Hilary Term
[2012] UKSC 5
On appeal from: [2010] EWCA Civ 1465

JUDGMENT

In the matter of Peacock (Appellant)

before

Lord Hope, Deputy President
Lord Walker
Lady Hale
Lord Brown
Lord Wilson

JUDGMENT GIVEN ON

22 February 2012

Heard on 14 December 2011

Appellant
Orlando Pownall QC
Christopher Marsh-Finch
(Instructed by Creed Lane Law Group)

Respondent
David Perry QC
William Hays
(Instructed by CPS Appeals Unit)

Intervener (Secretary of State for the Home Department)
David Perry QC
William Hays
(Instructed by Treasury Solicitors)

LORD BROWN

1. Suppose that a convicted drug trafficker is found to have benefited from his trafficking to the extent of £1m but, having at the time realisable property worth only £100,000, a confiscation order is initially made against him just for this lesser sum. Suppose then that the defendant, entirely legitimately, later acquires property to the value of upwards of a further £900,000. Is he at that stage liable to a further court order increasing to the full extent of his criminal gain the amount recoverable under the confiscation order by reference to these after-acquired assets?

2. It is not in doubt that, assuming his offences were committed after 24 March 2003, and that he were therefore subject to the provisions of the Proceeds of Crime Act 2002 ("POCA"), the answer would be a clear "yes" – see particularly section 22(3) of POCA. But what if, as in the case of this appellant, his offences were committed before that date so that he falls to be dealt with under the Drug Trafficking Act 1994 ("the 1994 Act"), in particular under section 16 of that Act? Section 16, as amended by section 165(1) of, and paragraph 169 of Schedule 9 to, the Powers of Criminal Courts (Sentencing Act 2000, provides:

> "(1) This section applies where, by virtue of section 5(3) of this Act, the amount which a person is ordered to pay by a confiscation order is less than the amount assessed to be the value of his proceeds of drug trafficking.
>
> (2) If, on an application made in accordance with subsection (3) below, the High Court is satisfied that the amount that might be realised in the case of the person in question is greater than the amount taken into account in making the confiscation order (whether it was greater than was thought when the order was made or has subsequently increased) the court shall issue a certificate to that effect, giving the court's reasons.
>
> (3) An application under subsection 2 above may be made either by the prosecutor or by a receiver appointed in relation to the realisable property of the person in question under section 26 or 29 of this Act or in pursuance of a charging order.
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> (4) Where a certificate has been issued under subsection (2) above the prosecutor may apply to the Crown Court for an increase in the

amount to be recovered under the confiscation order; and on that application the court may –

> (a) substitute for that amount such amount (not exceeding the amount assessed as the value referred to in subsection (1) above) as appears to the court to be appropriate having regard to the amount now shown to be realisable; and
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> (b) increase the term of imprisonment or detention fixed in respect of the confiscation order under subsection (2) of section 139 of the Powers of Criminal Courts (Sentencing) Act 2000 (as it has effect by virtue of section 9 of this Act) if the effect of the substitution is to increase the maximum period applicable in relation to the order under subsection (4) of that section."

3. Is the High Court, on an application made under section 16(2), entitled to have regard to after-acquired assets? That is the critical question now for decision by this court, leave to appeal in respect of it having been granted on 11 April 2011. It was a question expressly left open by the House of Lords successively in *In re Maye* [2008] 1 WLR 315 (see Lord Scott of Foscote's speech at para 24) and *R v May* [2008] AC 1028 (see Lord Bingham's speech at para 41).

4. There is, however, a preliminary issue also to be decided: was section 16 in force at the material time?

5. With that brief introduction let me sketch in, to the limited extent necessary, the particular facts of the present case.

6. On 7 January 1997 the appellant pleaded guilty before Judge Slinger at the Crown Court sitting at Preston to five offences of conspiracy to supply controlled drugs, two offences relating to Class A drugs, three to Class B drugs, all committed in 1995. On 8 January 1997 he was sentenced to 12 years imprisonment, reduced on appeal to ten years. In confiscation proceedings commenced under the 1994 Act the judge assessed the value of the appellant's proceeds of drug trafficking to be £273,717.50 but the amount then realisable to be only £823. Accordingly, on 10 July 1997, pursuant to section 5 of the 1994 Act, the judge made a confiscation order for £823 payable within 14 days, an order which was duly satisfied.

7. Following his release from prison in November 2000, the appellant went into the property business with his father and acquired very substantial further assets. In the light of this change of circumstances, the prosecution sought and obtained from the High Court, initially a restraint order under section 26 (made by Richards J on 18 March 2005) and thereafter a certificate under section 16(2) (issued by Mitting J on 18 May 2005) certifying that the amount that might now be realised was greater than the £823 taken into account when the confiscation order was first made. Armed with that certificate the prosecution then applied to the Crown Court under section 16(4) for an increase in the amount to be recovered under the confiscation order. On 26 October 2007, following a seven-day hearing, Judge Slinger found that the appellant now held realisable assets to the value of £348,315.54 and on 14 November 2007 he exercised his discretion to substitute for the £823 originally recoverable the sum of £273,717.50 (the full value of the appellant's proceeds from crime) to be paid within six months, with three years' imprisonment in default.

8. On 20 February 2009 (for reasons given on 2 April 2009) the Court of Appeal (Criminal Division) dismissed the appellant's appeal, brought on the basis that Judge Slinger had over-estimated the value of his realisable assets and had failed to take properly into account in the exercise of his discretion the length of time which had elapsed since the appellant's release from prison. The appellant no longer contends that, in making the order under section 16(4), Judge Slinger exercised his discretion incorrectly.

