absence of compliance by the end of January 2014 he would be prosecuted. Following a further attendance by an Officer on 4 February 2014, the summons was issued and served.
7. Following a trial (in substance an application to stay the proceedings as an abuse of process) before the District Judge in the Willesden Magistrates Court, the respondent was convicted of the offence on 2 February 2015. His subsequent appeal (effectively a second trial which was also, in substance, an application for a stay) against conviction to the Harrow Crown Court was dismissed on 26 August 2016. On LBB's application for a Confiscation Order pursuant to s.6 of POCA, procedural directions were given. Over three years later, the case came on for hearing in the Crown Court. Now, fifteen months after that, this appeal comes before us. The judge sentenced Mr. Kamyab to a fine of £10,000, to be paid within 12 months with a term of 6 months' imprisonment in default. He was ordered to pay costs in the sum of £10,000 within 18 months, and to pay the Victim Surcharge. These orders were made at the time required by s.15(2) of POCA and there has been no appeal against any of them. They are unaffected by this appeal.
8. In view of the judge's approach to the confiscation proceedings, it is worth recording that there were multiple issues raised at the two lengthy trials, at which applications to stay the proceedings as an abuse of the process of the court were rejected. One thing was common ground throughout. Mr. Kamyab agreed that at all times since his purchase of the property it had been in use as nine separate residential units and he had never done anything to discontinue that use. His case was that the conversion into that use occurred before his purchase. That was his evidence before the District Judge, and it was his case again before the Crown Court. The District Judge was required to make findings about the history of the dealings between LRB and Mr. Kamyab after the enforcement notice in the context of the abuse application. The issue was whether Mr. Kamyab had been promised that he would not be prosecuted if he left things as they were and did not comply with the enforcement notice. In the Crown Court the court explained that one reason (among others) why it was not an affront to the system of justice to prosecute Mr. Kamyab was the very long period during which the breach of planning control had lasted. In neither court was there a finding as to how long that period was, because it was not in issue. The courts had only to decide whether the prosecution was an abuse of process. If it was not, Mr. Kamyab was guilty. No-one suggested in either court that in fact the house had been used as nine residential units on one day only during the period following the date for compliance with the

enforcement notice. Any such suggestion would have been preposterous, but yet it is the factual basis on which confiscation has been assessed.

The confiscation proceedings

9. LBB's Statement of Information (18 December 2016) contended that Mr. Kamyab's benefit from his 'particular criminal conduct', i.e. from the offence, totalled £244,406 in rents received from the 9 flats up to and including 24 November 2016. His realisable known assets were said to total £3,469,250.
10. Mr. Kamyab's statement of response (20 February 2017) contended that his benefit should be limited to the period ending 10 February 2015; and in the total sum of £98,713. By a subsequent statement, this figure was reduced to £84,309. His realisable assets were ultimately stated to be nil.
11. By his skeleton argument (2 October 2018), Counsel for LBB contended for benefit in the revised sum of £455,414. In his skeleton argument (14 January 2019) Counsel for Mr. Kamyab acknowledged that there was *"…a period of time in which the respondent had obtained rent as a result of or in connection with his criminal conduct in failing to observe the terms of the enforcement notice once the periods for compliance had passed*, but contended that its start date was 1 April 2014 and the end date 10 February 2015 or various alternative later dates. This was an admission that his benefit was not limited to the rent received in respect of 4 February 2014. Indeed, that rent was asserted not to be part of the benefit.
12. On 27 February 2019, this Court gave its decision in *R v. Panayi* [2019] EWCA Crim 413. It held that the summons alleging breach of an enforcement notice contrary to s.179 of the 1990 Act had charged the defendant by reference to a single day of breach; and that in consequence his 'benefit' for the purpose of the application for a Confiscation Order was limited to a single day of rents received, i.e. £58.
13. The terms of the summons in *Panayi* were that:

> "On or about 18 February 2016, you being the owner of [the property] breached an Enforcement Notice issued by the London Borough of Islington in respect of unauthorised developments at [the property] by failing to comply with the remedial action required in Schedule 4 of the Enforcement Notice…"

