CRIMINAL LAW SEMINAR

DEVON CHAMBERS
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15 May 2014

Update on POCA – *AGAIN!* – **Jo Martin**

Cash Seizure and Forfeiture – **Julia Cox**

Cheating the Revenue – **Sarah Vince**

Sentencing Guidelines for Corporate Fraud - **Sally Daulton**

CPD reference: DHF/DECH

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This handout has been produced as a reference for use in conjunction with the talks given at the seminar. Please note that matters of Law are constantly being updated and the information given within this document should only be used as a guide.

CRIMINAL LAW SEMINAR

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15 May 2014

5.00 pm – 5.30 pm	Refreshments & Registration
5.30 pm – 6.00 pm	Update on PoCA – Again! **Jo Martin**
6.00 pm - 6.30 pm	Cash Forfeiture and Seizure **Julia Cox**
6.30 pm – 7.00 pm	Cheating The Revenue **Sarah Vince**
7.00 pm – 7.30 pm	Sentencing Guidelines on Corporate Fraud **Sally Daulton**

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UPDATE ON PoCA – AGAIN!

Jo Martin

Joanna Martin

Email address: jmartin@devonchambers.co.uk
Core Practice Area: Crime
Call: 2005 (Solicitor: 1996)
Inn: Middle Temple
Education: BA Hons English Literature; LLB - Law
Appointments: Category 4 Prosecutor; Specialist Regulatory Advocates Panel List B.
Memberships: Criminal Bar Association

Jo qualified as a solicitor in 1996 and worked for the Crown Prosecution Service and the Serious Fraud Office in London before moving to Devon in 2003. After a further period with the CPS in Plymouth as a Higher Court Advocate, Jo transfered to the Bar in 2005.

Since transfering to the Bar, Jo has prosecuted and defended in all areas of Criminal Law including cases involving death by dangerous driving, rape and murder. Jo specialises in fraud and confiscation work and in cases involving non-accidental injury in babies. Jo prosecutes regularly on behalf of the DWP and has been instructed by HSE, DTI and local councils in relation to regulatory crime.

Notable or reported cases

Notable Cases

R-v-M - defence of high value theft by manager/employee

R-v-C - prosecution of cigarette importation

R-v-H - prosecution of identity fraud and resulting confiscation proceedings

R-v-G - defence in conspiracy to supply to cocaine

R-v-JK - defence leading junior in high profile historic paedophile trial

R-v-SP – defence leading junior in 10 week fraud trial. Largest HMRC case in Cornwall

R-v-SB and others – leading junior prosecuting for the Environment Agency against 10 defendants for waste and other regulatory offences

Reported Cases

R-v-Burridge 2011 CLR 251 (prosecution junior in “baby shaking” case)

A-G’s Reference No 125 of 2010 (R-v-Draper) 2011 Archbold Review 4 CA(defence junior in “baby shaking” case)

R-v-Worth (Trevor) [2014] EWCA Crim 435 – appeal v sentence allowed (sentence for money laundering to be based on indictment amount only)

R-v-Harvey (Jack Frederick) [2013] EWCA Crim 1104; [2014] 1 W.L.R. 124 (complex appeal relating to confiscation). Leave granted for permission to appeal to the Supreme Court in relation to whether VAT should be included in the turnover figure of a company when assessing the benefit figure.

Other Interests

Walking, swimming in rivers and gardening.

Update on PoCA - *AGAIN!*

1. INTRODUCTION

Why PoCA yet again?

Resume of where we were and where we are going...

2. WAYA [2012] UKSC 51

What was it about?

A1 P1 - which means?

3. SPECIFIC ISSUES ARISING FROM WAYA -

a. Re Mortgage frauds/ obtaining by deception

R. v Mahmood (Ziarat) [2013] EWCA Crim 1291

but

R v Helen Chapman [2013] [2013] EWCA Crim 1370

b. Re Restoration of property

R. v Axworthy (Liam) [2012] EWCA Crim 2889 - first case post Waya

R. v Hursthouse (Susan Ann) [2013] EWCA Crim 517;

but

R. v Louca (Anastasis) [2013] EWCA Crim 2090

R. v Harvey (Jack Frederick) [2013] EWCA Crim 1104;

4. GENERAL ISSUE ARISING OUT OF WAYA

Proportionality

Not a return to judge's discretion or a way for a judge to avoid legislation

R. v Beazley (Rosemary)R. v Beazley (Scott) [2013] EWCA Crim 567;

Nor will Court of Appeal allow proportionality to be used as an easy way out

R. v Elsayed (Shearif Stephen) [2014] EWCA Crim 333

and

R. v King (Scott) [2014] EWCA Crim 621

and

R. v Morgan (Christopher Lynn) [2013] EWCA Crim 1307

but

R. v Jawad (Mohid) [2013] EWCA Crim 644;

and

R. v Sale (Peter John) [2013] EWCA Crim 1306;

5.OTHER CASES POST WAYA

a. Revisiting of confiscation orders - Waya not apply -

R. v Padda (Gurpreet Singh) [2013] EWCA Crim 2330;

but

b. Proportionality applies to cash seizure too …..

Ahmed v Revenue and Customs [2013] EWHC 2241 (Admin)

6. WHAT HAPPENS NEXT?

Cases presently before the Supreme Court

R (Appellant) v Ahmad and another (Respondents) UKSC 2012/0082

Fields and others (Appellants) v Crown Prosecution Service (Respondent) UKSC 2013/0271

R-v-Jack Harvey (Appellant) UKSC 2013/??

7. WHAT TO DO WITH THIS INFORMATION

What does it all mean to us in the Crown Court?

CASH SEIZURE AND FORFEITURE

Julia Cox

Julia Cox

Email address: jcox@devonchambers.co.uk
Core Practice Area: Crime
Call: 2006
Education: LLB (HONS) - University of the West of England (2:1), Bar Vocational Course – University of the West of England (Very Competent)
Memberships: Criminal Bar Association, Western Circuit

Julia joined Chambers on the completion of her pupillage.

Since joining Chambers Julia has focused on building a criminal practice both prosecuting and defending

Julia is regularly instructed by a variety of prosecuting authorities including the CPS, the Department for Work and Pensions and local authorities. Julia attained Level 3 in the recent CPS grading.

Julia has gained experience across a wide variety of cases including supplying drugs, sexual offences, violent offences and offences of dishonesty. She also undertakes work involving confiscation proceedings under the Proceeds of Crime Act 2002.

Julia also receives instructions in Prison Law cases representing prisoners at adjudication and parole hearings.

In addition to her criminal practice, Julia is also a member of Chambers' Family team and accepts instructions in relation to ancillary relief, contact and care proceedings.

Before joining chambers, Julia worked for a regional firm of solicitors in their clinical negligence team. As a result Julia maintains an interest in all cases with a clinical background.

Julia was recently appointed the Devon and Cornwall Representative on the Western Circuit Committee.

Notable or Reported Cases

R v G – Plymouth Crown Court – February 2010: Representing the Defendant at sentence for Possession with Intent to Supply Heroin. The Defendant was stopped entering Dartmoor Prison in possession of heroin which was to be supplied to a prisoner. Following a guilty plea at the first opportunity the Defendant received a Suspended Sentence Order.

R v Parry – Plymouth Crown Court – May 2010: Prosecution for Possession with Intent to Supply Cocaine. Mr Parry was convicted following trial.

R v RJ - Plymouth Crown Court - March 2012: Defending RJ, a young offender. RJ pleaded guilty to one charge of causing grievous bodily harm with intent, two charges of causing grievous bodily harm and one charge of attempted burglary. All of the offences taking place over a period of 9 months on separate occasions. RJ was sentenced in the Crown Court as a dangerous offender and received a sentence of detention for public protection with a minimum term of 5years imprisonment. The sentence was appealed. The Court of Appeal reduced the minimum term to 3years imprisonment.

R v K & P - Plymouth Crown Court - December 2012: Junior Counsel in a historic sex case. The defendant was convicted of sexually assaulting young girls throughout the 1970s and up to 2009. A previous trial in 2005 led to a conviction of another man in relation to the offences from 1970. The case involved careful scrutiny of the previous trial papers and complex legal issues on joinder severance and bad character.

Other Interests

Julia enjoys a variety of sports including running and swimming.

Cash Seizure and Forfeiture Orders

Introduction

The Proceeds of Crime Act 2002 (Part 5) makes provision for cash which represents property obtained through unlawful conduct, or which is intended to be used in such conduct to be seized, detained and forfeited. These provisions replace and extend the scheme that was previously found within the Drug Trafficking Act 1994.

The proceedings are civil proceedings, but are similar to proceedings for Anti-Social Behaviour Orders and Sexual Offences Prevention Orders, in that they are heard in the Magistrates Court. The individuals, who have cash seized and detained from them under the Proceeds of Crime Act 2002, may be eligible for Legal Aid subject to the standard criteria, which the Legal Aid Agency applies.

The Scheme

The scheme under the Proceeds of Crime Act 2002 is set out in sections 289 to 303.

The main provision for the seizure of cash is found in s.294 of the Proceeds of Crime Act 2002:

s.294 – Seizure of Cash

(1) An officer of Revenue and Customs, a constable or an accredited financial investigator may seize any cash if he has reasonable grounds for suspecting that it is—

(a) recoverable property, or

(b) intended by any person for use in unlawful conduct.

(2) An officer of Revenue and Customs, a constable or an accredited financial investigator may also seize cash part of which he has reasonable grounds for suspecting to be—

(a) recoverable property, or

(b) intended by any person for use in unlawful conduct,

if it is not reasonably practicable to seize only that part.

(2A) The powers conferred by this section are exercisable by an officer of Revenue and Customs only so far as the officer is exercising a function relating to a matter other than an excluded matter.

(2B) But the powers may be exercised by the officer in reliance on a suspicion that relates to an excluded matter.

(2C) The reference in subsection (2A) to an excluded matter is to a matter specified in section 54(4)(b) of, or in any of paragraphs 3, 5, 7, 10, 12 and 14 to 30 of Schedule 1 to, the Commissioners for Revenue and Customs Act 2005.

(3) This section does not authorise the seizure of an amount of cash if it or, as the case may be, the part to which his suspicion relates, is less than the minimum amount.

(4) This section does not authorise the seizure by an accredited financial investigator of cash found in Scotland.

"Recoverable Property" is defined under section 304 as "property obtained through unlawful conduct". It also extends to property, which has been disposed of IF it is "held by a person into whose hands it may be followed."

The definition of "unlawful conduct" is also defined within the Act.

s.241 – Unlawful Conduct

(1) Conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part.

(2) Conduct which—

(a) occurs in a country or territory outside the United Kingdom and is unlawful under the criminal law applying in that country or territory, and

(b) if it occurred in a part of the United Kingdom, would be unlawful under the criminal law of that part,

is also unlawful conduct.

(3) The court or sheriff must decide on a balance of probabilities whether it is proved—

(a) that any matters alleged to constitute unlawful conduct have occurred, or

(b) that any person intended to use any cash in unlawful conduct.

The Act does not limit a Police officer or Revenue and Customs to simply seizing cash that he comes across during the normal course of a search under separate legislation. The Act provides that such an officer can actively search premises where there are "reasonable grounds for suspecting there is such cash on the premises/person" under section 289.

s.289 – Searches

(1) If an officer of Revenue and Customs, a constable or an accredited financial investigator is lawfully on any premises and has reasonable grounds for suspecting that there is on the premises cash—

(a) which is recoverable property or is intended by any person for use in unlawful conduct, and

(b) the amount of which is not less than the minimum amount,

he may search for the cash there.

(2) If an officer of Revenue and Customs, a constable or an accredited financial investigator has reasonable grounds for suspecting that a person (the suspect) is carrying cash—

(a) which is recoverable property or is intended by any person for use in unlawful conduct, and

(b) the amount of which is not less than the minimum amount,

he may exercise the following powers.

(3) The officer, constable or accredited financial investigator may, so far as he thinks it necessary or expedient, require the suspect—

(a) to permit a search of any article he has with him,

(b) to permit a search of his person.

(4) An officer, constable or accredited financial investigator exercising powers by virtue of subsection (3)(b) may detain the suspect for so long as is necessary for their exercise.

(5) The powers conferred by this section—

(a) are exercisable only so far as reasonably required for the purpose of finding cash,

(b) are exercisable by a customs officer only if he has reasonable grounds for suspecting that the unlawful conduct in question relates to an assigned matter (within the meaning of the Customs and Excise Management Act 1979 (c. 2))

(ba) are exercisable by an officer of Revenue and Customs only so far as the officer is exercising a function relating to a matter other than an excluded matter,

(c) are exercisable by an accredited financial investigator only in relation to premises or (as the case may be) suspects in England, Wales or Northern Ireland.

(5A) The reference in subsection (5)(ba) to an excluded matter is to a matter specified in section 54(4)(b) of, or in any of paragraphs 3, 5, 7, 10, 12 and 14 to 30 of Schedule 1 to, the Commissioners for Revenue and Customs Act 2005.

(6) Cash means—

(a) notes and coins in any currency,

(b) postal orders,

(c) cheques of any kind, including travellers' cheques,

(d) bankers' drafts,

(e) bearer bonds and bearer shares,

found at any place in the United Kingdom.

(7) Cash also includes any kind of monetary instrument which is found at any place in the United Kingdom, if the instrument is specified by the Secretary of State by an order made after consultation with the Scottish Ministers or, in relation to Northern Ireland, is specified by the Department of Justice by an order.

(8) This section does not require a person to submit to an intimate search or strip search (within the meaning of section 164 of the Customs and Excise Management Act 1979 (c. 2)).

The search provisions under s.289 are extensive and could potentially be far-reaching. However, they cannot be exercised unless prior approval has been obtained.

s.290 – Prior approval

(1) The powers conferred by section 289 may be exercised only with the appropriate approval unless, in the circumstances, it is not practicable to obtain that approval before exercising the power.

(2) The appropriate approval means the approval of a judicial officer or (if that is not practicable in any case) the approval of a senior officer.

(3) A judicial officer means—

(a) in relation to England and Wales and Northern Ireland, a justice of the peace,

(b) in relation to Scotland, the sheriff.