9. Subsequently the prosecution obtained from Pitchford J on 18 December 2009 an order under section 31 of the 1994 Act appointing a receiver with a view to enforcing the revised confiscation order. However, in the light of the appellant's argument (citing the reservations of the House of Lords in *In re Maye* and *R v May*) that Mitting J's section 16(2) certificate, made by reference to after-acquired assets, had been issued without jurisdiction, the judge suspended the receiver's powers pending a proposed appeal. The appellant's appeal, brought by leave of Black LJ granted on 30 June 2010, was heard by the Court of Appeal (Arden, Thomas and Etherton LJJ) on 10 November 2010 and dismissed on 20 December 2010. Arden LJ gave the only reasoned judgment. She regarded the court as bound by an earlier decision of the Court of Appeal (Criminal Division) (judgment given by Rose VP) in *R v Tivnan* [1999] 1 Cr App R(S) 92 in the prosecution's favour. She in any event agreed with it. As for the appellant's submission that section 16 no longer had effect after POCA came into force on 24 March 2003, Arden LJ regarded it as clearly wrong having regard to the terms of The Proceeds of Crime Act 2002 (Commencement No 5, Transitional Provisions, Savings and Amendment) Order 2003 (SI 2003/333) ("the Commencement Order").

10. It is convenient, and in any event appropriate, to deal first with the appellant's argument that, by the time of Mitting J's section 16(2) certificate, section 16 was no longer in force.

The Commencement Order

11. Unless saved by the transitional provisions of the Commencement Order, it is clear that POCA repealed the relevant sections of the 1994 Act with effect from 24 March 2003. One turns, therefore, to article 3 of the Commencement Order headed "Transitional Provisions relating to confiscation orders – England and Wales" and in particular to article 3(1): "Section 6 of the Act (making a confiscation order) shall not have effect where the offence, or any of the offences, mentioned in section 6(2) was committed before 24 March 2003."

12. Section 6 of POCA (to broadly similar effect as section 2 of the 1994 Act) is the opening section of Part 2 of POCA dealing generally with confiscation orders in England and Wales and it comes into play when two conditions are satisfied, the first (specified by section 6(2)) being that a defendant has been convicted or is being committed to the Crown Court in respect of certain offences. The second condition is for present purposes immaterial.

13. What, then, is the position where, as here, the relevant offences *were* committed before 24 March 2003 so that, by virtue of article 3 of the Commencement Order, section 6 of POCA does not have effect? The answer to this is to be found in article 10 of the Commencement Order under the heading "Savings for England and Wales":

> "(1) Where, under article 3 . . . a provision of the Act does not have effect, the following provisions shall continue to have effect . . . (e) sections 1 to 36 and 41 of the Drug Trafficking Act 1994;"

14. The appellant's contention is that article 3 (and, in turn, article 10) only come into play when not only was the relevant offending before 24 March 2003 but also no confiscation order had by then been made. Section 6 of POCA, he submits, is concerned only with the *making* of a confiscation order, not with any subsequent adjustments, up or down, of the amount payable under it. If no confiscation order has been made in respect of pre-24 March 2003 offending, and after that date it appears that such an order may be appropriate, then, since article 3 precludes that happening under section 6 of POCA, article 10 provides that the relevant provisions of the 1994 Act continue to have effect instead. These include sections 13 and 14 (concerning respectively the reconsideration of a case where

initially the court did not consider making a confiscation order under section 2 and reassessing whether the defendant has in fact benefited from drug trafficking, both therefore predicating that no confiscation order has yet been made). Sections 15 and 16, however, (concerning respectively a revised assessment of the proceeds of drug trafficking and an increase in realisable property) would not continue to have effect since both these sections predicate that a confiscation order *has* already been made. Nor, for the same reason, would section 17 (concerning the inadequacy of the defendant's realisable property to pay the amount outstanding under a confiscation order) continue to have effect, much though the defendant might wish to invoke it.

15. Mr Pownall QC for the appellant accepts that there is no good reason why, in the circumstances he postulates, Parliament should have wished to repeal rather than give continuing effect to sections 15 and 16, still less section 17, of the 1994 Act. Construing article 3 as he does, however, namely as applying only to the actual making of confiscation orders and not to other legislative provisions in respect of them, such, he submits, is the (admittedly unsatisfactory) effect of the commencement order.

16. The Court of Appeal was to my mind clearly right to reject this argument. Section 6 of POCA is the foundational section for the whole confiscation order scheme and article 3, in disapplying it in respect of pre-24 March 2003 offending, is thereby disapplying the entire POCA confiscation order regime, leaving it to article 10, in particular article 10(1)(e), to continue in force the whole confiscation order scheme earlier provided for by the 1994 Act. So much for this preliminary issue.

Does section 16(2) extend to after acquired assets?

17. Mr Perry QC for the prosecution submits that section 16(2) is concerned with the amount that might be realised as at the date of the High Court hearing of the application. It is couched in the present tense and contains no words of limitation as to time. It is thus intended and apt to be operated in any or all of the following four differing (but sometimes overlapping) factual situations:

> (a) where the defendant concealed assets at the time the confiscation order was originally made (concealed assets);
>
> (b) where the assets originally taken into account were initially undervalued (undervalued assets);

> (c) where the assets originally taken into account have since increased in value (appreciated assets);
>
> (d) where, subsequent to the making of the original confiscation order, the defendant has increased his realisable property (after acquired assets).

18. The appellant argues that while section 16(2) applies to the first three situations, it does not apply to the fourth. It is, I should add, common ground that, with regard to the first three situations, section 16(2) applies no less to different property representing property actually held by the defendant at the time of the original confiscation order as to such property as was originally held. So much, indeed, was decided by the House of Lords in *In re Maye* [2008] 1 WLR 315 which held (with regard to comparable legislation in Northern Ireland) that the appellant's interest in his parents' unadministered estates (an interest later valued at £18,000) had been a "thing in action," and accordingly his property, when the confiscation order had originally been made; and so too an action for damages for false imprisonment, subsequently settled for £2,500.

19. In deciding upon the correct construction of section 16(2) the court must, of course, be guided principally by the language of the section itself and by the definition sections in the 1994 Act which bear upon it. Section 64 provides that: "In this Act the expressions listed below are defined by, or otherwise fall to be construed in accordance with, the provisions of this Act indicated below". Amongst the expressions then listed is "amount that might be realised", the provision indicated being section 6(1). Section 6(1) provides (so far as presently material):

> "For the purposes of this Act the amount that might be realised at the time a confiscation order is made against the defendant is –
>
> (a) the total of the values at that time of all the realisable property held by the defendant . . ."