14. Having considered that decision, counsel for the respondent submitted a supplementary skeleton argument relying on it, and contending that the respondent's benefit was likewise limited to a single day of rent received.
15. This argument was resisted by counsel for LBB on two essential bases. First, that there was a material difference in the language of the summons in *Panayi* and in the present case. Secondly, that *Panayi* had been decided without reference to s.8 POCA or to the Court's previous decision in *R. v. Ali* [2015] 1 WLR 841; [2014] EWCA Crim 1658; each of which supported the prosecution case that a defendant's POCA 'benefit' from such an offence was calculable on a continuing basis. We would add that the court in *Panayi* did not expressly consider the decision of the House of Lords in *Hodgetts v. Chiltern District Council* [1983] 2 A.C. 120. That court, of course, was unable also to consider the illuminating analysis of the nature of offences created by the Town and Country Planning Act 1990 in *Russnak-Johnston v. Reading Magistrates' Court* [2021] EWHC 112 (Admin).
16. S. 8 of POCA provides as material :

> "(1) If the court is proceeding under section 6 this section applies for the purpose of –
>
> > (a) deciding whether the defendant has benefited from conduct, and
> >
> > (b) deciding his benefit from the conduct.
>
> (2) The court must –
>
> > (a) take account of conduct occurring up to the time it makes its decision;
> >
> > (b) take account of property obtained up to that time".

17. In *Ali* the summons identified a period of non-compliance with the enforcement notice (*'between 20 June 2008 and 2 February 2009'*). The Court's summary of POCA principles included :

> "In cases where a defendant has benefited from a criminal lifestyle, the court must determine how much he has benefited from his general criminal conduct. If he does not have a criminal lifestyle, the court must determine whether he has benefited from the particular criminal conduct. In both cases, the first stage is to identify the benefit: see ss. 6(4), 8 and 76. s.8(2) requires the court to 'take account of conduct occurring up to the time it makes its decision' in the confiscation proceedings" : per Beatson LJ at [6(3)].

18. The Court also held that the conduct comprising the criminal offence in respect of a property for which an enforcement notice has been issued is not limited to the period that is actually charged:

> "In our judgment, the conduct is criminal, whether or not charged, once the time for compliance with the enforcement notice has elapsed, here after 19 June 2008, and it remains criminal, so that the order need not be limited to the period ending on 2 February 2009": [66].

The Judge's ruling

19. In his ruling, the Judge noted the many other issues between the parties; in particular as to both 'benefit' and the 'recoverable amount'. However, in the light of *Panayi* and the narrow point which it raised, he concluded that it should be dealt with as a preliminary issue. It appears that he had been the originator of that course, and he had caused counsel for the parties to be notified that he may decide to proceed in this way, as in due course he did. As it happens, that course had also been agreed as being appropriate by the parties in a joint note they submitted to the court.
20. The Judge rejected the arguments advanced on behalf of LBB.
21. As to the comparative language of the summons in *Panayi*, he held that there was no true distinction between the two cases. Thus he said:-

> "the natural meaning of "on or before 4 February" means a single day, either on 4th February, or a day before that".

22. If anything, that language was more restrictive than "On or about 18 February 2016" in *Panayi*:

> "…in that "on or before" shuts out anything subsequent, which "on or about" might not. However, both forms mean on a single day, in my view."

23. Furthermore, if the prosecution had wanted to identify an offence continuing over a period greater than a day, it could have done so by the language of (1) *"between two dates – which I am told is now the usual practice"* or (2) *"On and since"*: citing *Hodgetts v. Chiltern DC*; or through *"a series of separate offences representing the span of dates over the years."*
24. The Judge also noted the terms of the District Judge's ruling on conviction which began:

> "The defendant…is charged with a single offence that on the [4th] February 2014 he breached an enforcement notice…"

