Neutral Citation Number: [2021] EWHC 634 (Admin)

Case No: CO/4596/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2021

Before :

LORD JUSTICE EDIS
and
MR JUSTICE LINDEN

- -

Between :

JOHN KENNETH COLLINS	**Appellant**
- and -	
THE DIRECTOR OF PUBLIC PROSECUTIONS	**Respondent**

- -
- -

Nathaniel Rudolf, Q.C. (instructed by **Blackfords LLP**) for the **Appellant**
Philip Stott and **Anna Keighley** (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 9 March 2021

- -

Approved Judgment

Lord Justice Edis:

1. This is an appeal, by way of case stated, from a decision of District Judge Blake made on 1st August 2019 at Westminster Magistrates' Court, enforcing a confiscation order made under the Proceeds of Crime Act 2002 ("the 2002 Act") by HHJ Kinch QC sitting at Woolwich Crown Court ("the confiscation order"). The District Judge issued a warrant of commitment, and there is no challenge to that. The challenge is to his decision not to endorse the warrant of commitment in a way that made clear that the calculation of the time required to be served in prison by the appellant, Mr John Kenneth Collins, had to take into account any service of any period of imprisonment by any other co-conspirator who was subject to what is described (by the appellant) as the "joint and several" element of the order made by HHJ Kinch QC. The District Judge simply found the appellant to be in default in the sum of £7,502,519.68p and ordered him to serve a period of 2309 days imprisonment.

2. The statutory machinery for enforcing confiscation orders by the imposition of the default term is complex. Its effect is that the issue is dealt with in the Magistrates' Court, which deals with it in the same way as in enforcing fines, subject to amendments made in section 35(3) of the 2002 Act. This involves consideration of provisions in the Magistrates' Courts Act 1980 which were not drafted with confiscation in mind.

3. The confiscation order in the present case was made following the conviction of a number of people, including the appellant, of conspiracy to burgle the Hatton Garden Safe Deposit Company Ltd. The resulting burglary was committed over the Easter weekend in 2015. On 30 January 2018, following contested confiscation proceedings, HHJ Kinch QC found that the "benefit" from that crime was just under £14 million, which was obtained jointly by four relevant defendants who had been convicted at that stage. A significant amount of the stolen property was recovered, which reduced the amount of the confiscation order. Judge Kinch then found that the defendants had all failed to discharge the persuasive burden on them of establishing that the "available amount" was less than the amount of unrecovered stolen property (or the proceeds thereof) contended for by the prosecution, namely £5.75m in round figures. He also held that the defendants had failed to satisfy him that there should be any apportionment in relation to those remaining, hidden, assets. There were some realisable assets, which were reflected in the confiscation orders against those who had possession of them. The Judge therefore held that the available amount against each of those defendants (and the sum to be paid as a confiscation order) was that amount of hidden assets, together with the value of property which had been identified as realisable in the case of each defendant. In the appellant's case this amounted to a further £2m, again in round figures. The Judge additionally directed that "the confiscation orders are not to be enforced to the extent that a sum has been recovered by way of satisfaction of another confiscation order made in relation to the same joint benefit" stating that this was intended to be in line with the guidance from the Supreme Court in *R v Ahmad and Fields* [2015] AC 299. He set the period to be served in default of payment at 7 years in respect of each defendant.

4. This effect of HHJ Kinch QC's orders was that:-

    i) Each order was to be satisfied by the payment of the assessed value of the identified realisable assets of each defendant.

ii) In addition, each defendant was ordered to pay whole of the sum representing "hidden assets", namely £5.75m.

iii) The sum of £5.75m would be reduced in the case of each defendant by the sums, if any, paid by any of them in respect of it.

iv) The total term in default took into account the total sum in the order against each defendant, but at the enforcement stage the court is required to adjust it to reflect payments under (i) and (iii) by section 79(2) of the Magistrates' Courts Act 1980. There is no issue before us about how that will work in practice.