Section 6(2) then defines "realisable property" to mean (again, so far as presently material) "(a) any property held by the defendant …".

20. Mr Pownall's central submission is that those definition sections require section 16(2) to be construed as if it read:

> "If, on an application made in accordance with subsection (3) below, the High Court is satisfied that the total values of all property held by the person in question at the time the confiscation order is made is greater than the amount taken into account in making the confiscation order (whether it was greater than was thought when the order was made or has subsequently increased) the court shall issue a certificate to that effect, giving the court's reasons."

21. For my part I find that a difficult submission. The words in section 16(2) falling to be construed in accordance with section 6(1) are not "amount that might be realised at the time a confiscation order is made against the defendant" but are rather "amount that might be realised". When, therefore, one comes to section 6(1), which defines the former (longer) rather than the latter (shorter) expression, it seems to me that the meaning of this shorter expression (that in section 16(2) and section 64) is to be found in the part of section 6(1)(a) reading "the total of the values . . . of all the realisable property held by the defendant" ie excluding the words "at that time" which refer back to "the time a confiscation order is made against the defendant", words conspicuously absent from section 16(2). I would accordingly construe the material words in section 16(2) as if they read: "If . . . the High Court is satisfied that the total of the values of all the realisable property held . . . is greater than the amount taken into account in making the confiscation order . . . the court shall issue a certificate . . .". In short, nothing in the definition sections requires section 16(2) to be construed for all the world as if it referred to "the amount that might have been realised at the time the confiscation order was made". On the contrary, it seems to me plainly directed to the amount that might be realised "now" and by reference to realisable property "now" held by the defendant.

22. As for the words in parenthesis – "(whether it ['the amount that might be realised', as both sides agree] was greater than was thought when the order was made or has subsequently increased)" – it seems to me that they are designed to encompass all ways in which the amount might have grown and can apply equally to after-acquired assets as to concealed assets, undervalued assets or appreciated assets. The Court of Appeal in the present case thought that after-acquired assets fell for consideration within the first limb of the parenthesis. The Court of Appeal in Northern Ireland in *In re Maye* [2005] NI CA 41; [2006] NI 206 thought rather that they fell within the second limb, as having caused the realisable amount to be "subsequently increased". For my part I prefer the Northern Ireland view but really it matters not. No one suggests that the critical issue now arising can be determined by reference to the words in parenthesis.

23. It follows that, as a matter of pure construction of section 16 itself, I prefer Mr Perry's argument. There are, however, as it seems to me, other pointers too in the same direction. It is, for example, accepted that after- acquired assets are

properly to be taken into account in the operation of sections 15 and 17 of the Act. True it is that, so far as section 15 is concerned, the question is put beyond doubt by subsections 7 and 9. But presumably that is because section 15 is directed essentially to revising the assessment of the proceeds of drug trafficking and, but for these subsections, would not appear to involve any recalculation of realisable assets. Sections 16 and 17 by contrast are directly concerned with determining the value of the defendant's realisable property – section 16 to see whether it has increased, section 17 to see whether it has proved to be or has become inadequate to pay the amount outstanding. To my mind it is logical that, by the same token that the defendant cannot require his after-acquired assets to be ignored in the determination of his present ability to pay, (as was expressly conceded by Mr Pownall both in his written case and in his oral argument although now rather surprisingly Lord Hope suggests an entirely different view of section 17), nor should they be ignored in deciding whether he can pay an additional amount up to the point when he will "have disgorged an amount equivalent to all the benefit which has accrued to [him] from drug dealing" (per Rose LJ in *Tivnan* [1999] 1 Cr App R (S) 92, 97). The symmetry between sections 16 and 17 is to my mind striking. Their sidenotes read respectively: "Increase in realisable property" and "Inadequacy of realisable property". Sidenotes, as Lord Hope explained in *R v Montila* [2004] 1 WLR 3141, paras 33-34, although unamendable and thus carrying less weight than other parts of the Act, can nevertheless properly be considered in the Act's construction. Why should "realisable property", in one case but not the other, be confined to that held by the defendant at the time of the original confiscation order?

24. The Court of Appeal in *Tivnan* [1999] 1 Cr App R (S) 92, 97 further found support for the prosecution's contended-for construction of section 16 in section 9(5) of the 1994 Act:

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

Although I would not myself place very much weight upon it, I too would regard section 9(5) as at least a straw in the wind: an indication of Parliament's intention that even serving a term in default will not exonerate a defendant from the possibility of eventually having to disgorge assets up to the extent of his criminal gains.

25. I also see some force in Mr Perry's argument that Parliament would not willingly have sought to put upon the court the burden of disentangling the value

of assets held at the time of the confiscation order from their value at the time of a section 16(2) application. Suppose that when the confiscation order was made the defendant had partly completed the manuscript of a novel or a painting which was later completed and then sold for a substantial sum. Or suppose that at the time of the confiscation order he was part-way to acquiring a statutory right to buy his council house at a favourable price (the factual background to the Court of Appeal (Criminal Division) decision in *R v Bates* [2007] 1 Cr App R (S) 9). Why should the court have to apportion the eventual gain and ignore that part of it acquired subsequent to the confiscation order? Or suppose the defendant wins the lottery. Why should it make all the difference whether he bought his ticket the day before or the day after the confiscation order was made? Of course, considerations of this kind cannot be decisive. But I see no good reason to ignore them entirely.

26. The main argument in support of the appellant's case is that it is unfair and counter-productive to increase the amount of a confiscation order by reference to after-acquired assets. This, it is said, would militate against his reform and rehabilitation and be likely to discourage him (once he has satisfied any initial confiscation order and been released from any sentence of imprisonment) from engaging in lawful and openly profitable employment. And, of course, the longer after conviction it is sought to confiscate after-acquired assets, the more unfair it may appear. Such no doubt were the considerations which led the House of Lords in *In re Maye* [2008] 1 WLR 315 and in *R v May* [2008] AC 1028 to leave open what Lord Scott in *In re Maye*, para 24 called this "important and difficult" question for later decision.