(4) A senior officer means—

(a) in relation to the exercise of the power by an officer of Revenue and Customs, such an officer of a rank designated by the Commissioners of Customs and Excise as equivalent to that of a senior police officer,

(b) in relation to the exercise of the power by a constable, a senior police officer

(c) in relation to the exercise of the power by an accredited financial investigator, an accredited financial investigator who falls within a description specified in an order made for this purpose by the Secretary of State under section 453.

(5) A senior police officer means a police officer of at least the rank of inspector.

(6) If the powers are exercised without the approval of a judicial officer in a case where—

(a) no cash is seized by virtue of section 294, or

(b) any cash so seized is not detained for more than 48 hours (calculated in accordance with section 295(1B))

the officer of Revenue and Customs, constable or accredited financial investigator who exercised the powers must give a written report to the appointed person.

(7) The report must give particulars of the circumstances which led him to believe that—

(a) the powers were exercisable, and

(b) it was not practicable to obtain the approval of a judicial officer.

(8) In this section and section 291, the appointed person means—

(a) in relation to England and Wales, a person appointed by the Secretary of State,

(b) in relation to Scotland, a person appointed by the Scottish Ministers

(c) in relation to Northern Ireland, a person appointed by the Department of Justice.

(9) The appointed person must not be a person employed under or for the purposes of a government department or of the Scottish Administration; and the terms and conditions of his appointment, including any remuneration or expenses to be paid to him, are to be determined by the person appointing him.

The provisions for prior approval essentially limit the active search provisions under s.289 to circumstances where a warrant has been granted by a Magistrate or a senior officer as defined under the Act. It also includes a clause which could be considered a "penalty clause" by indicating that where the search provisions are exercised and the cash is not detained for more than 48 hours or cash is not seized then they are required to provide a detailed report of the circumstances for consideration.

In order for the seizure and search provisions to be activated, it is necessary for the amount of cash to be considered. The amount of money in question must be more than the minimum amount.

The minimum amount has decreased substantially since the provisions were initially introduced. It was originally the case that these provisions could not be used unless the cash in question was over £10,000.

The current minimum amount applicable is **£1,000**. This is set by Statutory Instrument and was last amended by the Recovery of Cash in Summary Proceedings: Minimum Amount) Order SI 2006/1699.

The minimum amount applies to cash. Although cash is not just limited to currency, but is widely defined in s.289(6) of the Act.

The seizure of the cash can be challenged as s.308 sets out specific exceptions to what constitutes recoverable property. These include cash obtained in good faith, for value and without notice; cash received in satisfaction of a count court judgment; cash received in satisfaction of a compensation order

s.308 - General exceptions

(1) If—

(a) a person disposes of recoverable property, and

(b) the person who obtains it on the disposal does so in good faith, for value and without notice that it was recoverable property,

the property may not be followed into that person's hands and, accordingly, it ceases to be recoverable.

(2) If recoverable property is vested, forfeited or otherwise disposed of in pursuance of powers conferred by virtue of this Part, it ceases to be recoverable.

(3) If—

(a) in pursuance of a judgment in civil proceedings (whether in the United Kingdom or elsewhere), the defendant makes a payment to the claimant or the claimant otherwise obtains property from the defendant,

(b) the claimant's claim is based on the defendant's unlawful conduct, and

(c) apart from this subsection, the sum received, or the property obtained, by the claimant would be recoverable property,

the property ceases to be recoverable.

(4) If—

(a) a payment is made to a person in pursuance of a compensation order … and

(b) apart from this subsection, the sum received would be recoverable property,

the property ceases to be recoverable.

(5) If—

(a) a payment is made to a person in pursuance of a restitution order … or a person otherwise obtains any property in pursuance of such an order, and

(b) apart from this subsection, the sum received, or the property obtained, would be recoverable property,

the property ceases to be recoverable.

(6) If—

(a) in pursuance of an order made by the court under section 382(3) or 383(5) of the Financial Services and Markets Act 2000 (c. 8) (restitution orders), an amount is paid to or distributed among any persons in accordance with the court's directions, and

(b) apart from this subsection, the sum received by them would be recoverable property,

the property ceases to be recoverable.

(7) If—

(a) in pursuance of a requirement of the Financial Conduct Authority, the Prudential Regulation Authority or the Bank of England under or by virtue of section 384(5) of the Financial Services and Markets Act 2000 (power to require restitution), an amount is paid to or distributed among any persons, and

(b) apart from this subsection, the sum received by them would be recoverable property,

the property ceases to be recoverable.

(7A) If—

(a) a payment is made to a person in pursuance of an unlawful profit order under section 4 of the Prevention of Social Housing Fraud Act 2013, and

(b) apart from this subsection, the sum received would be recoverable property,

the property ceases to be recoverable.

(8) Property is not recoverable while a restraint order applies to it, that is—

(a) an order under section 41, 120 or 190, or

(b) an order under any corresponding provision of an enactment mentioned in section 8(7)(a) to (g).

(9) Property is not recoverable if it has been taken into account in deciding the amount of a person's benefit from criminal conduct for the purpose of making a confiscation order, that is—

(a) an order under section 6, 92 or 156, or

(b) an order under a corresponding provision of an enactment mentioned in section 8(7)(a) to (g),

and, in relation to an order mentioned in paragraph (b), the reference to the amount of a person's benefit from criminal conduct is to be read as a reference to the corresponding amount under the enactment in question.

(10) Where—

(a) a person enters into a transaction to which section 305(2) applies, and

(b) the disposal is one to which subsection (1) or (2) applies,

this section does not affect the recoverability (by virtue of section 305(2)) of any property obtained on the transaction in place of the property disposed of.

The Procedure

When the cash has been seized, the prosecuting authority has the right to detain the cash for an initial period of 48 hours, providing there are still reasonable grounds for the suspicion that the cash is "recoverable property" under s.295 of the Act.

s.295 - Detention of seized cash

(1) While the officer of Revenue and Customs, constable or accredited financial investigator continues to have reasonable grounds for his suspicion, cash seized under section 294 may be detained initially for a period of 48 hours.

(1A) The period of 48 hours mentioned in subsection (1) is to be calculated in accordance with subsection (1B).

(1B) In calculating a period of 48 hours in accordance with this subsection, no account shall be taken of—

(a) any Saturday or Sunday,

(b) Christmas Day,

(c) Good Friday,

(d) any day that is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom within which the cash is seized, or

(e) any day prescribed under section 8(2) of the Criminal Procedure (Scotland) Act 1995 as a court holiday in a sheriff court in the sheriff court district within which the cash is seized.

(2) The period for which the cash or any part of it may be detained may be extended by an order made by a magistrates' court or (in Scotland) the sheriff; but the order may not authorise the detention of any of the cash—

(a) beyond the end of the period of six months beginning with the date of the order,

(b) in the case of any further order under this section, beyond the end of the period of two years beginning with the date of the first order.

(3) A justice of the peace may also exercise the power of a magistrates' court to make the first order under subsection (2) extending the period.

(4) An application for an order under subsection (2)—

(a) in relation to England and Wales and Northern Ireland, may be made by the Commissioners of Customs and Excise [, a constable or an accredited financial investigator] 5 ,

(b) in relation to Scotland, may be made by the Scottish Ministers in connection with their functions under section 298 or by a procurator fiscal,

and the court, sheriff or justice may make the order if satisfied, in relation to any cash to be further detained, that either of the following conditions is met.

(5) The first condition is that there are reasonable grounds for suspecting that the cash is recoverable property and that either—

(a) its continued detention is justified while its derivation is further investigated or consideration is given to bringing (in the United Kingdom or elsewhere) proceedings against any person for an offence with which the cash is connected, or

(b) proceedings against any person for an offence with which the cash is connected have

been started and have not been concluded.

(6) The second condition is that there are reasonable grounds for suspecting that the cash is intended to be used in unlawful conduct and that either—

(a) its continued detention is justified while its intended use is further investigated or consideration is given to bringing (in the United Kingdom or elsewhere) proceedings against any person for an offence with which the cash is connected, or

(b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.

(7) An application for an order under subsection (2) may also be made in respect of any cash seized under section 294(2), and the court, sheriff or justice may make the order if satisfied that—

(a) the condition in subsection (5) or (6) is met in respect of part of the cash, and

(b) it is not reasonably practicable to detain only that part.

(8) An order under subsection (2) must provide for notice to be given to persons affected by it.

The Act, luckily, provides for a definition of 48 hours so as to ensure that the prosecuting authorities do not fall foul of the time limit due to weekends and bank holidays, for example.

After the initial period of 48 hours, an extension can be applied for by the prosecuting agency. At this point, the Magistrates may extend the period by up to six months (initially this was limited to three months, but has recently been extended).

It is possible for the prosecuting agency to make repeated applications to extend the time for detention of the cash, providing that it does not exceed a total period of two years from the date of the original seizure of the cash. This brings Part 5 in line with the Confiscation provisions of the Act.

In order to extend the period of detention the Magistrates must apply the test in s.295(4) and be satisfied, on the balance of probabilities that one of the two conditions set out in s.295 apply.

The first condition is that there are reasonable grounds for suspecting that the cash is recoverable property, and either that continued detention is justified while its derivation is further investigated, or, proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.

The second condition is that there are reasonable grounds for suspecting that the cash is recoverable property, and either that its continued detention is justified while its intended use is further investigated or consideration is given to bringing proceedings against any person for an offence with which the cash is connected, or, proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.

In satisfying the Magistrates that either the first or second condition applies it will be necessary for the Police officer or Revenue and Customs Officer to give evidence on oath.

Obtaining Release of the Detained Cash

Where the cash has been detained, the individual from whom the cash was seized is able to apply to the Magistrates Court for its release back to them. In doing so, they must satisfy the Court that the conditions for detention are no longer made out.

The Act also allows for the Police or Revenue and Customs to seek release of the detained cash where they consider that the conditions are no longer met.

The likelihood is that those who have had the cash seized from them will use the provisions more extensively. However, where investigations reveal that the cash is not from unlawful conduct or is not intended for such use, the Police have the option to seek release of the cash.

s.297 - Release of detained cash

(1) This section applies while any cash is detained under section 295.

(2) A magistrates' court or (in Scotland) the sheriff may direct the release of the whole or any part of the cash if the following condition is met.

(3) The condition is that the court or sheriff is satisfied, on an application by the person from whom the cash was seized, that the conditions in section 295 for the detention of the cash are no longer met in relation to the cash to be released.

(4) An officer of Revenue and Customs, constable or accredited financial investigator or (in Scotland) procurator fiscal may, after notifying the magistrates' court, sheriff or justice under whose order cash is being detained, release the whole or any part of it if satisfied that the detention of the cash to be released is no longer justified.

If others have a legitimate claim to the cash the Act provides that they are able to apply to the Magistrates for release of the cash.

s.301 - Victims and other owners

(1) A person who claims that any cash detained under this Chapter, or any part of it, belongs to him may apply to a magistrates' court or (in Scotland) the sheriff for the cash or part to be released to him.

(2) The application may be made in the course of proceedings under section 295 or 298 or at any other time.

(3) If it appears to the court or sheriff concerned that—

(a) the applicant was deprived of the cash to which the application relates, or of property which it represents, by unlawful conduct,

(b) the property he was deprived of was not, immediately before he was deprived of it, recoverable property, and

(c) that cash belongs to him,

the court or sheriff may order the cash to which the application relates to be released to the applicant.

(4) If—

(a) the applicant is not the person from whom the cash to which the application relates was seized,

(b) it appears to the court or sheriff that that cash belongs to the applicant,

(c) the court or sheriff is satisfied that the conditions in section 295 for the detention of that cash are no longer met or, if an application has been made under section 298, the court or sheriff decides not to make an order under that section in relation to that cash, and

(d) no objection to the making of an order under this subsection has been made by the person from whom that cash was seized,

the court or sheriff may order the cash to which the application relates to be released to the applicant or to the person from whom it was seized.

The Act considers two situations. The first, where a person claims that some or all of the cash rightfully belongs to him and he was deprived of it through unlawful conduct. For example, where the cash was stolen from the individual applying for its release. Where the Court is satisfied that this is the case, then it may release the detained cash to the applicant.

The second scenario is where any other true owner of the cash, who is not the person from whom the cash was seized applies to the Court. In this situation, if the Court is satisfied that the applicant is the true owner and the grounds for detention are not met, the Court may release the cash, but only if the person from whom the cash was seized does not object. This ensures that that the Court does not become embroiled with ownership disputes.

Forfeiture of Detained Cash

The detention of cash is only a temporary measure, which cannot extend further than the two-year period detailed in the Act. As a result, all enquiries as to the legitimacy of the detained monies must be completed expeditiously.

When the enquiries have been completed by the prosecuting agency and they consider there is sufficient evidence to prove that the cash is recoverable property or intended for use in unlawful conduct, the next step is for them to apply under s.298 of the Act for a forfeiture order in respect of the cash (or part of it).

s.298 – Forfeiture

(1) While cash is detained under section 295, an application for the forfeiture of the whole or any part of it may be made—

(a) to a magistrates' court by the Commissioners of Customs and Excise, an accredited financial investigator or a constable,

(b) (in Scotland) to the sheriff by the Scottish Ministers.

(2) The court or sheriff may order the forfeiture of the cash or any part of it if satisfied that the cash or part—

(a) is recoverable property, or

(b) is intended by any person for use in unlawful conduct.

(3) But in the case of recoverable property which belongs to joint tenants, one of whom is an excepted joint owner, the order may not apply to so much of it as the court thinks is attributable to the excepted joint owner's share.

(4) Where an application for the forfeiture of any cash is made under this section, the cash is to be detained (and may not be released under any power conferred by this Chapter) until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded.

After the prosecuting agency has applied for forfeiture of the detained cash, the Court will list the case for directions. If the application for forfeiture is not contested, the Court is able to decide the application at the directions hearing, upon hearing from an officer present on behalf of the prosecuting authority.

Where the application is contested, directions are likely to be made for the service of statements and a forfeiture hearing will be set. At the hearing the Magistrates will be required to make a determination as to whether the detained cash constitutes recoverable property.