The stated case

5. There is no attack before this court on anything which was done by HHJ Kinch QC in the Crown Court. Proposed attacks on other parts of District Judge Blake's August 2019 ruling have not been pursued. We are solely concerned with one issue, which is an issue of law. The way in which Judge Blake expressed the question for us when he stated the case is as follows:-

> "Was I wrong in law, in declining to endorse the warrant of commitment to prison, in respect of John Kenneth Collins for non-payment of his confiscation order, that any term of imprisonment served by a person in default of payment of a confiscation order made in relation to the same joint benefit should reduce the term of imprisonment to be served by John Kenneth Collins for his default of payment?"

6. The case stated by Judge Blake recorded the current situation so far as the others who were ordered to pay the sum of £5.75m, reflecting jointly obtained property in addition to other sums relating to identified assets held by them individually. It says:-

> "Apart from the Appellant, Mr Perkins is dead, Mr Jones did not challenge the order and is serving the default term and Mr Reader was accepted by the prosecution not to be fit and able to participate in enforcement proceedings. On the 1st October 2020 Mr Seed [a recently convicted fifth defendant] was made subject to a proceeds of crime order by HHJ Kinch QC at the Crown Court sitting at Woolwich and given 3 months to pay in full."

7. This means that Mr. Perkins and Mr. Reader will not be subject to imprisonment following their failure to pay £5.75m or any part of it. Mr. Jones is serving the default term, part at least of which relates to that £5.75m. We were informed at the hearing that Mr. Seed appealed to the Court of Appeal Criminal Division against the confiscation order imposed on him, and that appeal is pending.

The District Judge's ruling

8. In his ruling, the District Judge set out the facts concerning the recovery of payments in respect of the orders. He put it this way:-

> "Subsequent to the conviction and sentence of Mr Collins, Michael Seed has been convicted of conspiracy to burgle and sentenced to 10 years' imprisonment. Items of jewellery were found in his possession to the value of £143,129.74. I understand that some 90% of this property has been identified as items stolen in the burglary or consistent with such items. To date £110,324.50 of the jewellery been realised at auction. A confiscation timetable has been ordered in respect of Mr Seed that will be heard sometime after 15 November 2019. Mr Collins has to date paid £591,059.29. The total paid towards the order is £738,334.35p. Interest accrues at approximately £1,543,93. The amount outstanding is £7,583,560.64p which is some 98% of the order of £7,635,233.31. Payment has been made in respect of part of the identified assets and no payment has been made in respect of the jointly obtained hidden assets."

9. The District Judge correctly followed the line of decisions in this court culminating in *R. (oao Sanghera) v. Birmingham Magistrates' Court* [2017] EWHC 3323 (Admin). This makes it clear that section 82(4) of the Magistrates' Court Act 1980 applies, which means that a warrant of commitment for default should not be issued unless the court:-

   i) Is satisfied that the default is due to the offender's wilful refusal or culpable neglect; and

   ii) Has considered or tried all other methods of enforcing payment of the sum and it appears to the court that they are inappropriate or unsuccessful.

10. The District Judge said this.

> "I am further satisfied that there has been wilful refusal and culpable neglect with regard to the 'hidden assets'. Mr Collins has made no payment towards this sum. He has not assisted in the realisation and recovery of any of this property. I do not accept the submissions made on behalf of Mr Collins with regard to the approach to the enforcement of this sum. The default periods are individual. It is quite wrong to see this as a default period which should be shared across all five defendants due to the joint and several liability approach as per *Ahmad & Fields.*
>
> "In my view the defence seek to muddle the enforcement procedure with the sum that is due as the 'hidden assets.' It is not a case of the state having 'multiple sentences' for the same sum of money. I am satisfied that the period in respect of each defendant was set by HHJ Kinch QC at the Woolwich Crown Court that the enforcement of that order in respect of each defendant is appropriate and proportionate. The term which is to be served is not a term of imprisonment for the offence but the default period for enforcement of the order."