25. As to s. 8 POCA and *Ali*, the Judge held that he was bound by *Panayi* and that any challenge to that decision was a matter for argument in the Court of Appeal. He added that he did not read s.8 as having application to a 'single day' offence; and that *Ali* was distinguishable as a case of general (rather than particular) criminal conduct, unlike *Panayi* or the present case. Mr. Rudolf before us does not seek to support these conclusions of the judge.
26. The judge therefore dealt with the issue as a matter of construction of the summons, and a pure matter of law. He said that it did not matter that the point had not been taken until late in the day: it was either a good point or a bad one.
27. On this basis, the following facts, which are not capable of dispute, were irrelevant:-
    a. it was obvious to everyone that Mr. Kamyab's benefit was not limited to a single day and could not possibly have been;
    b. he had never suggested otherwise during two long trials in which the history of events was relevant;
    c. he had made an admission through his counsel in a skeleton argument that his benefit extended over a longer period than one day;
    d. there was no procedural unfairness caused by any defect in the summons in dealing with the case on its real factual basis.

Developments since the judge's ruling

28. This Court returned to the issue of 'single day' breaches of enforcement notices in *R v. Roth* [2020] EWCA Crim 967. In that case, the POCA application was treated as one of benefit from particular criminal conduct. No reliance was placed on the criminal lifestyle provisions. The summons set out the offence as follows:

> "On 18 May 2017 at [the Property] you did fail to comply with the requirements of an Enforcement Notice served on you as the owner of the Property, which required you to cease using the property as self-contained flats by 9 March 2013, contrary to s. 179(2) of the Town and Country Planning Act 1990".

29. No 'single day' point was taken. A confiscation order was made in the sum of £527,887 in respect of rents received.
30. In the Court of Appeal, the appellant (amongst other grounds) for the first time took the 'single day' point, citing *Panayi*. Davis LJ, giving the judgment of the court, first expressed some concern at the result in *Panayi*, but then distinguished it by reference to the different terms of the summons before it, saying:-

> "40. In giving the judgment of the court, Males LJ held that the charge must be interpreted as relating to a criminal offence on a single day (18 February 2016): "the Council chose to charge by reference to a single day" (paras 18 and 19 of the judgment). It further followed, as the court went on to hold, that for the purposes of the confiscation proceedings the benefit was confined to the rent received on that one day.
>
> "41. Such an outcome, on so literalistic a reading of the charge, can scarcely appeal to a sense of the merits: although it has to be said that (not least in the drafting of a summons or an indictment) sometimes technicality has to prevail. But in any event the present case is, in our opinion, plainly distinguishable from *Panayi*.
>
> "42. In *Panayi* (and against a background of uncertainty as to when compliance was being demanded or extended) the only reference dates in the charge were the date when the Enforcement Notice was actually issued (which would not be the actual time by which compliance was required to take place) and the date of the rejection of the challenge to the refusal to issue the Certificate of Lawfulness. In the present case, however, the summons did indeed identify the date from which the (criminal) non-compliance had started: that is, 9 March 2013. Although the summons is undoubtedly clumsily drafted, it thereby sufficiently, in our judgment, identifies the start date (9 March 2013).
>
> "43. In our view, the charge was sufficiently worded."

31. The Court continued that in any event the accompanying Statement of Facts made clear that the entire period as identified was the subject of the summons; the matter was clearly committed to the Crown Court on that basis; and the confiscation proceedings were also conducted on that basis. Davis LJ said (our emphasis added):-

> "Throughout, therefore, the appellant knew the case he had to meet. So *even if there were technical deficiencies in the drafting of the summons they are not fatal*.": [43].

32. The Court then referred to the decision of the House of Lords in *Hodgetts*. This decided that failure under the prevailing planning legislation to comply with an Enforcement Notice by ceasing to desist from a certain use of land as required constituted a continuing offence, and not a succession of individual offences occurring on each day. The issue was whether a single offence charging conduct over a period of time was bad for duplicity. It was held that it was not, because the nature of the offence, on the true construction of the statute, is that it is a continuing offence. In that case the information had charged the offence as "on and since May 27, 1980" and was validly drafted. In *Roth*, this court cited Lord Roskill's observation that it might be preferable if hereafter offences were charged as being committed:-

> "…between two specified dates, the *termini* usually being on the one hand the date when compliance with the enforcement notice

> first became due and on the other hand a date not later than when the information was laid, or of course some earlier date if meanwhile the enforcement notice had been complied with" (p.128E-F).

