Neutral Citation Number: [2024] EWHC 2997 (Admin)

Case No: AC-2024-LON-000589

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 November 2024

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

- and -

PATRICK BIJOU

Respondent

- -

Martin Evans KC and **Tom Rainsbury** (instructed by the **Crown Prosecution Service**)
for the **Applicant**
Nathaniel Rudolf KC and **Annie Johnston** (instructed by **Janes Solicitors LLP**)
for the **Respondent**

Hearing date: 10 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30 am on 25 November 2024
by circulation to the parties by email and by release to the National Archives.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. By this application, Patrick Bijou (who is also known as His Excellency Sir Dr Patrick Bijou and was formerly known as Eric Danison) seeks to vary a property freezing order (a "PFO") made by Chamberlain J on 26 October 2022. The PFO was made on the application of the Director of Public Prosecutions pursuant to s.245A of the Proceeds of Crime Act 2002 ("the Act") in support of the DPP's intended civil recovery proceedings under Part 5 of the Act.

2. The PFO listed nine assets including:

   2.1 a freehold property known as Ffinnant in Llanarthney, Carmarthen;

   2.2 an Alfa Romeo Giulia 2.9 V8 BI Turbo Quadrifoglio registered number CN17 WHH;

   2.3 the balance on Mr Bijou's account at Lloyds Bank with account number ending 268; and

   2.4 the balance on Mr Bijou's further account at Lloyds with account number ending 468.

3. By this application, Mr Bijou argues that these four assets (referred to for convenience in this judgment as the "disputed assets") were taken into account in confiscation proceedings in the Crown Court under Part 2 of the Act and that accordingly there is an issue estoppel, judgment having already been given on the same matter, that prevents the DPP from maintaining a PFO over the same assets. Alternatively, he argues that it would now be an abuse of process for the DPP to pursue civil recovery proceedings, and therefore a PFO, in respect of the same assets.

THE FACTS

4. Mr Bijou is a convicted fraudster:

   4.1 On 3 January 1997, he was convicted of ten offences of suppression of documents contrary to s.20 of the Theft Act 1968 and four offences of obtaining property by deception contrary to s.15 of the Act. He was sentenced to four years' imprisonment.

   4.2 On 10 March 2000, he was convicted of two offences of carrying on a business with intent to defraud its creditors contrary to s.458 of the Companies Act 1985. He was sentenced to a suspended sentence of imprisonment and disqualified from being a company director for a period of six years.

   4.3 On 16 August 2010, he was convicted of multiple offences in connection with a multi-million-pound advance fee fraud. He was sentenced to 11 years' imprisonment, made the subject of a serious crime prevention order and further disqualified from being a director for 15 years.

   4.4 On 3 June 2019, he was convicted of eight offences of failing to comply with the serious crime prevention order and sentenced to a further two years' imprisonment.

5. Following his 2010 conviction, confiscation proceedings were commenced. On 3 October 2012, His Honour Judge Thomas QC determined that Mr Bijou led a criminal lifestyle and that his benefit from his general criminal conduct was £1,950,000. The judge concluded that the available amount was £456,605.57 and he therefore ordered Mr Bijou to pay that sum. The court's assessment of the available amount was reconsidered at hearings on 28 August

and 17 November 2014 with the effect that Mr Bijou was ordered to pay the increased sum of £466,502.73.

6. Subsequently, on 24 November 2016, Mr Bijou purchased Ffinnant for £1,100,000. The bulk of the purchase price was paid from accounts in Germany in the name of Dr Jan Taubert. Mr Bijou explains in a witness statement in these civil proceedings that Dr Taubert was his trust's lawyer. On 10 June 2017, Mr Bijou purchased the Alfa Romeo car for £65,653 without taking out any loan to finance the purchase.

7. On discovering additional assets, the prosecution again applied for an order that the Crown Court should reconsider the available amount pursuant to s.22 of the Act. The prosecution contended that there were further available assets of £1,638,860 including the disputed assets. Ffinnant was said to be worth at least £1,100,000 and the car was then valued at £31,100. The combined credit balance on accounts 268 and 486 was £497,260. At a hearing on 13 April 2022, the Crown Court accepted these and other valuations and accordingly determined that the available amount was the full benefit figure of £1,950,000.