11. It will not be uncommon in hidden assets cases for a finding of wilful refusal or culpable neglect to follow from a failure by the offender to explain, in a way which is believed,

what happened to the property which he, together with others, had stolen. In *R. (oao O'Connell) v, Westminster Magistrates' Court & the Crown Prosecution Service* [2017] EWHC 3120 (Admin) at [20] I, with the agreement of Lindblom LJ, said that the imposition of a confiscation order created a continuing duty to pay the order, and added this:

> "In a hidden assets case, the duty is not just to pay the order, but by implication also to take such steps as are necessary to find and recover the assets, or to assist the authorities to do so: *R. v. (oao Johnson) v. Birmingham City Magistrates' Court* [2012] EWHC 596 (Admin)"

Submissions

12. We have received helpful written submissions from Mr. Rudolf on behalf of the appellant, and Mr. Stott on behalf of the respondent. Mr. Rudolf expanded his submissions before us at the hearing and we did not call on Mr. Stott to develop his written arguments.

13. Mr. Rudolf submitted that the appeal raises a pure point of law which he limited to cases involving multiple defendants who had jointly obtained property by particular criminal conduct to which section 6(4)(c) of the 2002 Act applies. He said that criminal lifestyle cases may raise different questions which he did not need to address for the purposes of this appeal. In short, he submitted that the decision of the District Judge breaches Article 1 Protocol 1 of the European Convention on Human Rights ("A1P1"), leads to a disproportionate result, and is inconsistent with the legitimate aims of the 2002 Act. Mr. Stott, in his written submissions, contends that the correct analysis of the rights engaged in the present issue involves the right to liberty in Article 5 of the Convention rather than A1P1, and in oral argument Mr. Rudolf accepted that the result was likely to be the same whichever provision was engaged. Mr Stott also contends that it is entirely consistent with Article 5 for each defendant to be potentially liable to serve the whole default term imposed as part of the confiscation order, and for any period of imprisonment served or to be served by one defendant not to be set off against the term to be served by another.

14. Mr. Rudolf contends that *Ahmad & Fields* changed the approach to orders of the kind made in the present case, and that this change is the starting point for his submission. Previously, it had been thought right that an order for the whole sum could be made against each defendant who had obtained the property, and each would be liable to pay the whole of that order. In a case where there were, say, five defendants, all of whom had the ability to pay the order, that would result in the state receiving five times the value of the benefit from the particular criminal conduct to which the orders relate. One way of avoiding that was to make an order against each of the five for one fifth of the total. If one of those has the funds to pay the whole order, but the other four have nothing, the state receives only one fifth of the value of the benefit from the particular criminal conduct in question. Neither of these outcomes is satisfactory and the first is "disproportionate" for the purposes of section 6(5)(b) unless a mechanism is found to prevent recovery by the state of more than the value of the benefit from the criminal conduct. That is what happened in *Ahmad & Fields* and Mr. Rudolf submits that this created a form of order which he described as a "joint and several" order. In a nutshell, he submits that by the same logic the prison term in default of payment should be

subject to the same process of sharing between those who are subject to this kind of order as their liability to pay it is under the "joint and several" form of confiscation order he has described. Just as A1P1 required the adjustment of the total liability to give credit for sums paid by any defendant, so it also requires credit to be given to each defendant for time served by any of his accomplices.

15. Mr Rudolf accepts that the court should approach any issue of construction in this context with the words of the Supreme Court in *Ahmad & Fields* at [38] firmly in mind:-

> "When faced with an issue of interpretation of the 2002 Act, the court must, of course, arrive at a conclusion based both on the words of the statute and on legal principles, but it is also very important to bear in mind the overall aim of the statute, the need for practicality, and Convention rights. The overall aim of the statute is to recover assets acquired through criminal activity, both because it is wrong for criminals to retain the proceeds of crime and in order to show that crime does not pay. Practicality involves ensuring that, so far as is consistent with the wording of the statute and other legal principles, the recovery process, both in terms of any hearing and in terms of physically locating and confiscating the assets in question, is as simple, as predictable, and as effective, as possible. Defendants are entitled to their Convention rights, in particular to a fair trial under article 6 and are only to be deprived of assets in accordance with A1P1."