33. The Court stated that this guidance might usefully continue to be borne in mind by those drafting summonses by reference to s. 179 of the 1990 Act.
34. As in *Panayi*, the Court in *Roth* did not in terms consider s.8 of POCA; but identified s.76(4) and (7) of POCA as the provision of central relevance to the case. This provides:-

> "(4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.
>
> "(7) If a person benefits from conduct his benefit is the value of the property obtained".

35. The Court in *Roth* rejected the further ground of appeal that, on the facts of the case, the causation test was not satisfied. On the contrary:-

> "…his receipt of the rents derived from his prohibited conduct in ceasing to desist from his use of the property for twelve self-contained flats, contrary to the requirements of the Enforcement Notice. His conduct was criminal conduct and the rents were obtained as a result of or in connection with such conduct, and so were benefit for the purposes of section 76 of the 2002 Act": [55].

36. Very recently, the Divisional Court in *Russnak-Johnstone v. Reading Magistrates' Court* was required to analyse different offences created by the Town and Country Planning Act 1990 to determine when the six-month time limit for initiating summary proceedings expired for the purposes of s. 127 of the Magistrates' Courts Act 1980. Holgate J, with whom Coulson LJ agreed, reviewed the case law in detail and concluded at [78]:-

> "Ultimately, therefore, the issue of whether an offence is of a continuing or a once and for all nature turns on the wording and effect of the relevant legislation."

37. This was so, whether the notice was a "do notice", requiring the recipient to take some action, such as stripping out "all but one set of kitchen facilities, all but three bathrooms and locks from all separation doors", or a "desist notice", requiring the recipient to stop doing something, such as using "the land as nine units of residential accommodation". The latter kind of notice, we interject, may be a desist notice in form but a do notice in substance, as here. Many positive acts would be required in order to desist the use of the property for nine residential units including, most obviously, the eviction of the tenants.
38. Further, the court in *Panayi* did not have the benefit of the helpful analysis by the Divisional Court of the formal requirements for a valid summons contained in *Ceredigion County Council v. Robinson and others* [2020] EWHC 3425 (Admin). The court followed *Sanger v. Newham* [2015] 1 WLR 332, and applied the CrimPR 7.2 and 7.3. Generally, in indictments or summonses in criminal cases, dates are treated as not being "material averments". The court in *Ceredigion CC* was required to consider that proposition against earlier authority decided under a version of the Town and Country

Planning Act 1990 which was in force for a year or so before it was amended. We respectfully agree with that decision, and in particular with the words of Stuart-Smith LJ at [28], contrasting the current provisions with those briefly in force when the Act was first enacted:-

> "Under the current provisions, by contrast, the offence is not committed at a single point in time. As pointed out at [36] of *Sanger*, "the offence is committed "at any time" after the end of the period for compliance with an enforcement notice." After the period for compliance has expired, the offence is in that sense a continuing one. In our judgment, that explains why Singh J at [31] of *Sangar* identified that what the prosecution had to prove included that "the time for complying with the enforcement notice had expired" rather than having to prove that it had expired on a particular day. We respectfully endorse that approach. Put in other words, under the current provisions the focus shifts from the moment of expiry of the period for compliance to the period of alleged criminal contravention. What matters, and what the prosecution must prove, is that the period for compliance has expired so that the defendant was under an obligation not to contravene the notice: the exact moment at which it expired is no longer of critical or defining importance."

The positions of the parties on this appeal

39. On behalf of LBB Mr Campbell-Tiech QC relies on the decision in *Roth* in support of its primary ground of appeal that the Judge was wrong to hold that the summons identified the commission of an offence on a single day, i.e. 4 February 2014. As a continuing offence (*Hodgetts*) the alleged commission on any given day necessarily imports like offending on every other day starting with the date upon which compliance was required, at least until compliance occurs. In the present case, as in *Roth*, the summons identifies the starting date of the continuing offence. The continuing benefit obtained as a result of or in connection with that offence then falls to be determined: s.76(4), and also s.8(2).