8. In May and June 2022, Mr Bijou paid £1,483,497.27, being the outstanding balance of the revised confiscation order, by a series of transfers from a MoneyCorp account in his name. He did not need to sell Ffinnant or his Alfa Romeo car or draw down funds from the two Lloyds accounts in order to discharge his liability. In these proceedings, Mr Bijou explains that the funds were paid by his Dubai-based trust attorney and were transferred into his MoneyCorp account for onward payment to the confiscation unit. He says that the source of these funds was his earnings from various consultancy work undertaken in 2021 and 2022. Accordingly, it is clear that there were further significant available assets.

9. On 13 October 2022, the DPP applied for a PFO. The application was supported by the first witness statement of Roger Watkins who identified assets with an estimated value of between £3,470,000 and £3,870,000. The assets included Ffinnant, the Alfa Romeo and the two Lloyds accounts which then had a combined credit balance of £68,000. In addition, Mr Watkins identified, among other assets, a credit balance in the MoneyCorp account of £1,595,000 and a balance of £233,277.25 in Mr Bijou's account with Wise Payments Limited.

10. Mr Watkins described police investigations by Dyfed-Powys Police into Mr Bijou's suspected involvement in further offences of fraud:

    10.1 First, he referred to an investigation in respect of Mr Bijou's suspected involvement in a £1.5 million advance-fee fraud between September and December 2015.

    10.2 Secondly, he referred to a further investigation in respect of an alleged £21,000 advance-fee fraud between September 2018 and March 2019.

    10.3 Thirdly, he referred to an investigation in respect of an alleged attempted fraud in 2017.

11. Further, by contrast to the substantial assets identified by Mr Watkins, he explained that His Majesty's Revenue & Customs did not have any self-assessment tax records for either Patrick Tristram Bijou or Eric Fitzpatrick Danison for the tax years 2015 to 2022, that there were

no PAYE records in either name for the same tax years, that there were no VAT records in either name, and that, in the name Danison, Mr Bijou had received benefits from the Department of Work & Pensions in the sum of £23,458 between 2015 and 2018.

12. As already recounted, Chamberlain J made the PFO on 26 October 2022. By s.245A of the Act, a PFO could only be made where the High Court was satisfied that there was a good arguable case that the property to which the order related was "recoverable property", namely property obtained (or which represented property obtained) through unlawful conduct. In making the order, Chamberlain J expressly found that the evidence was "amply sufficient" to establish a good arguable case that the property identified by Mr Watkins was, or included, recoverable property. While acknowledging that it was not of itself sufficient to reach such conclusion, the judge took into account that Mr Bijou had apparently amassed valuable property and yet had not declared any income for tax purposes.

THE ARGUMENT

13. Nathaniel Rudolf KC and Annie Johnston, who appear for Mr Bijou, make clear that they do not for present purposes challenge the judge's finding that there was a good arguable case that the disputed assets were obtained through, or represented property obtained through, unlawful conduct. That said, it is important to be clear that it will ultimately be Mr Bijou's case that Ffinnant and the Alfa Romeo were purchased from legitimate funds and that the substantial bank balances were earned through legitimate consultancy work. In his witness statement, Mr Bijou admitted past criminality but denied further unlawful conduct and specifically addressed each of the alleged frauds that were being investigated in Wales.

14. Mr Rudolf argues that Parliament has legislated for two separate procedures for the same subject matter under Parts 2 and 5 of the Act and that it is for the state to elect which procedure to use in any individual case. Where, as here, the Crown Court has determined that particular property forms the basis for an uplifted confiscation order, Mr Rudolf argues that the matter has been litigated and decided by the court such that there is an issue estoppel. Further, relying heavily on observations made by Edis J, as he then was, in National Crime Agency v. Simkus [2016] EWHC 255 (Admin), [2016] 1 W.L.R. 3481 and the line of authorities from Henderson v. Henderson (1843) 3 Hare 100 to Johnson v. Gore Wood & Co. [2002] 2 AC 1, Mr Rudolf submits that, these assets having been taken into account in determining the available amount in the confiscation proceedings, it would be an abuse of process for the DPP now to seek the same property through civil recovery proceedings. Accordingly, he submits that the PFO should be varied to exclude the disputed assets.