Discussion

16. It is unnecessary to set out a detailed description of the scheme created by the 2002 Act or to give an account of the extensive challenges to it which have been made since it, and its predecessors, were enacted. The legislation is now well established and well understood. Sections 6-9 of the 2002 Act set out the process by which the court establishes the recoverable amount by assessing the benefit obtained by (in the present case) particular criminal conduct and makes an order in that sum unless:-

    i) It would be disproportionate to require the defendant to pay that amount, see section 6(5)(b) which was added by the Serious Crime Act 2015 c. 9 Sch.4 para.19 with effect from June 1, 2015 in order to codify the law as explained in *Waya* [2012] UKSC 51, [2013] 1AC 1028; or

    ii) The defendant has proved that the available amount is less than the benefit from the conduct concerned, see section 7.

17. As the Supreme Court noted in *Ahmad & Fields* at [39] there has been a significant volume of high level judicial decisions on these provisions, which have now been applied by the lower courts over many years. I do not propose to review that process, because the point raised in this appeal is novel and short.

18. Mr. Rudolf's submissions rely on the following chain of reasoning, in my summary:-

i) The liability of joint offenders for a "hidden assets" order is joint and several. Each is liable for the whole order, but entitled to credit for sums actually paid by other debtors liable in the same sum.

ii) Therefore, the liability of joint offenders to serve the default term should be treated in the same way. In the event of non-payment by A, he is liable to serve the whole term. But if part of that term has been, or is to be, served by another offender, then the term should be reduced to that extent in the case of A.

19. The "therefore" at the start of 18(ii) above asserts a logical connection which is not there. The District Judge was right, in my judgment, to identify a confusion of different concepts and stages in the proceedings as vitiating the argument. The argument in fact starts from the other end of the chain of reasoning. It is clear that the satisfaction of a confiscation order which is made against more than one defendant in respect of the same jointly obtained benefit will relieve others of their liability to pay it, to the extent that it has been so satisfied. This is a consequence of the application of A1P1 of the Convention to the construction of the 2002 Act. It is not proportionate to deprive a person of their assets in order to pay the proceeds of crime to the state if those proceeds have already been paid to the state by someone else. To put it in another way, the state should not be permitted double recovery. It is said that this affects other steps in the process in the same way, to convert what appears to be an individual's liability under an order into a joint liability. The argument then takes another large step, by contending that if the liability to pay money is joint, so also should be the liability to serve a prison sentence in default if the money is not paid.

20. A "hidden assets" order is a term used by those working in this field as a jargon abbreviation to describe the situation which arises when a defendant in confiscation proceedings fails to prove that the realisable amount is less than the benefit. As to "benefit" section 76 of the 2002 Act provides:-

> "(4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.
>
> ..
>
> (6) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and some other.
>
> (7) If a person benefits from conduct his benefit is the value of the property obtained."

21. If a defendant fails to prove that the realisable amount is less than the benefit, there will often be a shortfall between those two sums which is unexplained by any evidence. This is what is called "hidden assets". Of course, in some cases there will actually be no assets, or such assets as there may be will be worth less than the value of the shortfall. In cases of joint obtaining, such assets as there are may not be available to all those who jointly obtained them. The nature of the statutory scheme is that the prosecution does not have to prove, and the court does not have to find, that there are assets anywhere, or that each person against whom the order is made has the power to realise them. The

origin of the order is the failure of a defendant to prove that there are no assets, or that they are worth less than the shortfall. Where the "property" which was "obtained as a result of or in connection with the [criminal] conduct" was jointly obtained, then the order may be made in that sum against all those who obtained it.