40. In response, Mr Rudolf QC submits that the present case is more akin to *Panayi* than to *Roth* and says:-

    a. The information used the words 'on or before' a particular date; and was comparable to the language of 'on or about' the particular date in *Panayi*.
    b. Unlike *Roth*, *Panayi* and the present case involved a contested trial. Whilst accepting that the summons identified the start of the breach as 1 June 2013, this was a point of dispute at the trial in the Magistrates Court, and again on appeal against conviction in the Crown Court, and again in the confiscation proceedings.
    c. The summons did not use either of the forms approved by the House of Lords in *Hodgetts*, to which decision the judge had expressly referred.
    d. It was immaterial that a defendant otherwise knows the nature of the case against him. What matters is whether or not, on the proper interpretation of the summons, the prosecuting authority has chosen to confine the charge to the commission of an offence on a single day.

Decision on the "single day" issue

41. Unlike the judge, we have the benefit of this Court's subsequent decision in *Roth*. The reasoning in that decision applies equally to the present case. On its proper construction the summons does not confine the respondent's offending to a single day. On the contrary, it identifies the (extended) date for compliance (1 June 2013) and the offence continuing thereafter. As in *Roth*, this is in contrast to the different language of the summons in *Panayi*.
42. Further, and in any event, whether an offence is by its nature a continuing offence or a "once and for all" offence is a matter of construction of the offence creating provision, as explained in *Hodgetts* and *Russnak-Johnston*. Where, as here, the nature of the offence charged is that it is a single offence which is committed throughout the period of non-compliance we would suggest that it would require very clear words in the summons and in the presentation of the case to limit it to a particular day. No rational prosecutor would wish to proceed in that way without some wholly exceptional circumstance, and no rational defendant would understand the charge as being limited to one day unless the prosecutor specifically said that this was the position. Once the offence is a continuing offence starting at the expiry of the date for compliance and ending, if at all, at some point thereafter, the end date is not, we would suggest, a material averment in the determination of guilt. If it is disputed, which it was not in this case, it will be a matter for the trial court to determine if it is relevant to sentence. Absent some special circumstance, the court is not constrained in that exercise by dates in a summons or an indictment. Still less is it constrained when dealing with confiscation because of the terms of ss.8 and 76 of POCA.
43. The language of this summons was sufficiently clear, and we do not accept that any words of the District Judge in her decision affect the matter, one way or the other. The District Judge's phrase quoted by the judge at [24] above was not addressing the "single day" point at all. The language the District Judge used is entirely appropriate to the issue she had to decide. As we have said, the issue at the trial, and at the appeal by way of re-hearing, was whether it was an abuse of process to prosecute Mr. Kamyab or not. No defence on the facts was advanced at all, and everyone at both trials understood that the building had been in use as nine flats for years, and that Mr. Kamyab had at no time done anything to change that. We do not accept Mr. Rudolf's suggestion that the case can be distinguished from *Roth* on the basis that here there was no guilty plea. On these facts, it is precisely comparable with *Roth* so that, we quote again:-

> "Throughout, therefore, the appellant knew the case he had to meet. So *even if there were technical deficiencies in the drafting of the summons they are not fatal*." : [43].

44. It is therefore relevant that Mr. Kamyab knew exactly what was alleged. The skeleton arguments served on his behalf pre-*Panayi* demonstrate that he was in no doubt about that. In any event, there is no technical deficiency in the summons.
45. Whilst recognising that the Judge did not have the advantage of the decision in *Roth*, it must follow that he was wrong to conclude that the summons was confined to the commission of an offence on a single day, and therefore wrong to limit the confiscation order to one day's receipt of rent from the flats.
46. We have been invited by the Crown to say that *Panayi* should be confined to its own facts. We certainly agree that, where it can be distinguished, as in *Roth* and the present case, it should not be applied. A decision on whether it is rightly decided but confined to its own facts, or decided *per incuriam* by reason of the apparent absence of citation of *Hodgetts*, *Ali* and s. 8 of POCA, must await a case where it cannot be distinguished.