15. Martin Evans KC and Tom Rainsbury, who appear for the DPP, argue that the issues in confiscation and civil recovery proceedings are connected but entirely different. Mr Evans stresses that there is no challenge to Chamberlain J's conclusion that the DPP had amply demonstrated a good arguable case. He points to Mr Bijou's own evidence that he had no means of earning an income between 2015 and 2018 and was in receipt of jobseeker's allowance and housing benefit for a rented room in North London. Yet he asserts that he purchased Ffinnant in November 2016 using legitimate funds for £1.1 million with the benefit of a personal loan from his trust's lawyer and bridging finance on which the initial payments were £3,312 per month.

16. Mr Evans argues that the DPP seeks to use rather than abuse the procedure available to him for bringing civil recovery proceedings. He observes that Edis J was himself unsure in Simkus as to the applicability of the rule in Henderson v. Henderson to civil recovery proceedings. He relies on Latham LJ's observations in Director of the Assets Recovery Agency v. Singh [2005] EWCA Civ 580, [2005] 1 W.L.R. 3747 and points out that Singh was not cited to the court in Simkus. He argues that the draftsman deliberately limited the scope of s.308(9) to exclude only the recovery of assets taken into account in deciding the benefit amount. Further, Mr Evans points to the safeguards at s.266(3) which prevent the court from making a civil recovery order that is incompatible with a respondent's human rights.

17. Mr Evans asks rhetorically how on earth it could be incompatible with justice and public policy to allow civil recovery proceedings if there is compelling evidence that the disputed assets were acquired through unlawful conduct when the very policy of Part 5 of the Act is to remove the fruits of crime by forfeiting property that was obtained through unlawful conduct.

18. Mr Rudolf observes in reply that a respondent can only rely on s.266(3) in civil recovery proceedings but that, if it would be improper to order recovery, it would likewise be improper to make a PFO in respect of an asset.

CONFISCATION PROCEEDINGS

19. Confiscation proceedings are brought in the Crown Court under Part 2 of the Act. Where a defendant is convicted and either the prosecutor asks or the court believes that it is appropriate, the Crown Court must proceed to consider whether they have benefited from their criminal conduct and, if so, make a confiscation order pursuant to s.6 of the Act. The making of a confiscation order involves a four-stage process:

    19.1 First, s.6 provides that the court must determine whether:

        a) where the court decides that the defendant has a criminal lifestyle, they have benefited from general criminal conduct; or

        b) in other cases, they have benefited from the indicted criminal conduct.

    19.2 Secondly, the benefit must be valued in accordance with the rules at ss.79-80.

    19.3 Thirdly, ss.6-7 provide that the court must determine the recoverable amount which will be:

        a) the amount of the defendant's benefit;

        b) the available amount where the defendant shows that the available amount is less than the benefit figure; or

        c) a nominal amount where the defendant shows that the available amount is nil.

    19.4 Fourthly, s.6 provides that the court must only make a confiscation order if and to the extent that it would not be disproportionate.

20. There are various exceptions that must be applied in calculating the benefit figure. In particular, s.7(4) provides:

> "In calculating the defendant's benefit from the conduct concerned for the purposes of subsection (1), the following must be ignored–
>
> (a) any property in respect of which a recovery order is in force under s.266 …"

21. In this case, having decided that Mr Bijou had a criminal lifestyle, the court was required to make the assumptions under s.10 of the Act (in broad terms that his assets were obtained as a result of, and his expenditure was funded by, his criminal conduct) unless it was shown otherwise or such assumptions would give rise to a serious risk of injustice. It is, however, common ground that at the time of the original confiscation order on 3 October 2012:

    21.1 Mr Bijou had not yet purchased either Ffinnant or the Alfa Romeo;

    21.2 the court was not aware of the funds from which those assets were later acquired; and

    21.3 the court was not aware of the cash balances later identified in the 268 and 468 accounts, or funds from which such balances were later derived.