22. As a result of A1P1, the 2002 Act has been construed so as to reduce the liability of all those subject to such an order to the extent that it is satisfied by any of them. It appears that this has resulted in another jargon phrase entering the language used by those working in this area, namely a "joint and several" order. This is not a helpful phrase in this context, because joint and several liability is a precise legal term which describes the legal rights as between themselves, and the obligations to third parties, of joint tortfeasors and those who have assumed joint obligations as a matter of contract. Professor Andrew Burrows, writing in his then capacity, and not in his present judicial capacity, in the 23rd Edition of Chitty on Contracts explains the matter in this way at Volume 1, Chapter 17, paragraphs 001-004:-

> "Several liability arises when two or more persons make separate promises to another, whether by the same instrument or by different instruments. Thus if A and B covenant with C that they will each pay him £100, each is liable to pay £100; their promises are cumulative and payment by one does not discharge the other.
>
> Joint liability arises when two or more persons jointly promise to do the same thing. There is only one obligation, and consequently, performance by one discharges the others. Joint liability is subject to a number of strict and technical rules of law which are discussed in the paragraphs that follow.
>
> Joint and several liability arises when two or more persons in the same instrument jointly promise to do the same thing and also severally make separate promises to do the same thing. Joint and several liability gives rise to one joint obligation and to as many several obligations as there are joint and several promisors. It is like joint liability in that the co-promisors are not cumulatively liable, so that performance by one discharges all; but it is free from most of the technical rules governing joint liability.
>
> It should be emphasised that the above definitions—and the treatment in this chapter—focus on the standard *contractual* situations where the issues of several, joint, or joint and several liability arise. Particularly in mind is where the contractual liability is to pay an agreed sum (that is, a debt). Cutting across those definitions is joint and several liability in its traditional "tort" sense of wrongdoers acting independently to cause the same damage to the same claimant: and a wrongdoer for these purposes can include a contract-breaker as well as a tortfeasor. So if the same loss is caused to C by D1's breach of contract and D2's tort, D1 and D2 are jointly and severally liable to C. This will mean that D1 and D2 are each liable for the whole of C's loss albeit that, if one defendant pays a disproportionate sum to

> the other, contribution can be recovered from the other defendant under the Civil Liability (Contribution) Act 1978.

23. Professor Burrows goes on to consider the consequences as between the joint debtors of the discharge of the debt by one of them. A common feature of joint or joint and several liability in the modern law is a statutory or equitable route to contribution. Nothing like that exists in confiscation orders. If one defendant is prevailed upon to discharge the whole order, there could be no right of contribution against his former accomplices although they would be relieved of their own obligations to pay the order.

24. The only use of the term "joint and several liability" in authoritative decisions in the proceeds of crime sphere which counsel could point to appears in Lord Bingham's discussion of *R v. Porter* [1990] 1 WLR 1260 in his speech in *R v. May* [2008] AC 1028 at paragraph 27. The Court of Appeal in *Ahmad & Fields* set the passage out at paragraph 39:-

> "In *R v Porter* [1990] 1 WLR 1260 the defendant and a co-defendant pleaded guilty to drug offences. At a hearing to determine to what extent they had benefited from their drug trafficking the trial judge found as a fact that the two had jointly benefited in accordance with section 1(2) of the 1986 Act, that the extent of that benefit was £9,600 and that they should jointly and severally be ordered to pay that sum. The issue before the Court of Appeal, at p 1262, was whether the confiscation order could properly be joint and several, or whether it should be several, with each of them being required to pay £4,800. It was held, at p 1263, that the Act did not contemplate joint penalties, that the court must, as between co-defendants, determine their respective shares of any joint benefit that they might have received as a result of their drug trafficking, and that in the absence of any evidence the court was entitled to assume that they were sharing equally. So, the orders were quashed and several orders for £4,800 substituted in each case. This might, as later authorities show, have been a proper disposal had there in fact been no evidence of the parties' shares in the proceeds. But the judge's finding, not challenged on appeal, was that the proceeds had been received jointly. That being so each had received a payment or other reward in the full sum of £9,600 and orders in that sum should have been made against each of them severally." (emphasis added)