We hope that no such case will arise, given that it would require a summons to be drafted in exactly the same terms as that in *Panayi*, and something would have to have gone seriously wrong in the court below to exclude the approach taken by Davis LJ in *Roth* at [43], quoted here at [43] above. We endorse that approach. Davis LJ in *Roth* at [41] referred to the importance in drafting indictments and summonses of the technical requirements, and we do not doubt this. However, there are no breaches of any technical requirements on which Mr. Kamyab could rely, as the Divisional Court explained in *Ceredigion County Council v. Robinson and others.*

47. This appeal therefore succeeds because the judge was led into error by his conclusion that he was bound by *Panayi* to hold that he was limited to making a confiscation order for the benefit obtained on one day. He should have continued the proceedings, made a finding as to the benefit, applying s.8 of POCA, and made a finding as to the available amount, before making a confiscation order based on a benefit figure far higher than appears in the order which he wrongly made.

Disposal: the powers of this court

48. We now move to a considerably more difficult issue. By the notice of appeal LBB asks for the confiscation order to be quashed and the case remitted to the Crown Court for the continuation of the confiscation proceedings.
49. Mr Rudolf submits that there is no power to remit where the appeal is from the making (rather than the refusal) of a confiscation order. Thus, ss.31 and 32 provide as material:

> 31. (1) If the Crown Court makes a confiscation order the prosecutor may appeal to the Court of Appeal in respect of the order.
>
> (2) If the Crown Court decides not to make a confiscation order the prosecutor may appeal to the Court of Appeal against the decision.
>
> ...
>
> 32. (1) On an appeal under s. 31(1) the Court of Appeal may confirm, quash or vary the confiscation order.
>
> (2) On an appeal under section 31(2) the Court of Appeal may confirm the decision, or if it believes the decision was wrong it may:
>
> (a) itself proceed under section 6 (ignoring subsections (1) to (3)), or
>
> (b) direct the Crown Court to proceed afresh under section 6.

50. We do not criticise counsel who appeared before us for this, but the submissions developed somewhat during the hearing as they attempted to deal with various suggestions about how the court might find some way of disposing justly of this appeal. In the end, having at the court's invitation addressed various possibilities, Mr. Campbell-Tiech's preferred solution was to invite the court to say that the drafting of ss.31 and 32 contained an obvious error, and that Parliament cannot have intended to confer a right of appeal on the prosecution which could not produce any valuable result where the complaint was that an order had been made, but in far too low a sum.
51. Confirming such an order would obviously be of no value to the prosecution. The court would, in any event, decline to confirm an order which was obviously wrong.

52. At one point prior to the hearing, Mr. Campbell-Tiech had intended that his principal submission would be that an order quashing the order would take the matter back to the point before it was made and allow the Crown Court to proceed as if it had never been made, i.e. to continue to decide the proceedings on a proper application of the law. This had obvious attractions, and could be achieved by a construction of the word "quash" which is not unduly strained. However, s. 85(5) of POCA says:-

> (5) If a confiscation order is made against the defendant in proceedings for an offence (whether the order is made by the Crown Court or the Court of Appeal) the proceedings are concluded—
>
> (a) when the order is satisfied or discharged, or
>
> (b) when the order is quashed and there is no further possibility of an appeal against the decision to quash the order.

53. Without formally conceding the point, Mr. Campbell-Tiech acknowledged, rightly, that this provision appears to rule out the option of simply quashing the order and allowing the Crown Court to conclude its work. We cannot read it any other way.

Some decisions on prosecution appeals

54. In *R v Craft* [2012] EWCA Crim 1356 Mr. Martin Evans submitted, (at [24]):-

> "My Lord the consequences are these. This is an appeal under s. 31(1): this confiscation order was made. Turning to s. 32, where a confiscation order is made, the court powers are to vary or to discharge, or uphold the confiscation order. What it cannot do is to remit the matter to the Crown Court, that is a power only available where an appeal is brought under s. 31(2), namely where no confiscation order has been made. What that means is that the task falls to my Lords to, in my submission, increase the value of the confiscation order to take account of the £140,000 that was the tainted gift."