The hearing is a civil hearing heard in the criminal courts and as such the Court must be satisfied on the balance of probabilities that the test has been made out. In this sense, applications for forfeiture of detained cash differ from applications for Anti-Social Behaviour Orders and Sexual Offences Prevention Orders, as the criminal standard applies in those cases.

The rules of evidence are also relaxed to fall in line with those used in the civil courts. As such, previous convictions of the individual are automatically admissible and hearsay evidence is admissible subject to notice being given under the Magistrates Court (Hearsay) Rules 1999.

The Magistrates Courts Rules 1981 apply in relation to the conduct of the hearing.

Appeals

In the event that the Magistrates find that the detained cash is "recoverable property" and make a forfeiture order, the Act allows for an appeal to the Crown Court. The Appeal must be made within 30 days of the forfeiture hearing taking place in the Magistrates Court.

s.299 Appeal against decision under section 298

(1) Any party to proceedings for an order for the forfeiture of cash under section 298 who is aggrieved by an order under that section or by the decision of the court not to make such an order may appeal—

(a) in relation to England and Wales, to the Crown Court;

(b) in relation to Scotland, to the Sheriff Principal;

(c) in relation to Northern Ireland, to a county court.

(2) An appeal under subsection (1) must be made before the end of the period of 30 days starting with the day on which the court makes the order or decision.

(3) The court hearing the appeal may make any order it thinks appropriate.

(4) If the court upholds an appeal against an order forfeiting the cash, it may order the release of the cash.

What happens when the Magistrates refuse

to make a Forfeiture Order?

If the Magistrates are persuaded that the seized/detained cash is not "recoverable property", they must release the cash to the individual or individuals who successfully resisted the application. In these circumstances, a successful applicant is, subject to the Court's discretion, able to obtain their costs.

In addition, s.296 of the Act stipulates that if cash is detained for more than the initial 48 hours provided for in s.295 then it must be paid into an interest accruing account. On the release of the cash (or forfeiture) the interest must be added to the original sum.

CHEATING THE REVENUE

Sarah Vince

Sarah Vince

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Core Practice Area: Crime, Civil, and Family
Call: 2007
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Sarah became a tenant with Devon Chambers in April 2012 following successful completion of Pupillage. She practices primarily in crime and utilises the previous experience she gained from prosecuting for a Local Authority for the 3 years prior to accepting Pupillage.

Crime

Sarah accepts instructions from Prosecution Authorities and Defence Solicitors and is developing a practice of work in the Magistrates Court and Crown Court. Having worked for a Local Authority prior to coming to the Bar, Sarah has a detailed understanding of Local Authorities and the types of prosecutions they bring.

In addition to the standard criminal cases, Sarah has a particular interest in prosecutions involving the following bodies: Trading Standards including Animal Welfare, DWP, HSE, and the Environment Agency.

Civil

Sarah accepts instructions in all areas of civil lawand has appeared in small claims hearings and fast track trials. Sarah is keen to receive instructions in Housing Act proceedings including possession and injunction cases.

Family

Sarah's pragmatic approach lends itself well to resolving the problems encountered in areas of family law. Sarah accepts instructions in this area.

Other Interests

Sarah loves going to the theatre and even enjoys taking to the stage herself from time to time.

CHEATING THE REVENUE

WHAT IS IT & WHAT TO ASK FOR

The Indictment

Count 1

STATEMENT OF OFFENCE

Cheating the public revenue, contrary to common law

PARTICULARS OF OFFENCE

Simon Pearce, between 1st April 2006 and 16th October 2012 with intent to defraud prejudiced or took the risk of prejudicing Her Majesty's Revenue's right to public revenue, namely income tax, value added tax, and capital gains tax, payable by individuals who engaged Simon Pearce to prepare their accounts, by preparing accounts and tax returns which understated the relevant profit, turnover or gain.

The offence

"The common law offence of cheating the public Revenue does not necessarily require a false representation either by words or conduct. Cheating can include any form of fraudulent conduct which results in diverting money from the Revenue and in depriving the Revenue of the money to which it is entitled. It has, of course, to be fraudulent conduct. That is to say, deliberate conduct by the defendant to prejudice, or take the risk of prejudicing, the Revenue's right to the tax in question, knowing that he has no right to do so."

[*R v Less,* March 12, 1993, CA. unreported]

What to ask for:

1.) HMRC files

- Compliance files. Initial compliance reviews. Informal.

- Enquiry files. Formal enquiry. Opening and closing letters. Can find minutes of meetings with Officers of HMRC and accountants giving explanations for tax allowances given.

- Investigation files. Opened when real prospect that fraud has been committed. Formal process with Code of Practise.

2.) SA Notes. Self Assessment notes held on each taxpayer. Dates back to beginning of taxpayers UTR number (unique tax reference number). Provides a chronology of events that occurred on taxpayers account.

3.) Unused material. Always read this. You never know what may be hidden in there.

Things to remember:

1.) HMRC is like Big Brother. It can find out all sorts of information about anyone. Any data-holding organisation can be made to disclose information to the HMRC so they can double check what your client tells them.

2.) The HMRC offers incentives to those who co-operate with them. The HMRC is likely to encourage witnesses to come forward by writing to them asking for disclosure of possible inaccuracies with their accounts in exchange for freezing penalties on any undeclared tax.

3.) If figures are not your strong point or you have a slippery client, get an accountant on board to help you understand what the truth of the situation is - "the bullshit factor".

R v Hunt

COURT OF APPEAL, CRIMINAL DIVISION

STUART-SMITH LJ, IAN KENNEDY AND GAGE JJ

22, 23, 24, 25 MARCH, 5 MAY 1994

Conspiracy to cheat the public revenue - Tax evasion - Liability to corporation tax reduced by fraudulent inflation of freight charges paid on importation of vehicles - Whether conspiracy to cheat public revenue a result offence or a conduct offence - Whether proof of resultant loss required.

Information - Production of documents - Entry with warrant to obtain documents - Validity of warrant - Warrant addressed to no more than 55 officers of the Board of Inland Revenue - Whether 55 officers should be named in warrant - Whether warrant unlawful - Taxes Management Act 1970, s 20C(1).

Nissan UK Ltd (NUK) was the sole importer and distributor of Nissan vehicles in the United Kingdom. In 1976 the basis on which NUK purchased vehicles from Nissan Motor Co of Japan (NMC) was changed from a c i f basis to a c & i basis. The freight charge was thenceforth paid through two sets of shipping agents, appointed by NUK, to a carrier. The shipping agents performed no real functions but received payments for functions which in fact were all carried out by NMC or the carrier. The true freight charge was paid to the carrier and the balance was paid into a Swiss bank account. False invoices, correspondence and documents between NUK and the shipping agents were manufactured showing the inflated freight charge. Those false invoices and inflated freight payments were included in NUK's accounting books and records, and were reflected in annual accounts which were submitted to the Revenue for the purpose of determining the amount of corporation tax to be paid by NUK. The defendant, a director of NUK, and certain others including S, another director of NUK, were charged with, inter alia, conspiracy to cheat the public revenue between 1 December 1982 and 31 December 1991 (count 3). The Crown alleged that the change from c i f to c & i purchasing was brought about at the instigation of NUK to facilitate a tax fraud whereby the amount of corporation tax payable by NUK was reduced by reason of the inflated freight payments. In reliance on documents seized from the defendant's office pursuant to warrants issued under s 20C(1)[a] of the Taxes Management Act 1970, the Crown contended that the defendant was fully aware of the true freight rate and had been directly and actively involved in NUK's actions from the time of the initial negotiations for the first distribution agreement in connection with the shipping agency agreements. Subsequently S pleaded guilty to a substantive count (count 5), which was added by amendment, of cheating the public revenue on divers days between 1 November 1985 and 31 October 1986. S's plea of guilty was admitted in evidence against the defendant at a preparatory hearing before the trial. The defendant abandoned an interlocutory appeal to have the plea excluded and was subsequently convicted of count 3. He appealed contending that the judge should have excluded evidence of S's plea because it was a nullity, inter alia, on the grounds that as the offence of cheating at common law was not a 'conduct' crime

but a 'result' crime which was not indictable unless the resultant loss was alleged and proved, the particulars were bad because they did not amount to the offence of cheating the public revenue and the count was bad for duplicity. The defendant sought leave to withdraw the notice of abandonment of his appeal against the admission of the plea on the ground, inter alia, that the abandonment was the result of flagrant incompetence on the part of his trial counsel. By another ground of appeal the defendant contended that the documents seized from NUK's offices should have been excluded by the judge because the

warrants were unlawful in that they did not name the 55 officers of the Board of Inland Revenue.

a Section 20C is set out, so far as material, at p 838 *a-j*, post

Held - (1) The offence of cheating the public revenue was a 'conduct' offence; the actual result of the loss did not have to be proved. The particulars of the charge sufficiently identified the conduct alleged to amount to cheating the public revenue and the count was not bad for duplicity. Accordingly, S's plea was admissible in evidence against the defendant. The judge had had jurisdiction to determine the admissibility of the plea at the preparatory hearing and on the facts there was no basis upon which the court could interfere with the exercise of the judge's discretion to admit the plea. Moreoever, there had been no flagrant incompetence on the part of trial counsel such as to give rise to grounds on which leave to withdraw the notice of abandonment could be granted. Trial counsel's advice to abandon the interlocutory appeal had been given in good faith after due discussion with the defendant. There were tactical and practical reasons not to appeal quite apart from what were perceived to be poor prospects of success. Accordingly, the defendant, having abandoned his interlocutory appeal against the judge's admission of the plea, was estopped from raising the point on appeal. *R v Clinton* [1993] 1 WLR 1181 considered.

(2) A warrant issued under s 20C of the Taxes Management Act 1970 was valid if it complied strictly with the requirements of the section. There was no requirement therein that the names and not the maximum number of officers had to be specified in the warrant. Having regard to the terms of the warrants and a proper construction of s 20C the warrants were not bad in law nor had there been an abuse of process. In any event no application had been made to the judge to exclude the documents and as no valid criticism could be made of trial counsel in that regard the matter could not be reopened. *IRC v Rossminster* [1980] STC 42 considered.

Notes

For cheating the public revenue, see 11(1) Halsbury's Laws (4th edn reissue) para 478.

For the powers of the Revenue to obtain warrants to enter and search premises, see Simon's Taxes A3.157.

For the Taxes Management Act 1970, s 20C, see ibid, Part G2.

Cases referred to in judgment

Gunawardena, Harbutt and Banks, Re [1990] 1 WLR 703, [1990] 2 All ER 477, CA.

IRC v Rossminster [1980] STC 42, [1980] 1 All ER 80, 52 TC 160, sub nom *R v IRC, ex p Rossminster* [1980] AC 952, HL.

Kwan Ping Bong v R [1979] AC 609, PC.

R v Cheema [1994] 1 WLR 147, [1994] 1 All ER 639.

R v Clinton [1993] 1 WLR 1181, [1993] 2 All ER 998, CA.

R v Curry [1988] Crim LR 527, CA.

R v Durante [1972] 1 WLR 1612, [1972] 3 All ER 962, CA.

R v Gautam [1988] Crim LR 109, CA.

R v Gorman [1987] 2 All ER 435, CA.

R v Hudson [1956] 2 QB 252, [1956] 1 All ER 814, CA.

R v Jennings (1993) Times, 29 October, CA.

R v Kempster [1989] 1 WLR 1125, CA.

R v Less and Depala (2 March 1993, unreported), CA.

R v Lunnon (1988) 88 Cr App R 71, CA.

R v McKechnie (1991) 94 Cr App R 51, CA.

R v Medway [1976] 1 All ER 527, 62 Cr App R 85, CA.

R v Moore (5 February 199l, unreported), CA.

R v O'Connor (1987) 85 Cr App R 298, CA.

R v Sang [1980] AC 402, [1979] 2 All ER 46, CA.

R v Vreones (1891) 1 QB 360.

[1994] STC 819 at 821

R v Watson [1988] QB 690, [1988] 1 All ER 897, CA.

R v Wellings (20 December 1991, unreported), CA.

Cases also cited

Amos v DPP [1988] RTR 198.

Chiltern DC v Hodgetts [1983] AC 120, [1983] 1 All ER 1057, HL.

Comptroller of Customs v Western Lectric Co Ltd [1966] AC 367, [1965] 3 All ER 599, PC.

Cotterill v Lempriere (1890) 24 QBD 634.

Davies v DPP [1954] AC 378, [1954] 1 All ER 507, HL.

DPP v McCabe [1992] Crim LR 885.

DPP v Merriman [1973] AC 584, [1972] 3 All ER 42, HL.

Hoechst AG v EC Commission (Joined Cases 46/87 and 227/ 88) [1989] ECR 2859, CJEC.

Mallon v Allon [1964] 1 QB 385, [1963] 3 All ER 843.

Patel v Comptroller of Customs [1966] AC 356, [1965] 3 All ER 593, PC.

R v Angel (25 June 1992, unreported), CA.

R v Asif (1985) 82 Cr App R 123, CA.

R v Ayres [1984] AC 447, [1984] 1 All ER 619, HL.

R v Bembridge (1783) 22 St Tr 1.

R v Boal [1992] QB 591, [1992] 3 All ER 177, CA.

R v Bradbury 1920 [1956] 2 QB 262.

R v Christou [1992] QB 979, [1992] 4 All ER 559, CA.

R v Cohen (1992) Times, 9 October, CA.

R v Davey [1960] 1 WLR 1287, [1960] 3 All ER 533, CA.

R v Dossi (1918) 13 Cr App R 158, CCA.

R v Ensor [1989] 1 WLR 497, [1989] 2 All ER 586, CA.

R v Farid (1945) 30 Cr App R 168.

R v Forde [1923] 2 KB 400.

R v General Medical Council, ex p Gee [1987] 1 WLR 564, [1987] 2 All ER 193, HL.

R v Greenfield [1973] 1 WLR 1151, [1973] 3 All ER 1050, CA.

R v Landy [1981] 1 WLR 355, [1981] 1 All ER 1172, CA.