25. As the Supreme Court pointed out in *Ahmad & Fields* at [45], Lord Bingham's use of the phrase "joint ownership" elsewhere in his speech was not without difficulty as a description of the legal consequences of the obtaining of property by means of the commission of joint criminality. They concluded:-

> "The word "obtain" should be given a broad, normal meaning, and the non-statutory word "joint", referred to by Lord Bingham in *R v May* [2008] AC 1028, paras 17, 27-34, should be understood in the same non-technical way."

26. It is perhaps important that Lord Bingham uses the phrase "joint and several" only when describing the issues as they appeared to the Court of Appeal in a case which he held had been wrongly decided. At the end of the passage, he describes the orders which should have been made as "several" and not "joint and several". The criminals had obtained the property jointly, but this did not mean that their liability under the confiscation orders was a joint liability. The correct position is that confiscation orders do not involve joint liability of any kind. Each order is made against a particular person, who is liable to pay all of it. The making of an order in the full sum against all joint obtainers of criminal property, with a reduction for all to the extent that it is satisfied by any of them, does not depend on any joint legal rights or obligations. It depends on the construction of the 2002 Act, on the findings of fact made by the court when the order is made, on the qualified A1P1 right of each individual defendant to enjoy *his own* property and on the need to ensure that the order made is proportionate to the statutory aim of the 2002 Act.

27. I venture to suggest that the use of the Convention in this context provides an easy legal route to what the court would otherwise have had to achieve in another way. The statutory purpose of the 2002 Act is not assisted by the state recovering the same sum many times over so that it recovers more than the benefit obtained by the criminals.

28. The origin of the kind of order presently under consideration is *Ahmad & Fields*. It is notable that the Supreme Court did not itself use the phrase "joint and several" to describe the effect of what it determined was the correct course. Indeed in identifying three unavoidable problems in any system for recovering the proceeds of crime from criminals, the court said this at [36]:-

> "Thirdly, there will be obvious difficulties in applying established legal principles to the allocation of liability under the 2002 Act, as the rules relating to matters such as acquisition, joint and several ownership, and valuation of property and interests in property, and the rights and liabilities of owners, both as against the world and inter se, have been developed by the courts over centuries by reference to assets which were lawfully acquired and owned."

29. As there pointed out, the confiscation order is made in two stages, once it has been decided that an order should be made. The first stage is assessing the benefit as defined by section 76, set out above. This is not done by reference to any concept of ownership, because in many cases the criminal will acquire no title to the property obtained as a result of or in connection with criminal conduct. It often continues to be owned by the victim, at least at the point when it is obtained by the criminal. The property is <u>obtained</u> jointly by criminals acting together. *Ahmad & Fields* at [44] says this:-

> *"* In so far as technical English property law concepts are concerned, it may be more accurate to refer to several conspirators acquiring possession in common of any asset or money, rather than jointly owning the asset or money. However, rather than invoking English property law concepts, it is more appropriate to treat such conspirators as obtaining the asset or money together, which has the same meaning as "jointly", provided that the latter word is understood in its ordinary

> English, and not its technical, legal sense. "Obtain" is the statutory word, and "joint" reflects the criminal enterprise. While some aspects of English property law in connection with ownership may be esoteric, there is nothing remote from daily life about two burglars jointly (i.e. together) obtaining a television. The burglars do not become the owners of the television, and the argument about them being "joint owners" or "owners in common" proceeds on a wrong premise. Each burglar has usurped the rights of the owner."