55. Davis LJ made no observation on this submission, and the court proceeded to make an order in accordance with it.
56. In *R v Morrison* [2019] EWCA Crim 351 the Court of Appeal simply used its power to vary, following an error of law by the judge, to add the value of a tainted gift. In *R. v. Bajaj* [2020] EWCA Crim 1111 at [36] the court accepted and acted upon an agreement between the parties that there is no power to remit a case to the Crown Court for further consideration when allowing a prosecutor's appeal after an order has been made in the Crown Court.
57. We have been alerted to one case where the Court of Appeal did remit to the lower Court for a re-hearing, *R. v. Williams* [2007] EWCA Crim 1768. The appeal was by the Prosecution under 31(1). The confiscation order was quashed and the case simply remitted. There was no consideration of the terms of ss.31 and 32 in the judgment. The Court said this (at [23]):-

> "We have considered whether or not it would be appropriate for this court to attempt to vary the order. Tempted as we may be to delve into the minutiae of the schedules, this is a task which we

> fear we must delegate to a crown court judge who can hear the evidence afresh and detailed submissions upon it. "

58. We do not think that *Williams,* in which the existence of the power to remit was assumed without argument, enables us to deal with the matter as one which has been decided by previous binding authority.

The resolution of the principal argument before us on remedy

59. Mr Campbell-Tiech accepts that the literal terms of 32(1), in clear contrast to s. 32(2) - contain no power to remit the application to the Crown Court for that or any purpose. However he submits that the absence of such a power is anomalous and must amount to a drafting error which can be cured on the basis of the principles identified in e.g. *R (DPP) v. Bow Street Magistrates Court* [2007] 1 Cr. App. R 18 at [38]-[48] and *R v. Lehair* [2016] 1 Cr. App. R (S) 2; and that this Court should do so by reading into s.32(1) the words 'or direct the Crown Court to proceed afresh under s. 6'
60. Each of these points has been advanced very shortly before the hearing of this appeal. The first argument faces evident and formidable difficulties; not least when the contrast in remedies between s. 32(1) and s. 32(2) is substantially replicated in the provisions as they relate to appeals to the Supreme Court: s. 33(3) and (4). Far from being an obvious error, the provisions appear to have been carefully crafted, although why they should have been drawn as they were is a mystery. We bear in mind, in particular, that the right of the prosecution to appeal what is part of the sentencing process may have been thought to require some limits. A prosecution appeal against sentence is an unusual creature. Redrafting the provision so that it provides the prosecution with an effective remedy is a matter, we think, for Parliament. We hold that there is no power to remit the case to the Crown Court following a successful prosecution appeal under s. 31(1) of POCA. This is because of the clear terms of s. 32(1).
61. Two of the three powers available, confirming and quashing the order, mean that the prosecution appeal fails even if it has succeeded. What of the third?
62. The judge decided to proceed by way of preliminary issue, being led into what can now be seen to have been an error by his understanding of the decision of this court in *Panayi*. He did this with the support of both counsel who were agreed as to the procedure. We have sympathy for the judge who was trying to achieve the overriding objective, and who could not be expected to anticipate the consequences for the prosecution appeal, which was entirely foreseeable should he find against them on the preliminary issue. It can now be seen that he should have decided the case at the end, giving a ruling on all matters. This is the only sensible course in this technically difficult field where both sides have a right of appeal. If he had done that, we would have had the findings identified at paragraph 47 above. It would have been an easy matter to vary the order by starting from the figures found by the judge for the benefit and the available amount. If some error in that process were identified, those figures could be varied on appeal as required. We do not have these figures. We are faced with a confiscation order which is based on a benefit figure which is far too low. It is perhaps conceivable that this could be remedied by multiplying the single day benefit figure used by the judge by the number of days which the benefit actually accrued over, but that would not solve the dispute as to the available amount. Moreover, as the judge observed, there were disputes about the benefit figure which he did not resolve. The dangers of proceeding by way of a preliminary issue in a confiscation matter have been the subject of earlier decisions of this court, the first of which was available to the judge: *R v. Parveaz* [2017] EWCA 873 at [29]; and *R v. Bajaj* [2020] EWCA Crim 1111 at [23]. *Panayi* seemed to the judge to be the short answer to this case, but even in a

situation like that we consider that it is the job of the Crown Court in significant confiscation proceedings such as these to deal with them in the way we have described. We hope that this point, now made by three different constitutions of this court, will become much more widely appreciated.