R v Lee [1984] 1 WLR 578, [1984] 1 All ER 1080, CA.

R v Mavji [1986] STC 508, [1987] 2 All ER 758, CA.

R v Mcvitie [1960] 2 QB 483, [1960] 2 All ER 498, CA.

R v Mulligan [1990] STC 220, CA.

R v Redford [1988] STC 845.

R v Riley [1896] 18 Cox 285.

R v Thompson [1914] 2 KB 99.

R v West [1948] 1 KB 709.

R v Wheatly [1761] 2 Burr 1125.

R v Williams [1978] QB 373, [1977] 1 All ER 874, CA.

R v Wilson (1979) 69 Cr App R 83, CA.

Reynolds v Comr of Police of the Metropolis [1985] QB 881, [1984] 3 All ER 694, CA.

Scott v Metropolitan Police Comr [1975] AC 819, [1974] 3 All ER 1032, HL.

Thomson v Knights [1947] 1 KB 36.

Treacy v DPP [1971] AC 537, [1971] 1 All ER 110, HL.

Wai Yu-tsang v R [1992] 1 AC 269, [1991] 4 All ER 664, PC.

Ware v Fox [1967] 1 WLR 379, [1967] 1 All ER 100.

Appeal

On 26 June 1993 at the Crown Court at Southwark Michael John Hunt, the defendant, was convicted by a majority of 10 to 2 of conspiracy to cheat Her Majesty the Queen and the Commissioners of Inland Revenue contrary to s 1(1) of the Criminal Law Act 1977 and was sentenced to eight years' imprisonment, ordered to pay £513,512 towards the costs of the prosecution and disqualified from being concerned in the management of a company for ten years. The defendant appealed against conviction on the grounds, inter alia, (i) that the judge should have

[1994] STC 819 at 822

excluded evidence of a plea of guilty by Frank Shannon, a co-conspirator and director of NUK, because it was a nullity; and (ii) that the warrants under which documents had been seized from his office were unlawful as they did not name the 55 Revenue officers to whom they were addressed. The facts are set out in the judgment of the court.

Alun Jones QC, Kevin de Haan and *Campaspe Clare Lloyd-Jacob* (instructed by *Jeffrey Green Russell*) for the appellant.

Peter Rook QC, *Jonathan Fisher* and *Angela Morris* (instructed by the *Solicitor of Inland Revenue*) for the Crown.

Cur adv vult

5 May. The following judgment of the court was delivered.

STUART-SMITH LJ.

On 26 June 1993 at the Crown Court at Southwark the appellant was convicted by a majority of 10 to 2 of conspiracy to cheat Her Majesty the Queen and the Commissioners of Inland Revenue and was sentenced to eight years' imprisonment, ordered to pay £513,512 towards the costs of the prosecution and disqualified from being concerned in the management of a company for ten years.

He appeals against his conviction on a point of law. In so far as he requires leave to appeal in relation to some grounds of appeal, his application has been referred to the full court by the registrar, as likewise has his application for leave to appeal against sentence.

The indictment contained four counts. Count 1 alleged conspiracy to cheat Her Majesty the Queen and the Commissioners of Inland Revenue contrary to s 1(1) of the Criminal Law Act 1977 (the 1977 Act) between 1 October 1975 and 31 March 1983. Count 2 alleged conspiracy to make and use false accounting documents in contravention of s 17(1)(*b*) of the Theft Act 1968 and contrary to s 1(1) of the 1977 Act over a similar period to count 1 and was regarded as an alternative to count 1. Count 3, of which the appellant was convicted, alleged a similar conspiracy to count 1 between 1 December 1982 and 31 December 1991. Count 4 alleged conspiracy similar to count 2 between the dates as in count 3 and was regarded as an alternative to it. The appellant was acquitted of count 1 and found not guilty by direction under s 17 of the Criminal Justice Act 1967 of count 2. Count 4 was ordered to remain on the file. Frank Shannon was a defendant on all four counts. On 1 February 1993 he pleaded guilty to a substantive count, count 5, which was added by amendment, of cheating the Queen and the revenue on divers days between 1 November 1985 and 31 October 1986. The four counts of conspiracy remained on the file and he took no further part in the trial until he came to be sentenced on 30 June 1993. The appellant having by then been acquitted of counts 1 and 2, Shannon was also acquitted of these counts. Tore Arne Thorsen, a Norwegian, was a co-accused on counts 3 and 4. He failed to surrender to bail, returned to Norway and declined to take part in the trial. There were other conspirators referred to in the indictment, notably Octav Oswald Botnar, who the Crown alleged was the principal conspirator, and was named in all four counts. A warrant for his arrest could not be executed as he has remained outside the jurisdiction. On counts 1 and 2, Johannes Verkade, Karl Geuther and Walter Schmucki were named as conspirators. On counts 3 and 4, Friedrich Pannosch, an Austrian national, and Kurt Vogelsang were named as conspirators. Pannosch gave evidence for the Crown.

Botnar, the appellant and Shannon, until he left in October 1986, were all directors of Nissan UK Ltd--formerly Datsun UK--(NUK) which they acquired in the summer of 1970 Botnar was the chairman and owned 76·26% of the shares directly or through nominees. The appellant owned 10·63% of the shares in NUK in his own right and

2·935% through family trusts. He was the second largest shareholder. Shannon was the finance director and owned 7·24% of the shares.

[1994] STC 819 at 823

On 1 June 1971 NUK was appointed by the Nissan Motor Co of Japan (NMC) sole distributor to import and distribute Nissan vehicles in the United Kingdom. The vehicles were purchased on a c i f basis whereby NUK would pay the full cost in yen 90 days after the ship had sailed. On 1 January 1976, this arrangement was changed by a memorandum of that date so that thenceforth NUK paid NMC on a c & i basis only, paying in yen 90 days after sailing. The freight charge was paid separately under a new arrangement with Nissan Motor Car Carriers (NMCC), a Japanese company. It was payable in $US immediately the ship sailed. Under the memorandum NUK was able to appoint its own shipping agent to act as intermediary between NUK and NMCC. Autocontex Holland BV, a Dutch company (Autocontex), of which Verkade was the managing director, was appointed to act as shipping agent between 1976 and 1983, the period covered by the first two counts. Scansiris A/S, which was set up in Oslo by Thorsen, was the shipping agent for NUK from 1983 onwards. Under the terms of the memorandum the shipping agent had to make an exclusive transportation agreement with NMCC.

The prosecution alleged that the change from c i f to c & i was brought about at the instigation of NUK to facilitate a tax fraud by remitting inflated freight payments through a shipping agent (i e Autocontex/Roland Shipping & Transport Co Ltd (Roland), a Bermuda company controlled by Geuther and Scansiris/Pannosch) which were then paid to a Swiss bank (Swiss Credit Bank/the BFG). The true NMCC freight charge was paid to NMCC, with the balance siphoned off into a Swiss bank account. Payments to the shipping agent were made on the back of bogus agency agreements. The agreements were sham in that the agent was purporting to carry out numerous functions which in fact were all carried out by NMC or NMCC. The evidence that NMC or NMCC carried out all these functions was unchallenged. False invoices between NUK and the shipping agent and correspondence were manufactured which showed the inflated freight charge. These false invoices and inflated freight payments were included in NUK's accounting books and records, and were reflected in annual accounts which were submitted to the Revenue for the purpose of determining the amount of corporation tax to be paid by the company.

The mechanics of the fraud changed in 1983 when Scansiris/Pannosch replaced Autocontex/Roland as shipping agents. In both periods false agreements, invoices and other documents were created to cover the inflated freight charge. However, until 1983 the true freight charge made by NMCC was separated from the inflated payment in Switzerland at the Swiss Credit Bank. After Scansiris/Pannosch took over, the extracted sum was separated from the true freight charge by Scansiris in Norway, before the payments reached the BFG in Switzerland. The fraud was concealed throughout by the interposition of two sets of shipping agent (Autocontex/Roland and Scansiris/Pannosch) and the creation of two sets of bogus shipping agency agreements, addenda, invoices, correspondence and a convoluted payment trail.

There was clear undisputed oral evidence which established that for the majority of the time the freight charges paid by NUK were approximately 40% higher than the freight payments received by NMCC although in reality the shipping agents were performing no real functions.

As regards the ultimate destination of the extracted sums, the prosecution was able to trace the trail of moneys to bank accounts in Switzerland but was unable to prove that the shareholders of NUK (Botnar, the appellant and Shannon) benefited from the proceeds of the fraud.

Between 1975 and 1991, a total of £219,911,823 was extracted from NUK, causing a loss to the revenue of £97,119,462.

The prosecution alleged that Botnar was the moving spirit in the conspiracy. The appellant was alleged to have been second in command, and Shannon the third most culpable.

[1994] STC 819 at 824

The prosecution case against the appellant was this. He had been associated with Botnar from the earliest days when they went to Japan together in 1970 and negotiated the first distribution agreement. He was directly involved in replacing Autocontex with Scansiris. He was involved in the response to an investigation by the Dutch revenue authorities into Broekman Beheer and Autocontex in 1982. He travelled with Thorsen to Japan early in 1983 to negotiate the new shipping agency. He was involved with setting up arrangements with BFG and met the co-conspirators in the Scansiris conspiracy. The appellant signed many of the bogus shipping agency agreements and addenda between NUK and Scansiris, and from 1985 he was actively involved in direct negotiations with NMC and NMCC concerning the c & i price. The c & i price could not be negotiated without knowledge of the true freight rate charged by NMCC. Copies of documents concerning c & i and freight sent by NMCC to NUK were passed to him. He was involved in the freight negotiations before and after Shannon's departure in 1986 and was responsible for circulating the revised inflated freight rates to the NUK accounts department.

Documents found in the appellant's office and on his desk showed that he was fully aware of the true NMCC freight rate. A schedule of documents found in his office was put before the jury with the consent of the defence. There were a substantial amount of letters and correspondence found in his office which referred to the NMCC freight rate. In particular there was correspondence with Mr Richard of Nissan France comparing the true NMCC freight charge to NUK and the c i f rate charged to Nissan France. Also, there were diaries with entries showing the appellant's many journeys to Switzerland, his close association with Vogelsang of the BFG, and his visit to Japan with Thorsen at the time of the agency take-over.

In Botnar's absence, the appellant would deputise for him 'in all matters'. There was a memorandum dated 10 June 1988 from Botnar to all staff to this effect.

The appellant's defence was as follows: he did not admit the existence of a conspiracy to cheat the United Kingdom revenue. Indeed, he actively challenged whether there was a conspiracy to cheat the United Kingdom revenue. He advanced the case that the cheat was essentially Japanese by its essence and that the beneficiaries of the fraud were Japanese. He disputed that there was any proof of his involvement in any conspiracy. From the outset of the jury trial the appellant argued that the evidence adduced by the prosecution was equally consistent with a fraud by the Japanese; in particular that there could have been a fraud by the Japanese suppliers of the vehicles who had an interest in pretending that the freight rate charged by them was lower than in fact it was so that they could hive off the freight paid into a Swiss account without having to account for it to the Japanese tax or other authorities. It was the defence case that there was a credible alternative to the prosecution case, namely that NMC and NMCC knew about the rates actually paid by NUK.

Neither the appellant nor any other witness was called for the defence.

There was no dispute at the trial that there had been a fraud. The issues before the jury on each pair of counts were: (1) Had the prosecution proved that the fraud was upon the United Kingdom revenue or might it have been a fraud on the Japanese authorities? (2) If it was a fraud on the United Kingdom revenue, was the appellant a party to it?

It is now necessary to say something of the procedural history of the case. The appellant and Shannon were arraigned on 1 February 1993. Prior to that date, Shannon's advisers had told the prosecution that Shannon would be willing to plead guilty to count 3 limited to the period 1 November 1985 to 31 October 1986. The plea was offered on the basis that Shannon 'accepted by the time he signed, on 1st of April 1986, the accounts of NUK for the year ended 31st July 1985, he did so knowing that the relevant Scansiris invoices for that year had been inflated in order to reduce corporation tax payable by Nissan UK'. This was acceptable to the

[1994] STC 819 at 825

prosecution provided Shannon also accepted that 'as regards the accounting period between 1st August 1985 and 31st October 1986 he continued to authorise the relevant Scansiris invoices for that period which had been inflated to reduce corporation tax by NUK'. This was acceptable to Shannon. However, it appeared to prosecuting counsel, apparently because it was thought that it would make the basis of the plea clearer, that it would be preferable that the substance of what Shannon was willing to plead to should be indicted in a single substantive count. Accordingly, count 5 was added to the indictment by amendment. It was in these terms:

> 'Cheating Her Majesty the Queen and Her Commissioners of Inland Revenue, contrary to common law.
>
> *Particulars of Offence*
>
> Frank Shannon, on divers days between the 1st November 1985 and the 31st October 1986, with intent to defraud, cheated Her Majesty the Queen and Her Commissioners of Inland Revenue of public revenue, namely corporation tax, by:

(i) making and/or causing to be made and/or producing and/or causing to be produced documents, namely invoices, agreements and correspondence, which were misleading, false or deceptive in that they purported to show:

(a) commercial transactions between the parties made in good faith; and/or

(b) the true sums to be paid in respect of freight charges on the importation of motor cars manufactured by the Nissan Motor Company in Japan.

(ii) causing and/or permitting Nissan (UK) Limited (hereinafter referred to as "the company") to make payments to Scansiris AS in accordance with the sums shown in the said invoices, agreements and correspondence;

(iii) causing and/or permitting the said payments to be entered in the accounting records of the company between the 1st November 1985 and the 31st October 1986;

(iv) causing and/or permitting the accounts for the year ending 31st July 1985 to be submitted to Her Majesty's Commissioners of Inland Revenue for the purpose of calculating the amount of corporation tax which was payable by the company in respect of profits made during the said accounting periods.'

The particulars (i) to (iv) were in precisely the same terms as the particulars of the conspiracy in count 3, save only as to the dates.

On 1 February 1993 Shannon pleaded guilty to this count. It will be seen that the count covers two accounting periods, namely that ended on 31 July 1985 and for part of that ending on 31 July 1986.