27. In the same connection Mr Pownall points to the six-year limitation period – "six years beginning with the date of conviction" – to which applications under sections 13, 14 and 15 of the 1994 Act are all made subject. If the prosecution cannot beyond such six-year time limit seek to obtain, or increase the amount payable under, a confiscation order by reference to the defendant's gains from drug trafficking, he asks, why should they be entitled to increase the amount payable in respect of such gains by reference to after-acquired assets with no limitation of time whatever?

28. There seems to me, however, nothing in this latter point. It is plain that section 16 contains no limitation period, yet no one disputes that it can be invoked without limit of time in respect of concealed, undervalued or appreciated assets. The absence of a limitation period, therefore, tells one nothing about whether section 16 applies also to after-acquired assets. The reason for introducing a six-year time limit into sections 13, 14 and 15 must surely be to establish a finite period for determining the full extent of a defendant's criminal gains – the ultimate ceiling for any confiscation order. These sections fix the extent of a defendant's criminal liability for disgorgement under the confiscation scheme; sections 16 and 17 go to the very different question as to how far this liability is required to be met.

29. As for the main argument, based on fairness and rehabilitation, naturally I recognise that Parliament could have chosen a different policy with regard to after-acquired assets. But it seems to me perfectly understandable that in fact Parliament decided (as indisputably it did when later enacting POCA) to leave it open to the courts as a matter of discretion to mulct a defendant of his criminal gains on an ongoing basis irrespective of precisely how and when he came by any increased wealth.

30. That the court does indeed *have* a discretion in the matter is plain both from the wording of section 16(4) and from a number of authorities, notably *In re Saggar (Confiscation Order: Delay)* [2005] 1 WLR 2693; *R v Bates* [2007] 1 Cr App R (S) 9; and *R v Griffin* [2009] 2 Cr App R (S) 587. This is not, however, the occasion to explore the approach to the proper exercise of that discretion – or, indeed, the question whether its exercise could ever be affected by considerations arising under the Human Rights Act 1998. As already noted, there is no challenge here to the exercise of the Crown Court's section 16(4) discretion, only to whether the section 16(2) certificate was lawfully issued.

31. In my judgment the section 16(2) certificate here *was* lawfully issued: the section requires that after acquired assets are properly to be taken into account. In common, therefore, with Lord Walker and Lord Wilson, with both of whose judgments I am in full agreement, I too would dismiss this appeal.

LORD WALKER

32. On the first issue in this appeal the court is unanimous, and I need say no more than that I agree with the reasoning and conclusions of Lord Brown (with whom Lord Wilson agrees) and Lord Hope (with whom Lady Hale agrees). But on the second issue there is division. I agree with Lord Brown's reasoning and conclusions of Lord Brown and Lord Wilson and I respectfully disagree with Lord Hope's. I shall set out my reasons as briefly as possible.

33. On the second issue Lord Hope takes as his starting point the well-established principle of statutory construction that property rights are not to be taken away without compensation unless Parliament's intention to expropriate them has been expressed in clear and unambiguous terms. The principle is in no doubt. But the statutory purpose of the Drug Trafficking Act 1994 ("the 1994 Act"), and similar statutes, could hardly have been made clearer. As Lord Steyn observed in relation to Part VI of the Criminal Justice Act 1998 in *R v Rezvi* [2003] 1 AC 1099, 1152, para 14:

> "It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential. The provisions of the 1988 Act are aimed at depriving such offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises. These objectives reflect not only national but also international policy. The United Kingdom has undertaken, by signing and ratifying treaties agreed under the auspices of the United Nations and the Council of Europe, to take measures necessary to ensure that the profits of those engaged in drug trafficking or other crimes are confiscated: see the United Nations convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (19 December 1988); Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8 November 1990. These Conventions are in operation and have been ratified by the United Kingdom."

There are numerous other authoritative statements to the same effect. It is sufficient to refer to the observations of Lord Bingham in *McIntosh v Lord Advocate* [2003] 1 AC 1078, para 4 and in *R v May* [2008] AC 1028, paras 7 to 9.

34. Once it is recognised that Parliament certainly did intend to strip those convicted of serious crimes of the proceeds of their wrongdoing, the force of the general principle of construction is considerably attenuated. Of course the fact remains that the 1994 Act is a statute of a penal nature, and its detailed provisions must be closely considered and fairly applied. But I am not persuaded that the linguistic points mentioned by Lord Hope in paras 60 to 67 of his judgment raise any real doubt, so as to enable the appellant to be given the benefit of that doubt.

35. Before considering these detailed points I would draw attention to an ambiguity in the expression "after-acquired property" which may lead to confusion (as it did in *R v Maye* [2008] 1 WLR 315, an appeal from Northern Ireland which must be distinguished from *R v May* [2008] AC 1028). A newly-acquired asset may be obtained in place of another asset in numerous ways: for instance, by making changes in a portfolio of investments, or by remortgaging a house in order to pay the deposit on a second house, or by receiving cash on the surrender or maturity of a life policy. These may be termed substituted assets but they are not after-acquired property in the relevant sense, that is property accruing to a person (whether as earnings or by gift, inheritance or some other windfall) without a corresponding diminution in that person's existing assets. All this is elementary and was explained by Lord Scott in *R v Maye*. (The distinction is clearest in the law of personal insolvency. Under section 307 of the Insolvency Act 1986 an

undischarged bankrupt's trustee in bankruptcy can give notice causing after-acquired property of the bankrupt to vest in him. This necessarily means after-acquired property in the full sense, since assets acquired by any sort of process of exchange would necessarily already belong to the trustee.)

36. Section 6 of the 1994 Act explains the meaning of "the amount that might be realised" when a confiscation order is made. Section 6(1)(a) shows that it is an aggregate value: "The total of the values at that time of all the realisable property held by the defendant", subject to adjustment in two ways that are not now material. The plural form "values" indicates, as one would expect, that separate items of property are to be identified and valued.