63. We have considered whether to make an order in some nominal sum leaving the prosecution to seek a reconsideration of the available amount under s.22 of POCA. This appears to us to be a course which may involve significant difficulties in the Crown Court, not all of which can be easily foreseen. The provisions of ss. 6 and 7 of POCA include some mandatory provisions, which require the court to proceed in a particular way before making a confiscation order. It appears to us that it would be wrong in principle for this court to vary an order so that it comes into existence without any of those procedures having been properly followed in the hope that the Crown Court may be able to make a different order on a reconsideration application.
64. In the absence of any other power to deal justly with this situation, we have carefully considered whether there is a way in which this court can address this problem by doing the work which the Crown Court should have done.
65. There is no doubt that this court has a power to vary the order and a power to receive evidence in order to enable it to do so. Article 7 of the Proceeds of Crime Act 2002 (Appeals under Part 2) Order 2003 (SI 2003/82) provides for evidence to be heard in the Court of Appeal and Article 8 allows for directions to be given by a single judge of the Court of Appeal. The proceedings would then have to be determined by the full court, and would take some time.
66. As the court implied in *Williams*, quoted above, the resources of the Court of Appeal are not best used for this kind of work. The demands on the court are considerable and simply do not allow for lengthy hearings of this kind which should have been sorted out in the lower court.
67. However, this is a highly unusual situation for the following reasons:-
    a. The confiscation proceedings are substantial and, depending on their outcome, there is a large potential gain for the public purse. If that turns out to be the case, it would be unjust for that gain to be retained by Mr. Kamyab. The enforcement notice is over a decade old in this case.
    b. The problem is created by what appears to the court to be a less than perfect statutory appeal route which, it is to be hoped, may receive Parliamentary attention in the foreseeable future, with the advice of the Law Commission to assist in achieving improvements.
    c. The problem should never recur. We have said in the clearest terms that disposing of confiscation proceedings on a preliminary issue of law is, as the powers of this court currently stand, a dangerous course and one which we do not expect to see again. Confiscation proceedings should be conducted so that this court can vary orders if the prosecution appeals successfully against them without having to conduct detailed fact-finding hearings. If Parliament chooses to bestow a power to remit proceedings to the Crown Court so that they can be continued to a conclusion, then this practice may change in appropriate cases.
    d. The reason the judge fell into the error of proceeding as he did was his application of a decision of this court, *Panayi*, which is unlikely to be frequently followed in the future.
    e. The prosecution is not solely culpable for what happened. They should have resisted the procedural suggestion that a preliminary issue should be tried, but they were not the sole authors of the problem.
68. Therefore, on this one occasion only, the court is prepared to make the following order:-

a. The application for leave to appeal is granted. The court holds that the judge's ruling on law was wrong. The appeal is allowed.
b. The court will consider at a further hearing what the remedy should be and whether to vary the confiscation order made by the Harrow Crown Court, and will conduct a confiscation hearing in order to do so.
c. Directions for the conduct of that hearing will be given by Lord Justice Edis acting alone under Article 8 of the Proceeds of Crime Act 2002 (Appeals under Part 2) Order 2003 (SI 2003/82). A remote directions hearing for this purpose is to be fixed on a date before 23 April 2021. The parties are to attempt to agree directions, working towards a hearing date on the earliest available date after 5 July 2021, with an estimated length of hearing of 3 days. In default of agreement, a joint note indicating areas of disagreement is to be lodged by 4pm on the day prior to the directions hearing. The parties are to canvass dates with the Criminal Appeal Office listing officer before the directions hearing.
d. The prosecution will lodge a bundle of documents required for the hearing of the rest of the substantive appeal after discussion with Mr. Kamyab's legal team within 28 days of this judgment being handed down. The bundle is to be created digitally in a searchable pdf format, in which the digital page number matches that on the printed page. Hard copies will be created as directed by the court.