At the time of this plea, prosecuting counsel told the judge that the prosecution were unable to prove in those proceedings that Shannon had received any personal benefit from the fraud. But the tax loss for the first of these periods was in the region of £8m, and although was more difficult to quantify in relation to the second period, it was of the same order.

On 10 February 1993, the prosecution applied to put Shannon's plea of guilty in evidence against the appellant pursuant to s 74 of the Police and Criminal Evidence Act 1984 (the 1984 Act). The application was opposed by the appellant's then legal advisers, not on the grounds that the plea did not fall within the provisions of s 74, but on the ground of s 78 of the 1984 Act; it was contended that it was unfair to the

appellant because the very limited nature of the plea as compared to the prosecution's case against Shannon, namely that he had been party to the full extent of the two conspiracies, at least until he left NUK in 1986. The judge rejected this submission. He said that if a responsible prosecution had decided to accept a limited plea rather than expending a great deal of time and public money in attempting to prove the full case against Shannon, there could be no sensible objection. He also pointed out that the admission of the plea might have a marked effect on the most time-consuming aspect of the trial, namely the proof of the trail of false invoices and overpayment. The judge gave leave to appeal this decision. An appeal was lodged, but after receiving written advice from the two leading

counsel who then represented him, the appellant abandoned the appeal on 24 March 1993. The trial began on 20 April and concluded with the verdict on Saturday 26 June; sentence was passed on 30 June.

At trial the appellant was represented by the well-known solicitors, Herbert Smith and Mr Sherrard QC and Mr Mayes QC. Mr Sherrard is one of the most experienced practitioners at the criminal bar. Since his conviction the appellant has changed his solicitors and counsel. There are 12 grounds of appeal. In no less than seven of these grounds the conduct and advice of his previous advisers, particularly his counsel, is severely criticised. Indeed, they are said to have been flagrantly incompetent. In these circumstances, the appellant was asked by the registrar to waive privilege, which he did, and the observations of his previous advisers have been sought and obtained in respect of the relevant grounds of appeal where their conduct is under attack. Save in very minor respects, the factual content of their observations, which is contained in two memoranda, is accepted by the appellant.

The first four grounds of appeal are concerned with the admission of Shannon's plea of guilty. In ground 1 it is said that it should not have been admitted under s 74 or s 75 because it was a nullity. Three reasons are advanced for this proposition: (a) the particulars were bad because they did not cover or amount to the offence of cheating the revenue; (b) the count was bad for duplicity, or (c) Shannon's knowledge of the fraud, which he admitted was based on hearsay.

The foundation for (a) and (b) is, so it is said by Mr Jones, that the offence of cheating at common law is a 'result' crime and not a 'conduct' crime. In other words, it is not indictable unless the resultant loss is alleged and proved. The particulars do not allege any resultant loss and are therefore bad; alternatively, if a loss is alleged, it is in fact two losses, namely that for the accounting period up to 31 July 1985 and part of that ending on 31 July 1986 and alleged various acts on divers days during the period in question accordingly it is bad for duplicity. Although it is possible to find some expressions of opinion in the old cases and text books which tend to support Mr Alun Jones QC's submissions, in our judgment it is not correct. There is ample authority to show that it is a 'conduct' offence. A distinction is drawn between cheating the public or the king, in which the resultant loss does not have to be proved, and cheating a private individual where it must be. Pollock B explained the difference in *R v Vreones* [1891] 1 QB 360 at 368-369, a case of attempting to pervert the course of justice. He said:

> 'This is an indictment for a fraud or cheat at common law. If it had been charged as a cheat against a private individual, I should have felt bound to give effect to the argument of the defendant's counsel. In cases where a cheat or fraud against private individuals is charged, the two conditions--(1) that the act has been completed, and (2), that there has been injury to the individual--are conditions precedent to the offence. But this is not the case of a private fraud. It is an offence which comes within the description in East's Pleas of the Crown, c 18, s 4: 'There is also another head of public cheats indictable at common law, which are levelled against the public justice of the kingdom, such as the doing of judicial acts without authority in the name of
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> *[1994] STC 819 at 827*
>
> another." ... I am quite clear that the condition precedent that there must be injury to the individual does not apply in the present case. It applies in cases of cheating or defrauding private individuals, because otherwise a mere naked lie might constitute an offence. But very different considerations apply to the class of cases in which the present is included. The real offence here is the doing of some act which has a tendency and is intended to pervert the administration of public justice.'

Archbold Pleading and Practice (1825 edn) gives a precedent for cheating through selling by false scales. The indictment relates to divers days between certain dates falsely, fraudulently and deceitfully selling and uttering to divers subjects of our Lord the King. The editors add a note: 'If you can prove any particular instance of a sale by those scales, to a particular person, you may add a count upon it.'

The offence of cheating at common law was repealed by s 32(1)(*a*) of the Theft Act 1968 except in relation to the revenue. More recent authority is consistent with the view that the offence is a conduct crime. In *R v Hudson* [1956] 2 QB 252 this court held that the offence of making a false statement tending to prejudice the Queen and the public revenue with intent to defraud the Queen is, and always has been, a common law misdemeanour and includes the offence of causing to be delivered to an inspector of taxes accounts relating to the profit of a business which falsely and fraudulently state the profits to be less than they actually were.

In *R v Less and Depala* (2 March 1993, unreported) the appellants contended, inter alia, that the trial judge had not properly defined the actus reus. This court approved his summing-up in this form:

> 'The next direction I have to give you is what in law is cheating the public revenue. To cheat, members of the jury, is defined by the Concise Oxford Dictionary as: "To deceive or trick a person into or out of a thing". The common law offence of cheating the public revenue does not necessarily require a false representation either by words or conduct. Cheating can include any form of fraudulent conduct which results in diverting money from the revenue and in depriving the revenue of the money to which it is entitled. It has, of course, to be fraudulent conduct. That is to say, deliberate conduct by the defendant to prejudice, or take the risk of prejudicing, the revenue's right to the tax in question knowing that it has no right to do so.'

The last sentence makes it plain that the actual result of the loss does not need to be proved.

In our judgment, the particulars sufficiently identified the conduct alleged to amount to cheating the revenue and the count is not bad for duplicity.

Then it is said that the conviction of Shannon is based on hearsay, and is for that reason invalid. This submission is based on counsel's mitigation on behalf of Shannon, in which it is said that he first got to know there was a fraud on the revenue because Botnar told him so. In our judgment, this point is misconceived. It matters not how Shannon came to know there was a fraud. What matters is that he became a party to it and furthered it by the acts alleged against him and accepted by him.

Ground 2. It is contended that Shannon's plea of guilty was equivocal. It is said that the mitigation offered on his behalf was equally consistent with the hypothesis advanced by the appellant that it was a fraud on the Japanese authorities. This argument is quite untenable. How it can seriously be said that a plea of guilty to cheating the Queen and the public revenue can equally be understood as being a plea to cheat the Japanese authorities we have not understood. Nothing that was said by Shannon's counsel in mitigation is in any way inconsistent with the plea. In any event, at the time the plea was admitted under s 74 there had been no mitigation.

Ground 3. It is said that the particulars in count 5 did not reflect the confession which Shannon was making. We have not found this submission altogether easy to follow. We have set out the circumstances in which count 5 was drafted and pleaded to, in preference to a limited plea to count 3.

Section 75(1) of the Police and Criminal Evidence Act 1984 provides:

> 'Where evidence that a person has been convicted of an offence is admissible by virtue of section 74 above, then without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based--
>
> (*a*) the contents of any document which is admissible as evidence of the conviction; and
>
> (*b*) the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted,
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> shall be admissible in evidence for that purpose.'

The contents of the indictment are therefore admissible to prove the facts upon which the conviction is based; but there can be other evidence of this. Mr Jones's point seems to be that Shannon was not pleading guilty to all the particulars in the count. He relies upon the answer that the judge gave to the jury in answer to their question. In speaking of Shannon's plea, the judge said:

> 'What you do not know is the basis on which he pleaded. In other words, was he pleading to using false invoices, false agreements or false correspondence. You do not know that. What you do know is that Shannon pleaded guilty to cheating Her Majesty's Commissioners of Inland Revenue in that year. The rest of the particulars follow because all that is admitted.'

So, says Mr Jones, if all the jury knew was that Shannon was pleading guilty to a fraud on the revenue, why could it not be some completely different and unrelated fraud? At this point the submission seems to depart from all contact with reality. We do not think there was the slightest doubt that Shannon was pleading guilty to cheating the revenue by submitting accounts showing falsely inflated freight costs, these costs being supported by false invoices and documents.

In ground 4 it is alleged that the judge wrongly exercised his discretion under s 78 of the Police and Criminal Evidence Act 1984 and ought to have excluded evidence of Shannon's plea. Two arguments are advanced. It is said that a plea by a co-conspirator should not be admitted under s 74 in a complex or serious fraud case. It is said that the reported cases are all involved with simpler cases. We see no reason in principle why the use of s 74 should be so confined. In *R v Lunnon* (1988) 88 Cr App R 71, admittedly a much less complex case, a plea of guilty by one conspirator was admitted to prove the existence of the conspiracy, but not the accused's complicity in it. The admission of such a plea in a case like this may have, and did in this case, have the beneficial effect of reducing the evidence that the jury was required to consider.

Then it is said that in exercising his discretion the judge failed adequately to take into account certain matters. This is no proper basis upon which this court can interfere with the exercise of the judge's discretion.

It is convenient at this point to consider ground 8 of the grounds of appeal, which relates to the abandoned interlocutory appeal. The prosecution contends that even if the appellant's arguments on grounds 1 to 4 or any of them are correct, the appellant is estopped from arguing them. The appellant, on the other hand, contends in ground 8 that his abandonment is a nullity and he is not precluded from arguing the points.

[1994] STC 819 at 829

The provisions relating to preliminary hearings are contained in ss 7 to 10 of the Criminal Justice Act 1987 (the 1987 Act). So far as material, these sections provide as follows:

> '**7**. (1) Where it appears to a judge of the Crown Court that the evidence on an indictment reveals a case of fraud of such seriousness and complexity that substantial benefits are likely to accrue from a hearing (in this Act referred to as a "preparatory hearing") before the jury are sworn, for the purpose of--
>
> (*a*) identifying issues which are likely to be material to the verdict of the jury;
>
> (*b*) assisting their comprehension of any such issues;
>
> (*c*) expediting the proceedings before the jury; or
>
> (*d*) assisting the judge's management of the trial,
>
> he may order that such a hearing shall be held ...
>
> **9**. (1) At the preparatory hearing the judge may exercise any of the powers specified in this section ...
>
> (3) He may determine-- ...
>
> (*b*) any question as to the admissibility of evidence; and
>
> (*c*) any question of law relating to the case ...
>
> (11) An appeal shall lie to the Court of Appeal from any order or ruling of a judge under subsection (3)(*b*) or (*c*) above, but only with the leave of the judge or of the Court of Appeal.'

The first point taken by Mr Jones, though it was only taken in the course of his reply, was that the purpose of the application in relation to the admission of Shannon's plea, did not fall within any of the provisions of (*a*) to (*d*) of s 7(1) of the 1987 Act; therefore he submitted that the court had no jurisdiction to determine the point, accordingly the appeal and its abandonment were a nullity. It has been held that

matters which do not relate to the purposes specified in those sub-paragraphs are outside the ambit of the preparatory hearing, and accordingly there is no jurisdiction to determine matters under the provisions of s 9(3) of the 1987 Act and no jurisdiction for the Court of Appeal to entertain any appeal from such a point under s 9(11) (see *Re Gunawardena, Harbutt and Banks* [1990] 1 WLR 703). Examples of points of law where the purpose of making the determination did not fall within s 7(1) are severance of an indictment (see *R v Jennings* (1993) Times, 29 October) quashing a count in the indictment (see *R v Moore* (5 February 1991, unreported)); an application to dismiss as an abuse of process (see *Gunawardena*). Mr Jones submitted that the jurisdiction under s 7 and s 9 is now so limited that it is of little practical effect and he even went so far as to submit that no determination as to the admissibility of evidence could come within the limited purposes of s 7(1), although it might have the incidental effect of falling within one of the provisions of (*a*) to (*d*). We cannot accept this submission; it would make nonsense of s 9(3)(*b*). Although it is important for the judge who is deciding whether to hold a preparatory hearing and make determinations under s 9(3), to ensure that he has jurisdiction to do so having regard to one or more of the purposes set out in s 7(1)(*a*) to (*d*), it seems to us that a decision as to admissibility of evidence is par excellence something that is likely to fall within the provisions of (*a*), (*c*) or (*d*). We have no doubt that the judge had jurisdiction to do so in this case. Indeed, the point was never doubted until raised by Mr Jones as we have indicated.

The Criminal Justice Act 1987 (Preparatory Hearings) (Interlocutory Appeals) Rules 1988, SI 1988/1700 (the 1988 rules), were made by the Crown Court Rule Committee in the exercise of powers conferred under ss 84(1) and 86 of the Supreme Court Act 1981. Rule 7 provides:

> 'Rule 10 of the principal Rules (abandonment of proceedings) shall apply for the purposes of an appeal or an application for leave to appeal by an appellant under section 9(11) of the Act of 1987 as it applies to an appeal or application for leave under Part I of the Act of 1968.'

The exceptions are immaterial.

The principal rules are the Criminal Appeal Rules 1968, SI 1968/1262 (the 1968 rules). Rule 10 provides:

> '(1) An appeal or an application for leave to appeal under Part I of the Act may be abandoned before the hearing of the appeal or application by serving on the Registrar notice thereof in Form 14 ...
>
> (4) Where an appeal or an application for leave to appeal is abandoned, the appeal or application shall be treated as having been dismissed or refused by the court.'

Mr Jones submitted, again for the first time in the course of his reply, that the 1988 rules are self-contained and apply only to appeals under the 1987 Act. The effect of r 10 of the 1968 rules therefore, he submitted, was only to prevent a further appeal at the interlocutory stage and did not prevent the same point being argued on an appeal brought pursuant to s 1 of the Criminal Appeal Act 1968. Again, we cannot accept this submission, which ignores the words in r 7 'as it applies to an appeal or application for leave under Part I of the Act of 1968', which of course includes s 1.