37. Section 6(1) expressly focuses on the time when a confiscation order is made. Section 6(3), referring to various coercive orders that may be made under penal statutes, does not have the same explicit focus. If the language of section 6(1) has to be adapted to valuation at a later time, as sections 16 and 17 plainly require, I see no reason why section 6(3) should not be adapted in the same way.

38. In paras 63 and 64 Lord Hope refers to section 15(7) and (9) of the 1994 Act. Section 15 is concerned with reassessing the proceeds of drug trafficking as determined (in the normal course) under the provisions of sections 2 and 4. It is a central feature of the legislation that under section 2(4) (and apart from the special procedure for postponed determinations under section 3) the determination of the amount to be recovered is to be made under section 4 (assessing the proceeds of drug trafficking) and section 5 (amount to be recovered under confiscation order) before the convicted defendant is sentenced. A reassessment of the proceeds of drug trafficking is therefore a major step and subsections (6) to (14) of section 15 are required in order to spell out the detailed changes in the statutory procedure needed to make the process of reassessment workable.

39. Section 16 is concerned, as Lord Hope observes, with the other part of the formula defining the quantum of any varied confiscation order. Section 16 (and its counterpart, section 17) are less complicated because the amount of the proceeds (whether as assessed before the original confiscation order was made, or as reassessed under section 15) are by then a given, and section 16 is unmistakeably looking at the matter at the time of the application under that section. Section 16(2) provides: "If . . . the High Court is satisfied that the amount that might be realised . . . is greater than the amount taken into account in making the confiscation order." The section then has a parenthesis with two loosely-framed alternatives "(Whether it [the amount] was greater than was thought when the order was made or has subsequently increased)." The amount is, as already noted, an aggregate value of separate items of property which must be first identified and then valued. The past

tense of the words “was greater” is surprising but I do not think anything can turn on it.

40. It would be odd, to my mind, if separate items of realisable property were to be identified at one date (that of the original confiscation order) but valued at another (the date when the section 16 application is heard). I agree with Lord Hope that it is not *necessary* to read section 16 as extending to after-acquired assets in order to give it some sensible meaning. But if after-acquired property is excluded, difficult problems of identification and tracing are likely to arise, especially if the individual in question has engaged in business activities highly geared by borrowing, such as those of which the appellant gave evidence. Had Parliament intended to draw a distinction between substituted assets and after-acquired assets it could easily have made its intention clearer. Neither side made any submission as to the effect of section 7(3) of the 1994 Act.

41. In relation to section 17 Lord Hope does not accept the submission of Mr Perry QC as to his construction producing symmetry between section 16 (increase in realisable property) and section 17 (inadequacy of realisable property). Lord Hope’s point (though not put quite so bluntly) is that this argument begs the question in that it makes the unreasoned assumption that for the purposes of section 17 after-acquired property must be taken into account. But in my opinion there are sound reasons for approaching the question of symmetry on that basis. Under section 17 a convicted criminal subject to a confiscation order is asking to be released from his obligation. The justification for section 17 is that not even the worst offender should be sent to prison for an additional term if he is simply incapable of complying with his obligation under an existing order. If he can comply with it out of his after-acquired assets, he should be required to do so.

42. For these reasons, and for the fuller reasons set out in the judgments of Lord Brown and Lord Wilson, I would dismiss this appeal.

LORD WILSON

43. I agree with Lord Brown and Lord Walker that the appeal should be dismissed. On the first issue I wish to add nothing to Lord Brown’s judgment. On the second issue I add this judgment only because the other four members of the court are evenly divided.

44. I consider that a natural reading of section 16(2) of the 1994 Act yields the conclusion that after-acquired assets fall to be taken into account upon applications to the High Court and thereafter to the Crown Court under the section. There is in

my view a fallacy at the heart of the construction which Mr Pownall QC presses upon the court. The inquiry of the High Court is whether "the amount that might be realised" is greater than another specified and easily identified amount. Mr Pownall is right to say that, in the construction of the quoted phrase, section 64 sends the court back to section 6. But then comes his misconstruction. Section 6 provides that "the amount that might be realised at the time a confiscation order is made...is...the total of the values at that time of all the realisable property held by the defendant" subject to adjustments. But the two references to the time when a confiscation order is made form no part of the meaning of the phrase. The draftsman of the section is doing no more than to apply the meaning of the phrase, viz "the total of the values....of all the realisable property held by the defendant", to the particular time which section 6 is designed to address. The particular time which, by contrast, section 16(2) is designed to address is the time of the application made thereunder: "is" the amount that might be realised greater than the other specified amount? In my view, moreover, Mr Pownall's construction does not work if only because it is common ground that, in relation to pre-acquired assets, the inquiry is into their value at the time of the application rather than their value at the time when the confiscation order was made.

45. So I find nothing in section 16(2) to suggest an exclusion of after-acquired assets. On the contrary I consider that the words in parenthesis confirm their inclusion. The words are "whether [the amount that might be realised] was greater than was thought when the order was made or has subsequently increased". The Court of Appeal relied on the first alternative whereas I consider that the relevant alternative is the second. The use of the aorist tense ("was") in the first alternative requires the court to survey pre-acquired assets, in particular when hidden or undervalued at the time when the confiscation order was made, and to assess their true value at that time. But the use of the perfect tense ("has increased") in the second alternative requires the court to survey any increase up to the date of its inquiry in the "amount that might be realised", not just because of a rise in the value of the pre-acquired assets. A second obvious reason for such an increase is the acquisition of assets after the date of the confiscation order.