30. The second stage in assessing the amount of a confiscation order is the assessment of the realisable amount. I have explained above how this works in "hidden assets" cases. Once again, the phrase "joint and several" adds nothing useful to the analysis and may serve to confuse. Each defendant in the confiscation proceedings had the opportunity to prove, on the balance of probability, that the realisable amount in his case was less than the benefit figure. A prison sentence in default of payment is then fixed by reference to the amount of the order, but this is not a purely mathematical exercise: see the helpful analysis in *R. v. Castillo* [2011] EWCA Crim 3173; [2012] Cr. App. R. (S.) 36. The purpose of the prison sentence is, principally, the enforcement of the order and the term is proportionate to that aim having regard to the sum which is ordered to be paid.

31. A prison sentence imposed to enforce payment of an order is not the same thing, or the same type of thing, as payment of the order. It is by definition an order which is exclusively personal to the person against whom it is made. It requires his detention. The difference between serving a sentence on the one hand and paying the order on the other is made express by section 38(5) of the 2002 Act, which provides:-

> "If the defendant serves a term of imprisonment or detention in default of paying any amount due under a confiscation order, his serving that term does not prevent the confiscation order from continuing to have effect so far as any other method of enforcement is concerned."

32. Does proportionality require the prison sentence to be, effectively, shared? The concept of proportionality is built into the Act at the stage when an order is made by section 6(5)(b). The meaning of that concept is authoritatively explained by the Court of Appeal Criminal Division in *R. v. Andrewes* [2020] EWCA Crim 1055. At the point when the Magistrates' Court is considering whether to impose the default term, the context is that the court which made the confiscation order has already made a determination as to proportionality. The Magistrates' Court then gives credit for sums paid (not necessarily an easy process in cases of the present kind) under section 79(2) of the Magistrates' Court Act 1980, and makes the necessary determinations as to wilful neglect or culpable neglect, and the sufficiency of other means of enforcement required by section 82(4) of the same Act, see paragraph 9 above. The result is that the decision of the Magistrates' Court is also proportionate. Unsurprisingly, therefore, there is no statutory provision which enables the court to do as Mr. Rudolf submits it must.

33. As to whether the statutory provisions should be read on the basis that A1P1 or Article 5 of the Convention require the set off mechanism contended for by Mr Rudolf, on the grounds that proportionality requires it as a matter of law, in my judgment they should

not be read in this way. Neither Article 5 nor A1P1 requires it. On the contrary, the acceptance of Mr. Rudolf's submissions would lead to absurdity and tend to defeat the statutory purpose of the 2002 Act as explained above. Since proportionality is defined in *Andrewes* as being "proportionate to the statutory purpose of the scheme of the 2002 Act" it cannot be relied upon to support an approach which would defeat that purpose. The absurdity is that a criminal who acts with others to obtain criminal property jointly would be in a much better position than one who obtains the same property in the same way but on his own. Equally, the criminal who is the only person convicted following a joint offence, because his accomplices have died or fled, will be worse off than the person who is convicted along with others. If nobody pays anything, and all are subject to the imposition of the default term, the result will be that nobody serves the appropriate term, and the efficacy of imprisonment as a means of enforcement will be reduced in proportion to the size of the criminal gang. It is possible to identify many other such anomalies, but unnecessary. There is, in truth, nothing to be said in favour of the approach which Mr. Rudolf says is mandatory.

Conclusion

34. The simple point is that the court making the order fixed the default term as being the term necessary to persuade each defendant to pay the order, or to secure its payment, by all possible means. That term works because if it is imposed each defendant will himself have to serve it and cannot benefit from other people who have also failed to secure payment of their orders having served the sentences imposed on them. A confiscation order is an order against a person for the payment of money. The default term which must be imposed when such an order is made is calculated to exert sufficient pressure on that person to ensure that the order is paid. Reducing it to reflect someone else's detention would undermine the statutory purpose. For these reasons I would dismiss the appeal and answer the question posed for us by District Judge Blake in the negative: he was not wrong to do as he did.

Mr. Justice Linden:-

35. I agree.