Any other construction would completely defeat the purpose of ss 7 to 10 of the 1987 Act. It is plain that the object of these sections is that decisions as to admissibility of evidence and matters of law, provided they are taken for the purposes set out in s 7, are to be decided once and for all at the interlocutory stage, subject to the judge's power to vary or discharge the order during the trial under s 9(10); if there is an appeal and the point is decided against the appellant, he is therefore estopped from raising the point on appeal after conviction; if he appeals and abandons his appeal, the position is the same because it is treated as if it were dismissed. The position is the same if there is no appeal or application for leave to appeal. The issue has been finally determined by a court of competent jurisdiction. The purpose of the Act is to ensure that immensely long and expensive trials, as serious fraud cases tend to be, do not get under way on a wrong view of the law.

Should the court give leave to the appellant to withdraw his notice of abandonment so as to appeal the judge's decision to admit Shannon's plea under s 74 of the Act? The full court of five judges considered the question in *R v Medway* [1976] 1 All ER 527, 62 Cr App R 85 what circumstances this can be permitted. It was held ((1975) 62 Cr App R 85):

> 'The Court has jurisdiction to give an applicant or appellant leave to withdraw a notice of abandonment of appeal or application for leave to appeal where the notice of abandonment can be treated as a nullity, i e where the abandonment was not the result of a deliberate and informed decision--in other words, where the mind of the applicant or appellant did not go with his act of abandonment. Headings such as mistake, fraud, wrong advice, misapprehension etc should be regarded only as guidelines, the presence of which may justify the exercise of such jurisdiction of the Court and are not exhaustive of the types of case where the jurisdiction can be exercised. There is no inherent jurisdiction enabling the Court to give leave in other special circumstances. Where a notice of abandonment cannot be treated as a nullity and where, accordingly, leave to withdraw the notice cannot be given, the Court, if satisfied that injustice would otherwise ensue, may under section 17 of the Criminal Appeal Act 1968 invite the Secretary of State to refer the matter to the Court.'

One of the arguments for the appellant in that case was that the single judge, refusing leave to appeal, has expressed a mistaken view of the powers of the Court of Appeal. In dealing with this point Lawson J, who gave the judgment of the court, said ([1976] 1 All ER 527 at 543, 62 Cr App R 85 at 99):

> 'Even if we accepted the factual basis for this contention, which we do not, we do not think that a deliberate decision to abandon taken as a result of advice which is founded on a mistaken view of the law is in itself capable of vitiating the effectiveness of the notice to abandon so as to enable the court to treat it as a nullity.'

This would suggest that a mistaken view of the law taken by counsel would a fortiori not be a ground for contending that the decision to abandon was a nullity. On the other hand, wrong advice appears to be one of the headings which justifies the exercise of the court's discretion, and was so stated to be in the passage ([1976] 1 All ER 527 at 543, 62 Cr App R 85 at 98) which contains the ratio of the case.

In our judgment, this aspect of *R v Medway* must be considered in the light of recent authorities where it is alleged that trial counsel's advice, or conduct of the trial, was wrong. These authorities were reviewed in *R v Clinton* [1993] 2 All ER 998. The court held that the circumstances in which the Court of Appeal is entitled to overset a

jury's verdict when the grounds advanced consist wholly or substantially of criticism of defence counsel's conduct of the trial must be extremely rare. Essentially the question is whether the case falls within s 2(1)(*a*) of the Criminal Appeal Act 1968, namely whether the court thinks that in all the circumstances of the case the conviction is unsafe and unsatisfactory. Cases in which the conduct of counsel can afford a basis for appeal are to be regarded as wholly exceptional. The reason for this rule was given by the court in *R v Gautam* [1988] Crim LR 109 where it was held that provided counsel has properly discussed the case with his client the court would not permit the defendant to have another opportunity to run an alternative defence to that taken at his trial. In *R v Wellings* (20 December 1991, unreported) Lord Lane CJ said:

> 'The fact that counsel may appear to have made at trial a mistaken decision, or has indeed made a decision which in retrospect has been shown to have been mistaken, is seldom a proper ground of appeal. Generally speaking it is only when counsel's conduct of the case can be described as flagrantly incompetent advocacy that this court will be minded to intervene.'

Rougier J, who gave the judgment of the court in *R v Clinton,* said (at 1004-1005):

> 'The court was rightly concerned to emphasise that where counsel had made decisions in good faith after proper consideration of the competing arguments, and, where appropriate after due discussion with his client, such decisions could not possibly be said to render a subsequent verdict unsafe or unsatisfactory. Particularly does this apply to the decision as to whether or not to call the defendant. Conversely and, we stress, exceptionally, where it is shown that the decision was taken either in defiance of or without proper instructions, or when all the promptings of reason and good sense pointed the other way, it may be open to an appellate court to set aside the verdict by reason of the terms of s 2(1)(*a*) of the 1968 Act. It is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial and the verdict according to the terms of the subsection.'

Can it be said in this case that the advice to abandon the appeal was flagrantly incompetent or when all the promptings of reason and good sense pointed the other way so that the court may think the verdict unsafe and unsatisfactory? Even if we

took the view that count 1 was bad for duplicity or that the particulars were bad, we do not consider that the case falls anywhere near fulfilling the *Clinton* test. The advice was given in good faith; the question of duplicity was considered. The view was taken that the count was not bad. Above all, there were several tactical and practical reasons not to appeal, quite apart from what were perceived to be poor prospects of success. First, the appellant's clear instructions were that the trial was not to be delayed. There appears to have been good reason for this. The Crown had not obtained evidence from Switzerland as to what happened to the funds that were paid into the Swiss Credit Bank or the BFG, but they were hoping to do so. The appellant, while insisting that these funds could not be traced to him, was, so it appeared to his advisers, apprehensive that they might be traced to Mr Botnar; in the light of his close association with Mr Botnar this would have had a prejudicial effect on his case. Secondly, because the defence had not at that stage positively advanced the case that the fraud might be a Japanese fraud, it was thought that the prosecution were not alive to the real significance of Shannon's plea, namely that it was direct evidence of a United Kingdom fraud. It was thought inadvisable to risk the Court of Appeal pointing this out. Thirdly, it was appreciated that if the

appellant successfully contended that Shannon's plea was a nullity, he would have to be rearraigned. He could then have pleaded guilty to count 3 for the limited period as he was willing to do, or count 5 could have been amended to cure the defect alleged. There were obvious advantages to the defence in not having Shannon's plea to conspiracy on count 3 admitted under s 74. Mr Jones submitted that such a plea could not have been admitted. We do not agree. The case of *Lunnon* is authority to the contrary. This is not a case where only two conspirators are charged in the count, as in *R v O'Connor* (1987) 85 Cr App R 298 or where it was a necessary inference from the facts of the case that a plea by one of the three conspirators necessarily implicated the accused as in *R v Curry* [1988] Crim LR 527. It is true that in the course of his review on the admissibility of the plea the judge expressed the view that the fact that Shannon's plea did not in any way prove the appellant's participation in any conspiracy told in favour of allowing its admission in evidence. It does not in the least follow from this observation that if the judge had been persuaded that count 5 was bad in law, he would have refused to admit evidence of a limited plea to count 3 by Shannon for the purpose of proving the existence of a fraud or conspiracy on the English revenue, which was indeed the sole purpose of the exercise. It did not prove the appellant's complicity in the conspiracy.

Finally on this point Mr Jones submitted that since the appeal related only to the exercise of the judge's discretion under s 78, the appellant is not now estopped from raising arguments, as he sought to do in grounds 1 to 3 as to inadmissibility. We cannot accept this contention. The judge's decision under appeal related to the admissibility of the plea under s 74. That must relate both to jurisdiction and discretion.

In ground 5 it is contended that there was a material irregularity in the trial in that the issue of Shannon's guilt upon counts 1 to 4 of the indictment was tried in his absence as an issue in the case against the appellant.

The judge explained the position to the jury, correctly in our view, in this passage:

> '[Shannon] has pleaded not guilty to the four counts on which he was originally indicted. As you have heard, the Crown do not accept those pleas, but they are content not to proceed against Shannon on those four pleas in the light of his plea of guilty to count 5. Those four pleas simply in legal terminology remain on the file not to be proceeded with without the leave of this court or the Court of Criminal Appeal.'

In our judgment, the prosecution never said anything contrary to this and the jury cannot have been under any misapprehension. Shannon was not in their

charge and they were not required to give a verdict in respect of him. There is nothing whatever in the point.

In ground 6 it is contended that the judge misdirected the jury as to the evidential value of Shannon's plea of guilty to count 5 and the position of the co-conspirators Botnar and Thorsen. It is said first that the judge should have warned the jury that it was dangerous to rely on the plea in the absence of corroboration; that submission

was not persisted in. It was, however, argued that the type of warning that is given where one co-accused gives evidence against another should have been given.

No authority was cited in support of this proposition. But Mr Jones relied upon the general statement of principle in *R v Cheema* [1994] 1 WLR 147. In that case the court reviewed the authorities relating to the proper direction to be given where one co-accused gives evidence against another. Lord Taylor CJ said (at 157):

> 'Accordingly, in our judgment, what is required when one defendant implicates another in evidence, is simply to warn the jury of what may very often be obvious--namely, that the defendant witness may have a purpose of his own to serve.'

Mr Jones pointed out that is a requirement. That is so, but it relates to a situation where one defendant implicates another in evidence. Shannon did not give evidence and his plea did not implicate the appellant.

Reliance was also placed on observations of Staughton LJ in *R v Kempster* [1989] 1 WLR 1125 at 1134. That was a case on ss 74 and 78 of the 1984 Act. He said:

> 'On the more general question whether, if objection had been taken under section 78, the evidence should have been excluded, we have paid particular attention to the observation in *Reg. v Curry* that "where the evidence expressly or by necessary inference imports the *complicity* of the person on trial it should not be used" (our emphasis). The effect of admitting a conviction as evidence of the complicity of the defendant is that the prosecution will not have to call the person convicted as a witness, to give evidence on oath. It may well be true that the other person is unlikely to have pleaded guilty unless he was in fact guilty; but the defence will be deprived of any opportunity to cross-examine him, in particular as to the complicity of the defendant.'

This dictum is in the context of the exercise of discretion under s 78 of the 1984 Act and relates to the admission of a plea of guilty which necessarily involves complicity of the defendant. Whether in such a case, if the judge has exercised his discretion in favour of admitting such a plea, he should give a warning that the jury should bear in mind that they have not had the advantage of hearing the co-accused cross-examined and that he may have a purpose of his own to serve, must depend on the circumstances of each case. But that is not this case.

The judge was careful to tell the jury the purpose and the sole purpose for which the plea was relevant. He commended the prosecution's approach, which came to the same in the end as that of the defence, but divided the issue into two questions. First, he said:

> 'Has it been proved to you that there was a cheat on the revenue, a conspiracy? If so, has the prosecution proved to you that [the appellant] was a party to that conspiracy? I ask you, members of the jury, to consider this case on Mr Rook's approach, because it does highlight the importance of the plea of guilty by Mr Shannon. One of the things that the prosecution has to prove, of course, is that there was a cheat on the United Kingdom revenue. If you are satisfied that there was a cheat on the United Kingdom revenue, no doubt you will be satisfied that there is a conspiracy to do it because it is the sort of massive fraud that could not be committed by one man alone. He must have had assistance. If you come to the conclusion on that first issue that there was
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> *[1994] STC 819 at 833*
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> a conspiracy to cheat the United Kingdom revenue that plea of guilty to count 5 is very powerful evidence that there was a cheat on the revenue and that is where its relevance comes in, but it is not relevant to the second of Mr Rook's two issues: if there was a cheat, was [the appellant] a party to it? It has no bearing on that at all. I think you will appreciate the difference, that is why I have asked you to approach the crucial issue, that is the two parts; remembering that the plea of guilty to cheating by Shannon in the year 1985 to 1986 is a very relevant matter when you consider whether

> this was an English cheat or a Japanese cheat, but it has no bearing on the second vital question that you also have to be satisfied of and that is, was [the appellant] a party to that cheat?'

In answer to the jury's question about direct evidence of fraud on the revenue, he told them that Shannon's plea was such evidence. He said:

> 'Let me make it plain; that is the only direct evidence. All the rest must be inference. It is an inference you may feel follows from the direct evidence, but it is for you to judge how strong the inference is. In other words, Shannon's plea to guilty of cheating in 1985-86 does not prove a conspiracy by itself. You need other evidence to decide that. It certainly does not prove [the appellant's] being concerned in that cheat of the revenue.'

Mr Jones submits that even if a warning is not necessary or required in every case, it was required in this case because of the special circumstances which were known to the judge surrounding Shannon's plea. Following this plea, on 1 February 1993 negotiations took place between the Revenue, through Mr Brown, a senior officer, and Shannon's legal and financial advisers. Shannon was anxious to settle all his outstanding tax liabilities to the Revenue. These related not only to any liability that the Revenue might eventually be able to prove in relation to the fraud in issue in the case, but to other matters which were quite unrelated to it. On 4 May 1993, Shannon entered into an agreement to settle all his outstanding liabilities by paying £10m over a period of time.

The submission made by Mr Jones appeared to be that, because Shannon was anxious to settle all his liabilities, he was prepared to plead guilty to something which he had never done. We do not accept this submission. While it is reasonable to assume that any co-defendant who pleads guilty does so because he sees benefit to himself in such a course, either by limiting his involvement or by obtaining a discount on sentence or both, and in that sense has a purpose of his own to serve, it is not reasonable to believe that he will plead guilty to something he had not done. A warning is required if and when a co-accused gives evidence seeking to minimise his own part at the expense of a defendant, not because he admits his own guilt. In our judgment, it adds nothing to show that Shannon was anxious, following his plea for which the initiative came from him, to settle all outstanding liabilities. Moreover, if Mr Jones's submission is right, it would be necessary to give a warning on the admission of a plea of guilty but not a conviction. This cannot be correct.