46. Sections 16 and 17 of the 1994 Act are opposite sides of the same coin. Their side-notes describe their subject-matter as "increase in realisable property" and "inadequacy of realisable property" respectively. Both sections address the situation in which, pursuant to section 5(3), the court has ordered that the amount to be recovered from the defendant is the "amount that might be realised" rather than the higher amount of his proceeds of drug trafficking and in which, subsequently, the prosecution and the defendant wish to argue that the ordered amount should then be seen to be too low or too high respectively and be adjusted accordingly. There was no issue before this court but that, on an application by the defendant under section 17, the High Court should survey the present value of all the defendant's property, whether acquired before or after the making of the

confiscation order. Such was decided by the Court of Appeal, Civil Division, in *In re O'Donoghue* [2004] EWCA Civ 1800 in relation to a provision, namely section 83(1) of the Criminal Justice Act 1988, in substantially identical terms. It would be surprising if the court's survey under section 16 lacked the same width.

47. Section 16 does not oblige the Crown Court to order an increase in the amount of the confiscation order (which is subject in any event to the ceiling of the assessed value of the defendant's proceeds of drug trafficking) in parallel with its assessment of the amount of the increase in the defendant's realisable property. Subsection (4) confers on it a discretion to order such lesser increase "as appears to the court to be appropriate having regard to the amount now shown to be realisable". It is clear from the decision of the Court of Appeal, Criminal Division, in *R v Bates* [2006] EWCA Crim 1015, [2007] 1 Cr App R (S) 9, at paras 12 and 13, that factors such as the defendant's abandonment of a life of crime, the legitimate nature of his acquisition of the assets, the passage of time since the confiscation order was made and matters of exceptional hardship may be relevant to the exercise of the discretion. Such is in my view the area which Parliament has provided for the court to make allowance for the type of factors which, as is clear in para 59, Lord Hope instead prefers to weigh in his approach to the exercise of construction.

48. I agree with the observation of Lord Hope, at para 61 below, that, in the exercise of construction, broad generalisations about the purpose of the 1994 Act are to be avoided. That is why, in my respectful view, there may be pitfalls in an approach founded first upon a proposition that the Act is not designed to provide for confiscation "in the sense in which schoolchildren and others understand it" (para 57) or "in the popular sense" (para 58) and then upon a conclusion that the respondent's construction of section 16 would provide for confiscation in such senses. Nor do I agree that a rule of construction apt to a provision which expropriates property without compensation should be applied to a provision designed to extract from a defendant a sum which cannot exceed the value of his proceeds of drug trafficking.

49. In my view the most arguable point in favour of the appellant's construction of section 16(2) is that Parliament could have made it clearer – or, as I prefer to say, even clearer – that after-acquired assets were to be *included.* In this regard a contrast is fairly made with section 22(3) of the Proceeds of Crime Act 2002 and, in particular, with section 15(7) and (9)(c) of the 1994 Act itself. But then Parliament could have made it clearer – or, as I prefer to say, would have made it clearer had such been its intention – that after- acquired assets were to be *excluded*. So, albeit that it is the most arguable, the point fails in my mind to deflect the force of the arguments in support of their inclusion which I have sought to articulate.

LORD HOPE (with whom Lady Hale agrees)

50. I agree with Lord Brown, for the reasons he gives, that section 16 of the Drug Trafficking Act 1994 was in force on 18 May 2005 in relation to existing confiscation orders such as those which were made against the appellant on 10 July 1997 when Mitting J issued his certificate under that section.

51. Section 6 of the Proceeds of Crime Act 2002 sets out the basic framework for the making of a confiscation order under the 2002 Act. Article 3(1) of the Proceeds of Crime Act 2002 (Commencement No 5, Transitional Provisions, Savings and Amendment) Order 2003 provides that section 6 of the 2002 Act shall not have effect where the offence, or any of the offences, mentioned in section 6(2) was committed before 24 March 2003. There is therefore a clear dividing line between the 1994 Act on the one hand and the 2002 Act on the other as to the date when the scheme of the 1994 Act was to cease to apply and the scheme of the 2002 Act was to take effect.

52. It would be surprising, however, if article 3(1), which is in the widest terms, was intended to prevent the courts from increasing the amount to be recovered under a confiscation order that was made under the 1994 Act where it turns out after the scheme of the 2002 Act has come into operation that the real value of the proceeds of drug trafficking was greater than the assessed value, or that there was an increase in the defendant's realisable property. That these contingencies, which sections 15 and 16 of the 1994 Act provided for, were not overlooked becomes plain when the Commencement Order is read as a whole. Article 10(e) states that, where under article 3, a provision of the 2002 Act does not have effect, sections 1 to 36 and 41 of the 1994 Act shall continue to have effect. These words ensure that the scheme of the 1994 Act is preserved in relation to persons such as the appellant whose offences were committed before 24 March 2003.

53. It is worth noting, as Lord Brown points out at the end of para 14, that the scheme of the 1994 Act contains, in section 17, a provision that is designed to operate in favour of a defendant unlike sections 15 and 16 which are available to be invoked against him by the prosecutor. That provision is available where the defendant's realisable property is inadequate to enable him to satisfy the terms of the confiscation order. The court can, if satisfied that this is the situation, substitute a different amount as the amount to be recovered under it. But for that provision, defendants in the situation that it refers to would be exposed to the risk of a prison sentence for failing to meet the terms of the confiscation order. The need to preserve the protection that it gives to the defendant is not one which the draftsman of the Commencement Order is likely to have overlooked.

54. Mr Pownall QC for the appellant submitted, however, that the saving provision in article 10 applied only to orders made after 23 March 2003 by virtue of sections 13, 14 or 19 of the 1994 Act. This was because orders made under those sections were confiscation orders within the meaning of section 2(9) of the 1994 Act, not variations of existing confiscation orders. He acknowledged that Parliament was unlikely to have wanted to prevent a defendant whose confiscation order was made before that date from applying for relief under section 17, and he was unable to suggest any good reason for supposing that it was Parliament's intention to exclude the application of sections 15 and 16 in such a case either. But he said that the wording of the Commencement Order was clear and that article 3(1) was to be read narrowly according to its own terms. Its effect, in a case such as this, was that section 22 of the 2002 Act which provides for the making of a fresh order on reconsideration of the available amount could not apply, as it was available only in the case of orders made under section 2 of that Act and those referred to in section 2(9).