In our judgment, there is nothing in the point that the judge failed to warn the jury not to find the appellant guilty by association, or that the failure of Botnar and Thorsen to face trial was not evidence against the appellant. Indeed, in the event, Mr Jones did not press this aspect of the ground of appeal.

In ground 7 it is contended that the judge misdirected the jury in answering their question 'Is there any direct evidence of fraud (tax evasion) upon the United Kingdom revenue?' The judge answered the question in the affirmative. He said on day 34:

> 'Shannon's plea of guilty to count 5 is direct evidence that Shannon cheated the revenue in the year alleged, 1st November 1985 to 31st October 1986. That is direct evidence, his plea of guilty. That is tax evasion and, indeed, the

> other particulars in the offence charged follow. What you do not know is the basis on which he pleaded. In other words, was he pleading to using false invoices, false agreements or false correspondence. You do not know that. What you do know is that Shannon pleaded guilty to cheating Her Majesty's Commissioners of Inland Revenue of Public Revenue Corporation Tax in that year. The rest of the particulars follow because all this is admitted. Let me make it plain; that is the only direct evidence. All the rest must be inference. It is an inference you may feel follows from the direct evidence, but it is for you to judge how strong the inference is. In other words, Shannon's plea to guilty of cheating in 1985-86 does not prove a conspiracy by itself. You need other evidence to decide that. It certainly does not prove [the appellant's] being concerned in that cheat of the revenue.'

The reference to 'direct evidence' in the jury's question appears to have arisen from a submission made by Mr Sherrard on the difference between direct evidence and inference. The jury was handed copies of the dictum of Lord Diplock in *Kwan Ping Bong v R* [1979] AC 609 at 615 where he said:

> 'There is no principle in the criminal law more fundamental than that the prosecution must prove the existence of all essential elements of the offence with which the accused is charged--and the proof must be "beyond all reasonable doubt," which calls for a degree of certainty considerably higher than proof on a mere balance of probabilities. The requirement of proof beyond all reasonable doubt does not prevent a jury from inferring, from the facts that have been the subject of direct evidence before them, the existence of some further fact, such as the knowledge or intent of the accused, which constitutes an essential element of the offence; but the inference must be compelling--one (and the only one) that no reasonable man could fail to draw from the direct facts proved.'

In our judgment, it was undesirable that the jury should have been given this statement in writing, not because it is wrong, but because questions of the burden and standard of proof and the drawing of inferences is a necessary part of the direction the judge must and did give. To emphasise one point by giving it in writing may tend to detract from the judge's other directions and there is the possibility that the jury may not understand what is meant by direct evidence.

Mr Jones's submissions fall under two heads. Firstly, he contends that the judge's direction was inconsistent with what he had previously said in the course of the summing-up, and therefore, presumably wrong. On day 33, he had said:

> 'In fact, members of the jury, I am reminded by Mr Sherrard and he is quite right, there is no direct evidence of a fraud either way. It is only inference, is it not? If there was a fraud on the United Kingdom revenue, there is no direct evidence, you may infer that from all the surrounding circumstances that we have been through at great length.'

Secondly, he submits that the plea was not direct evidence of fraud on the United Kingdom revenue. We do not agree; in our judgment it was, because that is the effect of s 74 of the 1984 Act. It was direct evidence that Shannon had committed a cheat or fraud on the United Kingdom revenue in relation to the false freight costs incurred by NUK. The judge's earlier direction was too favourable to the appellant. In fact, there was ample direct evidence from which the jury could infer that the fraud was on the United Kingdom revenue.

It was one of the principal planks of Mr Jones's argument that this answer to the jury's question, being wrong, accounted for the fact that the jury convicted on count 3

but acquitted on count 1. This leads to a consideration of ground 10, in which it is contended that the verdict is unsafe and unsatisfactory by reason of that

inconsistency. An appellant who seeks to obtain the quashing of a conviction on the ground that the verdict of guilty on a count on which he was convicted was inconsistent with a verdict of not guilty on another count has a burden cast upon him to show not merely that the verdicts on the two counts were inconsistent, but that they were so inconsistent as to call for interference by an appellate court (see *R v Durante* [1972] 3 All ER 962 and *R v McKechnie* (1991) 94 Cr App R 51). Mr Jones conceded that there was no logical inconsistency between the two verdicts. Despite this, he contended that because the prosecution had always presented the case as being a single fraud throughout the period 1975 to December 1991, the jury could not sensibly acquit the appellant in relation to the earlier period and convict in respect of the latter. This is to place far too much weight on the Crown's contention that throughout this period there was a fraud on the United Kingdom revenue and that the nature of the fraud was the same, namely the underdeclaration of profits for corporation tax by the false inflation of freight charges. But there were two conspiracies and not one, with different conspirators, other than the three NUK directors who were common to both. The judge correctly directed the jury that they had to consider the evidence in relation to each count separately. It would have been a misdirection to hold that the two counts stood or fell together. The evidence relating to them, particularly relating to the appellant's involvement, was quite different on each. It is perfectly possible that the jury was sure of his involvement in the Scansiris project, but not in the Autocontex project.

There was ample evidence in addition to Shannon's plea that the fraud was on the United Kingdom revenue. It is only necessary to refer to a few matters. (1) The initiative for the change from c i f to c & i together with separate freight payments came from NUK. This is what made the fraud possible. (2) There was cogent evidence that no one would pay freight rates higher than the 'Conference' or 'Harrods' rates. Yet this is what NUK were doing. (3) Throughout the period the Japanese referred to the genuine freight rates charged and received by NMCC. (4) Senior executives from NMC and NMCC gave evidence. They were cross-examined at length on the documents on the basis that it was a Japanese fraud and not a United Kingdom one. They denied it and their denials were tested. The jury must have accepted their explanations. (5) In about 1984 the Japanese were anxious to change the Swiss bank from the BFG. This made no sense if they were parties to the fraud since Vogelsang and this bank were essential links.

There was significantly more evidence of the appellant's involvement in the second period than the first. There was evidence on the following among other points. The appellant had visited Japan with Thorsen when Scansiris took over from Autocontex and signed the bogus shipping agreements with Scansiris. He was involved in setting up the new banking arrangements with BFG and knew Vogelsang. He was involved in the negotiation of the c & i prices payable to NMC in 1985 and 1986. This could not be done without knowledge of the true freight rates. After Shannon's departure there was evidence that the appellant was responsible for circulating the revised inflated freight rates to the NUK accounts department. There was evidence that, in Botnar's absence, the appellant deputised for him in all matters. Documents found in his desk and office showed that he was well aware of the true freight rates. At no

stage, either in evidence or before trial, did the appellant seek to give any explanation of these matters.

The argument that the verdicts are inconsistent is quite unsustainable.

Ground 9 raises a different point, which is not linked, as most of the other grounds are, to Shannon's plea. It is contended that the judge's comments shortly before the jury returned their verdict imposed an unfair pressure upon them and constituted a material irregularity.

The jury retired at 2.07 p m on Thursday 24 June. They were given a majority verdict direction at 2.27 p m on Friday. At 4.44 p m the jury returned to court to say that they had not reached a 10 to 2 majority. The judge told them that it was

very important that they should feel under no pressure at all, arrangements were made for their overnight accommodation and they could continue next day for as long as necessary. He then gave them the direction which was approved in *R v Watson* [1988] QB 690. The proceedings for that day were adjourned at 5.15 p m.

On Saturday 26 June at 12.49 p m the jury sent another note. In accordance with the authority of *R v Gorman* [1987] 2 All ER 435 the judge declined to show the note to counsel. In that case Lord Lane CJ, after saying that the general rule is that jury notes should be disclosed to counsel, said this (at 439):

> 'Exceptionally if, as in the present case, the communication from the jury contains information which the jury need not, and indeed should not, have imparted, such as details of voting figures, as we have called them, then, so far as possible the communication should be dealt with in the normal way, save that the judge should not disclose the detailed information which the jury ought not to have revealed.'

Mr Jones invited this court to rule that the note should be disclosed to counsel. We have seen this note. We declined to make the ruling sought by Mr Jones. We are satisfied that it is one to which Lord Lane's dictum applies.

When the jury returned to court, the judge said:

> 'Mr Foreman, I have no doubt the jury is striving night and day to reach the preferable unanimity, at least the necessary acceptable majority of 10 to 2 on which I have directed you. All I am going to say is that you can take time off until 2 o'clock because I will not accept a verdict between now and 2 o'clock. Thank you very much.'

The jury returned their verdict at 2.14 p m.

It is that last passage of which Mr Jones complains. It is submitted that this remark amounted to unacceptable pressure on the jury and gave rise to what Mr Jones says is a compromise verdict of an acquittal on count 1 and a conviction on count 3.

In our judgment, this submission is quite untenable. It cannot possibly amount to improper pressure to tell the jury that the judge believes they have been striving to reach an acceptable verdict. To say that he will not accept a verdict till 2 p m is the standard instruction that a judge gives a jury if he is not available to take the verdict and he wishes them to take a break for refreshment. For reasons which we have already dealt with under ground 10, there is no substance in the submission that the jury may have reached a compromise verdict.

Grounds 11 and 12 relate to the admission of documents obtained by the Revenue as a result of a search and seizure operation carried out on 26 June 1991 pursuant to warrants issued the previous day. We are concerned principally with the search carried out at Nissan House; a number of incriminating documents were found in the appellant's office and desk. It is said that all the documents seized as a result of this search, and others at the home of the appellant and other officers of NUK, should not have been admitted in evidence. The judge, it is said, should have excluded them in the exercise of his discretion under s 78 of the 1984 Act for two reasons: firstly, that the warrants were unlawful (ground 11) and, secondly, that the seizure exceeded the terms of the warrants, was excessive and disproportionate and consequently an illegal abuse of process (ground 12).

The first thing to note about these grounds of appeal is that no application was made to the judge to exclude the documents. Nothing daunted, Mr Jones submits that one ought to have been made; he contends that the appellant's previous advisers were guilty of flagrant incompetence in not making it, and that it would have succeeded had it been made.

The conclusion that the warrant was bad in law depends upon its wording and the proper construction of s 20C(1) of the Taxes Management Act 1970 which was

inserted in that Act by Sch 6 to the Finance Act 1976 and subsequently amended by s 146 of the Finance Act 1989. Section 20C(1) provides as follows:

> 'If the appropriate judicial authority is satisfied on information on oath given by an officer of the Board that--
>
> (*a*) there is reasonable ground for suspecting that an offence involving serious fraud in connection with, or in relation to, tax is being, has been or is about to be committed and that evidence of it is to be found on premises specified in the information; and
>
> (*b*) in applying under this section, the officer acts with the approval of the Board given in relation to the particular case,
>
> the authority may issue a warrant in writing authorising an officer of the Board to enter the premises, if necessary by force, at any time within 14 days from the time of issue of the warrant, and search them.'

Limitations on the scope of the warrant are imposed by s 20C(1B):

> 'The powers conferred by a warrant under this section shall not be exercisable--
>
> (*a*) by more than such number of officers of the Board as may be specified in the warrant;

(*b*) outside such times of day as may be so specified;

(*c*) if the warrant so provides, otherwise than in the presence of a constable in uniform.'

Section 20C(3) confers the powers on the Revenue officers and provides as follows:

'An officer who enters the premises under the authority of a warrant under this section may--

(*a*) take with him such other persons as appear to him to be necessary;

(*b*) seize and remove any things whatsoever found there which he has reasonable cause to believe may be required as evidence for the purposes of proceedings in respect of such an offence as is mentioned in subsection (1) above; and

(*c*) search or cause to be searched any person found on the premises whom he has reasonable cause to believe to be in possession of any such things;

but no person shall be searched except by a person of the same sex.'

Protection for the occupier's rights are set out in s 20C(5) which provides:

'An officer of the Board seeking to exercise the powers conferred by a warrant under this section or, if there is more than one such officer, that one of them who is in charge of the search--

(*a*) if the occupier of the premises concerned is present at the time the search is to begin, shall supply a copy of the warrant endorsed with his name to the occupier;

(*b*) if at that time the occupier is not present but a person who appears to the officer to be in charge of the premises is present, shall supply such a copy to that person; and

(*c*) if neither paragraph (*a*) nor paragraph (*b*) above applies, shall leave such a copy in a prominent place on the premises.'

The warrant was issued by His Honour Judge Lowry on 25 June 1991. It was addressed to 'Not more than 55 officers of the Board of Inland Revenue'. It authorised entry to Nissan House between 7 a m and midnight on any day within

[1994] STC 819 at 838

14 days of issue to search the premises. Any officer who was involved was authorised to do the acts permitted by s 20C(3) of the Taxes Management Act 1970. The warrant was endorsed with the name of Mr Brown of the Inland Revenue Enquiry Branch who was in overall charge of the case. Mr Jones submits that the 55 officers must be named in the warrant and that it was invalid because this was not done.

The submission is not based on the language of s 20C, from which it gains no support, but upon a dictum of Lord Diplock in *IRC v Rossminster* [1980] STC 42, [1980] AC 952. The principal issue in that case was whether the precise nature of the

offences alleged to have been committed had to be specified in the warrant. The House of Lords held that they did not. The warrant in that case did signify the names of the Revenue officers, but the number of officers was not in issue. It was in this context that Lord Diplock said ([1980] STC 42 at 53, [1980] AC 952 at 1009):

> 'All that the subsection expressly requires shall be specified in the warrant are the address of the premises to be searched and the name of the officer or officers of the Board who are authorised to search them.'

The passage is clearly obiter and there is nothing similar in any of the other speeches of their Lordships. Nevertheless, because Parliament considered the section in 1989, Mr Jones submits that it must be taken to have approved the dictum. While it is true that several of their Lordships expressed concern at the width of the Revenue's powers, the warrant is valid if it complies strictly with the requirements of the section. Lord Wilberforce said ([1980] STC 42 at 44, [1980] AC 952 at 998):

> 'It is necessary to be clear at once that Parliament, in conferring these wide powers, has introduced substantial safeguards. Those relevant to this case are three: (1) No action can be taken under s 20C without the approval of the Board of Inland Revenue--viz, two members, at least, acting personally ... (2) No warrant to enter can be issued except by a circuit judge, not, as is usually the case, by a magistrate ... (3) The courts retain their full powers of supervision of judicial and executive action. There is nothing in s 20C which cuts these down: on the contrary, Parliament, by using such phrases as "is satisfied", "has reasonable cause to believe", must be taken to accept the restraints which courts in many cases have held to be inherent in them.'

In our judgment Mr Jones's submission cannot be reconciled with the express words of the statute. Section 20C(1B)(*a*) makes no sense if the names and not the maximum number of officers has to be specified.

Accordingly, in our judgment, the legal basis for the challenge to the validity of the warrant is not made out. Even if the warrant was technically defective, the court could have refused to exclude the documents, either pursuant to s 78 or its common law powers (see *R v Sang* [1980] AC 402). Although the courts require strict compliance with formality in warrants, it is difficult to see how the appellant was prejudiced by the fact that only the number and not the names were included in the warrant. The protection to the occupier is afforded by s 20C(5); and that was complied with.

There is simply no evidence before the court to sustain the contention in ground 12 that there was an abuse of process.

Even if we are wrong in our construction of s 20C, and contrary to our view the documents might have been excluded in the exercise of the judge's discretion, the appellant's argument faces insuperable difficulty under the principles set out in *Clinton*. It is now clear from the memorandum provided by trial counsel that the question of the validity of the warrant was carefully considered by them and several other senior and experienced counsel. No one thought the warrant would be held

invalid on the basis of Lord Diplock's dictum. It was not until an opinion written by Mr Jones and Mr de Haan dated 17 May 1993 (well after the trial had started) that the contrary opinion was expressed, this opinion apparently having been written for Botnar for the purpose of certain civil proceedings. But quite apart from the fact that there was no justification for taking a barely arguable point of law, which even if

right, would not have secured the exclusion of the documents, there were sound tactical reasons not to do so. One of the main planks of the defence case was that NUK, in marked contrast to NMC and NMCC, had kept a vast quantity of documentation. NUK had nothing to hide, they would have destroyed documents if they had; why was it that the Japanese retained so few?

It was a good point. It would have been destroyed if all the documents seized in the search were excluded. Moreover, some of these documents were made the foundation of the case against the Japanese and the cross-examination of their witnesses. In our judgment, no valid criticism can be made of trial counsel in relation to this matter. It is a matter of regret to this court that the appellant's present counsel should see fit to make such a completely unsustainable attack on the competence of trial counsel. Counsel should exercise some discretion before asserting that previous counsel have been guilty of flagrant incompetence or have taken a course which is contrary to the promptings of reason and good sense, and in particular they should have regard to the explanations given by previous counsel for their advice and decisions. It is not enough to point to some mistake or supposed mistake and assert that it amounts to flagrant incompetence, as if that expression will open the door to a new trial.

For these reasons we dismiss the appeal and refuse leave where it is required to appeal against conviction.

We turn to the application for leave to appeal on sentence. The grounds of appeal are commendably short. They are that the sentence of eight years is manifestly excessive in the light of the applicant's antecedents and there is disparity with the sentence of three years passed on Shannon.

The applicant is now 60, he is married with children and grandchildren. He is of good character. The loss to the revenue over the period of count 3 was £55m in lost corporation tax and over £30m in interest. It was fraud on a massive scale over nine years. While it is true to say that the Crown could not prove by how much the applicant had benefited from the fraud, it is absurd to suggest that he had not done so at all. Those who indulge in fraud on anything like this scale are playing for very high stakes. The potential profit is enormous; the punishment if they are caught must be condign. This type of fraud with its complex web of international transactions, overseas banks and trail of false documents is difficult to detect and immensely expensive to prosecute. It is inevitable that those who are brought to justice face deterrent sentences. In our judgment, the sentence was not a day too long.

There is nothing in the disparity point. Shannon had to be sentenced on the basis of his limited plea and mitigation. In this type of case those who plead guilty are entitled to a substantial discount. If the appellant feels aggrieved at the disparity, he has no justifiable reason to do so. The application must be refused.

Appeal dismissed.

Barbara Higham Solicitor.

NEW SENTENCING GUIDELINES FOR CORPORATE FRAUD

Sally Daulton

Sally Daulton

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Sally joined Devon Chambers as a pupil in October 2010 and became a tenant in October 2011. Before coming to the bar, Sally has a career in business and as a management consultant. She worked for Price Waterhouse's Strategic Consulting Group, was a Director of Devon and Cornwall Training and Enterprise Council, and spent many years as a Non-Executive Director in the NHS.

Family
Sally accepts instructions in financial remedy and public and private children law matters.

She has acted at all stages of financial remedy proceedings, including claims under the Matrimonial Causes Act, TOLATA and Schedule 1 Children Act. Her involvement has ranged from providing initial advice on the prospects of the claim to conducting contested final hearings.

She has represented parents in private law children matters, including conducting fact-finding and contested final hearings. She has also acted in public law children matters at all stages in proceedings form late night emergency protection order applications to agreed and contested final hearings.

Crime
Sally is regularly instructed by the Crown Prosecution Service, the Department for Work and Pensions and the Probation Service to prosecute in both the Crown and Magistrates Courts. She is a Category 2 Prosecutor. Sally also defends in both courts. She has experience of a wide range of offences including Offences Against the Person, Offences Against Property, Drugs, Theft and Fraud (including Robbery and Burglary), Public Disorder, Sexual Offences and Motoring Offences.

She has also represented both appellants and respondents in appeals to the Crown Court, and undertakes work involving confiscation proceedings under the Proceeds of Crime Act 2002.

Sally also receives instructions in Prison Law cases, representing prisoners at parole hearings.

Mental Health
As a Non-Executive Director of Cornwall Partnership NHS Trust, Sally was Chair of the Mental Health Act Managers for Cornwall and regularly chaired Mental Health Act panels at which patients were detained or discharged under the Mental Health Act 1983. She has particular strengths in advocating for people with learning difficulties or mental health issues, and is happy to accept instructions for Mental Health Tribunals.

New Sentencing Guidelines for Corporate Fraud

Background

In 2012 the Ministry of Justice consulted on the introduction of Deferred Prosecution Agreements (DPAs) for dealing with corporate offenders involved in economic crime. A DPA is an agreement made between a prosecutor and an organisation under which a criminal prosecution is deferred pending compliance with terms and conditions that may include payment of substantial financial penalties.

In2012 the Lord Chancellor wrote to the Sentencing Council in relation to a proposal that it was the appropriate body to issue guidance for the new DPAs system. The Council responded that its statutory function extends only to issuing guidelines on disposals following conviction; as DPAs do not fall within this remit it was not possible for the Council to produce such guidance without amending its statutory functions. In the event, the Council agreed to expedite its planned work on bribery, fraud and money laundering and to include within these guidelines guidance for sentencing both individual and corporate offenders. Both sets of guidelines will come into force from 1 October 2014. The guidelines for individuals have not yet been published. The guidelines for corporate offenders will not be published in hard copy until those for individuals are also available, but have been published on-line, in order that they can be used in the DPA development process.

The guidelines will operate as a definitive guideline in cases where organisations are prosecuted for, and convicted of the offences covered. It is not a guideline for DPAs, as they will only be made where there is not a conviction, but the Sentencing Council has expressed the hope that it will be of assistance as a point of reference when fine levels within DPAs are being considered and negotiated.

There is currently no guideline for sentencing organisations convicted of financial crimes. The new guideline covers fraud, money laundering and bribery offences committed by companies or other corporate bodies, for example, local authorities. In the guideline the term 'corporation' is used to describe the offender; the term covers any organisation or body including partnerships and charities but it does not cover individuals.

There have been very few criminal prosecutions of organisations for the offences covered by this guideline and consequently no established sentencing practice for organisations.

The only punishment available for an organisation convicted of these offences is a fine.

A separate guideline for individuals convicted of fraud offences will be published later in 2014.

Introduction

The guidelines cover the following offences:

Fraud
Conspiracy to defraud (common law)
Cheat the public revenue (common law)
Triable only on indictment

Fraud Act 2006 (sections 1, 6 and 7)
Theft Act 1968 (section 17)
Value Added Tax Act 1994 (section 72)
Customs and Excise Management Act 1979 (section 170)
Triable either way

Bribery
Bribery Act 2010 (sections 1, 2, 6 and 7)
Triable either way

Money laundering
Proceeds of Crime Act 2002 (sections 327, 328 and 329)
Triable either way

The maximum penalty for all offences is an unlimited fine.

The guidelines apply to all organisations that are sentenced on or after 1 October 2014, regardless of the date of the offence.

STEP ONE – Compensation

The court must consider making a compensation order requiring the offender to pay compensation for any personal injury, loss or damage resulting from the offence in such an amount as the court considers appropriate, having regard to the evidence and to the means of the offender.

Where the means of the offender are limited, priority should be given to the payment of compensation *over payment of any other financial penalty*.
Reasons should be given if a compensation order is not made.

STEP TWO - Confiscation

Confiscation must be considered if either the Crown asks for it or the court thinks that it may be appropriate. Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation).

STEP THREE - Determining the offence category

The court should determine the offence category with reference to:

Culpability: demonstrated by the offending corporation's role and motivation.
Harm: represented by a financial sum (The amount obtained or intended to be obtained,
or the loss avoided or intended to be avoided).

CULPABILITY

May be demonstrated by one or more of the following non-exhaustive characteristics:

High culpability

- Corporation plays a leading role in organised, planned unlawful activity (whether acting alone or with others)
- Wilful obstruction of detection (for example destruction of evidence, misleading investigators, suborning employees)
- Involving others through pressure or coercion (for example employees or suppliers)
- Targeting of vulnerable victims or a large number of victims
- Corruption of local or national government officials or ministers
- Corruption of officials performing a law enforcement role
- Abuse of dominant market position or position of trust or responsibility
- Offending committed over a sustained period of time
- Culture of wilful disregard of commission of offences by employees or agents with no effort to put effective systems in place (section 7 Bribery Act only)

Medium culpability

- Corporation plays a significant role in unlawful activity organised by others
- Activity not unlawful from the outset
- Corporation reckless in making false statement (section 72 VAT Act 1994)
- All other cases where characteristics for categories high or low are not present

Lesser culpability

- Corporation plays a minor, peripheral role in unlawful activity organised by others
- Some effort made to put bribery prevention measures in place but insufficient to amount to a defence (section 7 Bribery Act only)
- Involvement through coercion, intimidation or exploitation

HARM

The measure of harm will depend on the nature of the offence:

Fraud For offences of fraud, conspiracy to defraud, cheating the Revenue and fraudulent evasion of duty or VAT, harm will normally be **the actual or intended gross gain to the offender.**

Bribery For offences under the Bribery Act the appropriate figure will normally be **the gross profit from the contract obtained, retained or sought as a result of the offending**. An alternative measure for offences under section 7 may be the likely cost avoided by failing to put in place appropriate measures to prevent bribery.

Money laundering For offences of money laundering the appropriate figure will normally be **the amount laundered** or, alternatively, the likely cost avoided by failing to put in place an effective anti-money laundering programme if this is higher.

General Where the actual or intended gain cannot be established, the appropriate measure will be **the amount that the court considers was likely to be achieved in all the circumstances**. In the absence of sufficient evidence of the amount that was likely to be obtained, 10–20% of the relevant revenue (for instance between 10 and 20% of the worldwide revenue derived from the product or business area to which the offence relates for the period of the offending) may be an appropriate measure. There may be large cases of fraud or bribery in which the true harm is to commerce or markets generally. That may justify adopting a harm figure beyond the normal figures.

STEP FOUR - Starting point and category range

The harm figure at step three is multiplied by the relevant percentage figure representing culpability.

	Culpability Level		
Harm figure multiplier	**High**	**Medium**	**Low**
	Starting Point 300%	Starting point 200%	Starting point 100%
	Category range 250% to 400%	Category range 100% to 300%	Category range 20% to 150%

Position within the category range is then determined by considering the aggravating and mitigating factors:

Aggravating factors

- Previous relevant convictions or subject to previous relevant civil or regulatory enforcement action
- Corporation or subsidiary set up to commit fraudulent activity
- Fraudulent activity endemic within corporation
- Attempts made to conceal misconduct
- Substantial harm (whether financial or otherwise) suffered by victims of offending or by third parties affected by offending
- Risk of harm greater than actual or intended harm (for example in banking/credit fraud)
- Substantial harm caused to integrity or confidence of markets
- Substantial harm caused to integrity of local or national governments

- Serious nature of underlying criminal activity (money laundering offences)
- Offence committed across borders or jurisdictions

Mitigating factors

- No previous relevant convictions or previous relevant civil or regulatory enforcement action
- Victims voluntarily reimbursed/compensated
- No actual loss to victims
- Corporation co-operated with investigation, made early admissions and/or voluntarily reported offending
- Offending committed under previous director(s)/ manager(s)
- Little or no actual gain to corporation from offending

STEP FIVE - Adjustment of fine

Having arrived at a fine level, the court should consider whether there are any further factors which indicate an adjustment in the level of the fine. The court should 'step back' and consider the overall effect of its orders. The combination of orders made, compensation, confiscation and fine ought to achieve:

- the removal of all gain
- appropriate additional punishment, and
- deterrence.

The fine may be adjusted to ensure that these objectives are met in a fair way.

The court should consider any further factors relevant to the setting of the level of the fine to ensure that the fine is proportionate, having regard to the size and financial position of the offending organisation and the seriousness of the offence.

Factors to consider in adjusting the level of fine

- Fine fulfils the objectives of punishment, deterrence and removal of gain
- The value, worth or available means of the offender
- Fine impairs offender's ability to make restitution to victims
- Impact of fine on offender's ability to implement effective compliance programmes
- Impact of fine on employment of staff, service users, customers and local economy (but not shareholders)
- Impact of fine on performance of public or charitable function.

STEP SIX - Consider any factors which would indicate a reduction, such as assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP SEVEN - Reduction for guilty pleas

STEP EIGHT - Ancillary Orders

STEP NINE - Totality principle

STEP TEN - Reasons