55. The answer to this submission is, as I have already indicated, that article 3 does not stand alone. It has to be read in the context of the Commencement Order as a whole. Article 10(e) of the Order says all that is needed to preserve the scheme that was comprised in sections 1 to 36 of the 1994 Act. Its effect is to fill the gap that would have been created if those sections were not to continue to be available where the offence was committed before 23 March 2003. As sections 15 to 17 were part of that scheme, they remain available. I would hold that the appellant fails on this issue.

56. The more difficult question is whether section 16(2) of the 1994 Act extends to after-acquired assets in the full sense of that expression as explained by Lord Walker in para 35. The difficulty lies partly in the wording of that subsection, which is framed in general terms and does not address this question directly, and partly in the nature of the exercise that, on the respondent's construction of it, the court is required to carry out.

57. In *R v May* [2008] AC 1028, para 9 Lord Bingham of Cornhill said the process for which the statute provides is not confiscation in the sense in which schoolchildren and others understand it. This was because the object is to deprive the criminal who has benefited financially from crime, directly or indirectly, of what he has gained: see also para 48(1) where he added that the system does not operate by way of a fine. He had already made that point in *McIntosh v Lord Advocate* [2003] 1 AC 1078, para 4, where he said that one of the important premises on which the Proceeds of Crime (Scotland) Act 1995 rested was that it was desirable to deprive traffickers of "their ill-gotten gains". Lord Steyn in *R v Rezvi* [2003] 1 AC 1099, para 14 said that the measures that the United Kingdom had undertaken to take by signing and ratifying the relevant treaties was to ensure that "the profits" of those engaged in drug trafficking are confiscated. I do not find

anything in these observations that suggests that they had mind the problem raised by this case.

58. The respondent says that the object of the scheme of which section 16 forms part is to deprive the defendant of realisable assets whether or not they consist of after-acquired assets in the full sense, albeit not exceeding the value of the benefit received from his offending. He points out that, when proceeding under section 6 of the 1994 Act, the court was required to assess the amount that might be realised at the time the confiscation order was made by having regard to all assets, irrespective of whether they were acquired by criminal conduct or legitimate means. The amount to be recovered was not limited to the product of the defendant's criminal enterprise. But it seems to me that if legitimate after-acquired assets were to be included too, this would indeed amount to their confiscation in the popular sense.

59. It seems to be clear that the effect of reading section 16(2) of the 1994 Act in that way could be to penalise a defendant for the efforts of his own enterprise and hard work after he is released from custody. That objection can indeed be made in this case. The appellant was released from prison in November 2000. There is no suggestion that the increase in the value of his assets that has accrued since then has had anything to do with his previous offending. The assumption must be that the assets that he has acquired as a result of his business activities are entirely legitimate. I think that to deprive him of the increase can properly be described as confiscation. This is the kind of situation that, according to well established principles, ought not to be assumed to have been what Parliament intended unless it provided for this in clear terms. Section 22(3) of the 2002 Act, which states that the court must apply the available amount provision in section 9 when that amount is being recalculated under it as if references to the time the confiscation order is made were to the time of the new calculation, does satisfy this test. There is no doubt that the solution which section 22(3) has adopted meets the problems of identification and tracing if after-acquired property is excluded to which Lord Walker refers in para 39. The question is whether the same result was achieved by section 16(2), which lacks a clear direction to that effect.

60. The general principle of construction is that a statute should not be held to take away property rights without compensation unless the intention to do so is expressed in terms which are clear and unambiguous: *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Comrs* [1927] AC 343, 359, per Lord Warrington of Clyffe. As Lord Reid explained in *Westminster Bank Ltd v Beverley Borough Council* [1971] AC 508, 529, this principle flows from the fact that Parliament seldom intends to do that, and that before attributing such an intention we should be sure that it was really intended. But he added this qualification to the way the principle was expressed by Lord Warrington:

> "When we are seeking the intention of Parliament that may appear from express words but it may also appear by irresistible inference from the statute read as a whole. But I would agree that, if there is a reasonable doubt, the subject should be given the benefit of the doubt."

There is no hint here that this principle should be attenuated according to the impression one forms as to whether or not the subject deserves, or does not deserve, to be given that benefit. It is a principle of universal application. Its force would be greatly weakened if it were otherwise.

61. Lord Bingham was, I think, making the same point in *R v May* [2008] AC 1028 when, in the course of his description of the principles to be followed by those called upon to exercise this jurisdiction in the future, he said in para 48, under item (4) of his list, that in view of its importance and difficulty the court should focus very closely on the language of the statutory provision in question and in the light of any statutory definition. We are not concerned in this case with his warning to avoid being distracted by proliferating case law or any judicial gloss or exegesis, as the question which we have to address here was left open both in *R v May* and in *In re Maye* [2008] 1 WLR 315. But his advice that guidance should be sought in the statutory language itself is very much in point in this case. Broad generalisations as to what the legislation was designed to achieve will not do. One must concentrate on the words that were used by Parliament.

62. The wording that the head note to section 16 uses is "Increase in realisable property". The expression "realisable property" is defined in section 6(2) of the Act: see the index of defined expressions in section 64. Section 6(1) states that for the purposes of the Act an amount that might be realised "at the time a confiscation order is made against the defendant" includes, among other things, the total of the values at that time of all the realisable property held by the defendant. It is in that context that section 6(2) provides:

> "In this Act 'realisable property' means, subject to subsection (3) below –
>
> (a) any property held by the defendant; and
>
> (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Act."

Section 6(3) provides that property is not realisable property if an order made under various Acts which provide for the forfeiture of property is in force in respect of it. The context in which the definition appears directs attention to the time that the confiscation order is made. It does not appear to contemplate the carrying out of the exercise that section 6(1) refers to at any later date.

63. Mr Pownall's argument that the expression "realisable property" has nothing to do with after-acquired property is reinforced by the presence in section 15, which deals with the revised assessment of the proceeds of drug trafficking, of subsections (7) and (9)(c). Section 15(7) provides:

> "Any determination under section 2(4) of this Act by virtue of this section shall be by reference to the amount that might be realised at the time when the *determination* is made." [emphasis added]

Section 15(9)(c) provides that section 6(1) of the Act shall have effect as if for "confiscation order is made" there were substituted "of the determination". These modifications would not have been required if the expression "the amount that might be realised" in section 6(1), read together with section 6(2), was capable of embracing assets acquired after the date when the confiscation order was made.

64. Section 15 is concerned with the amount assessed to be the value of the defendant's proceeds of drug trafficking. Section 16 is concerned with the other part of the formula that defines the amount to be recovered under the compensation order, as the head note makes clear. In contrast to what one finds in sections 15(7) and 15(9)(c), there is no indication that in this context the date as at which the realisable property held by the defendant is to be identified, for the purpose of assessing the amount that might be realised by it, is different from that as at which the exercise directed by section 6(1) was carried out. The fact that recourse to the court under section 16 is not subject to any time limit, unlike section 15(15) which imposes a six year time limit on applications for a revised assessment of the proceeds, adds weight to this argument. It is not inconceivable that it was the intention that assets acquired legitimately many decades after the making of the confiscation should enable the recoverable amount to be recalculated and it can, of course, be said that there are no words that exclude after-acquired property. But the confiscatory nature of the exercise requires us to be satisfied that this was what Parliament really intended and to give the benefit of the doubt to the defendant if we are not.

65. Moreover, it is not necessary to read section 16 as extending to after-acquired property to make sense of it. Mr Perry QC for the respondent accepted that section 16 can be invoked where the defendant concealed assets at the time of

the confiscation order, or where the assets that were originally taken into account were undervalued when the order was made or where they have increased in value. The presence of the words in parenthesis in section 16(2), which contemplate that the amount that might be realised "was greater than was thought when the order was made or has subsequently increased", is sufficiently explained by those three situations. They do not point irresistibly to the conclusion that after-acquired assets may be taken into account too when the court is determining the amount that might be realised under that section.

66. Section 17 deals with the problem which arises where the realisable property is inadequate for the payment of any amount remaining to be recovered under the compensation order. It was said by Mr Perry to support his argument that section 16 extended to after-acquired property. There was, he said, a symmetry between the two sections which enabled the court to have regard to the defendant's assets as a whole when it was making its assessment. There is an obvious symmetry if the cause of the problem is that the assets that were originally taken into account were overvalued at that time or that they have decreased in value. In either of these situations the property that was taken into account as "realisable property" within the meaning of section 6(2) would be incapable of providing the defendant with the funds needed to meet the terms of the confiscation order. So means are provided for an adjustment to be made to take account of this.

67. There is obvious force in the point that Lord Walker makes in para 41 that the offender should not be excused from his prison sentence if he can comply with the terms of the existing order. But there is no indication in section 17 that any assets that the defendant may have acquired after the making of the compensation order have any part to play in this assessment. The fact that it uses the defined expression "realisable property" (which section 6(2), read with the direction in section 64 as to how these words are to be construed, identifies as the assets held by the defendant at the time of the making of the confiscation order) to identify the subject matter of the exercise is an indication to the contrary. The symmetry argument might, indeed, be said to support the conclusion that section 16 is no more concerned with after-acquired property than, on this reading of it, is section 17. Section 23(2) of the 2002 Act solves this problem, as does section 22(3), by making it clear in express terms that the available amount is to be re-assessed at the time of the new calculation.

68. It is perhaps worth noting that the author of the unusually detailed annotations to the 1994 Act in *Current Law Statutes* included the following sentence in his general note on section 16:

> "Note that this section does not apply to property which comes into the possession of the defendant after the order is made."

No reasons are given for this observation. But this may be because the annotator, who had studied the background to this enactment in great detail, regarded the point as so obvious as not to require any explanation. In any event, it is of some interest that this was what a contemporary writer understood to be the effect of the section. For the reasons I have given, I do not think that it is self-evident that he was wrong.

69. A contrast can, no doubt, be drawn between the phrase "the amount that might be realised" in section 16(2) and the phrase "the amount that might be realised at the time a confiscation order is made" in section 6(1). As Lord Brown says in para 21, the words "at the time a confiscation order is made" are conspicuously absent from the phrase used in section 16(2). It can also be said that section 16(2) does not in terms confine its attention to what, as defined by section 6(2), is "realisable property". But, as the head note to section 16 indicates, the exercise that it contemplates is concerned only with an increase in the value of realisable property, which is a defined expression. None of the language that it uses is unworkable on that assumption.

70. I do not think that the other factors that Lord Brown so helpfully refers to in his judgment carry much weight. I do not see that section 9(5) of the 1994 Act, to which the Court of Appeal in *R v Tivnan* [1999] 1 Cr App R (S) 92 attached some importance, as providing any guidance as to what Parliament intended in a case where a defendant who was in default had acquired more assets after the date of the making of the confiscation order. All one can say is that the purpose of the terms imposed in default of payment is to encourage or coerce payment of the sum due under the order. They are not imposed as a substitute for payment. So it makes sense for the order to continue to have effect, for what it may be worth.

71. I have not found this an easy question to answer, and I confess that my initial impression was that Mr Perry was right and, as there was no express direction to the contrary, that the High Court was entitled under section 16 to have regard to after-acquired assets in determining the amount that might be realised. But, on further reflection, I have concluded that the proper approach is that indicated by Lord Reid in *Westminster Bank Ltd v Beverley Borough Council* [1971] AC 508, 529. Before attributing such an intention to Parliament we have to be sure that this is what it really intended. The section, in contrast to what one finds in section 15, does not say this expressly, and I am unable to say that such an intention appears by irresistible inference when the statue is read as a whole. I cannot, with the greatest of respect, agree with Lord Walker that the linguistic points that I have mentioned do not raise any real doubt. In my opinion there is such a doubt, and the benefit of the doubt must go to the appellant.

72. For these reasons I would allow the appeal and set aside the section 16(2) certificate.