22. Accordingly, the Crown Court could not and did not take the disputed assets into account when determining the benefit figure.

23. The later discovery of additional assets might, in a criminal lifestyle case, lead the prosecutor to apply under s.21 for reconsideration of the benefit figure. Such application can, however, only be made within six years of the date of conviction. Quite separately, the discovery of additional assets (whether previously undisclosed or acquired after the original order was made) might lead the prosecutor to apply under s.22 for reconsideration of the available amount. A s.22 application can be made even after the deadline for a s.21 application has passed.

24. In this case there was no application under s.21; no doubt because the property and car were not even acquired until after the statutory deadline. As already recounted there was a successful application under s.22 and the court, after taking into account the disputed and other assets, redetermined the available amount as the full benefit figure of £1,950,000.

25. A confiscation order does not attach to any particular asset. It is an order made *in personam* that can properly be paid by the defendant from any assets whether taken into account in assessing the available amount or not. In this case, Mr Bijou paid his additional liability under the revised confiscation order from the MoneyCorp account without realising the disputed assets. Such action indicated that there might be yet further undisclosed assets but that was irrelevant to the Crown Court proceedings given that the confiscation order had been discharged in the full benefit sum and it was then too late to ask the court to reconsider the question of benefit.

26. Accordingly:

    26.1 The disputed assets were not taken into account in determining the benefit figure which remained unchanged at £1,950,000.

26.2 Such assets were taken into account in determining that there were further available assets such that the amended available amount was the full benefit figure.

26.3 Since in fact the confiscation order was discharged from other assets, it is clear that there were yet further available assets.

CIVIL RECOVERY PROCEEDINGS

27. Civil recovery proceedings are brought by the DPP or other enforcement authority in the High Court under Part 5 of the Act to recover property which was obtained (or represents property obtained) through unlawful conduct. A civil recovery order may be made regardless of whether a prosecution has been brought in connection with the property. Three matters must be considered:

27.1 First, the court must consider whether it has been established that unlawful conduct has occurred: s.241.

27.2 Secondly, the court must consider whether the respondent has obtained the property through such unlawful conduct (whether their own conduct or another's): s.242.

27.3 Thirdly, the court must consider whether the property is recoverable within the meaning of s.304. Broadly, property obtained through unlawful conduct which has not been disposed of since it was so obtained will be recoverable and, although irrelevant in this case, property can sometimes be "followed into the hands" of third parties (see ss.304 and 308) or traced into the proceeds of any disposal (s.305) or a mixed fund (s.306).

28. Section 266 provides that if the High Court is satisfied that any property is recoverable, the court must make a recovery order.

29. There are various exceptions. In particular:

29.1 The court may not make any order that is incompatible with a respondent's Convention rights: s.266(3)(b).

29.2 Section 308(9) provides:

> "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 …"

30. Where civil recovery proceedings have been or may be brought, the enforcement authority may apply for a property freezing order. By s.245A, the High Court may make such an order where it is satisfied that there is a good arguable case that the property to which the application relates is recoverable property.

RES JUDICATA

31. In Virgin Atlantic Airways Ltd v. Zodiac Seats Ltd [2013] UKSC 46, [2014] AC 160, Lord Sumption analysed the defence of res judicata. He said, at [17]:

> "Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle.
>
> The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.
>
> Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v. Boot [1928] 2 K.B. 336.
>
> Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as 'of higher nature' and therefore as superseding the underlying cause of action: see King v. Hoare (1844) 13 M & W 494, 504 (Parke B) …
>
> Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 State Tr 355. 'Issue estoppel' was the expression devised to describe this principle by Higgins J in Hoysted v. Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v. Thoday [1964] P 181, 197-198.
>
> Fifth, there is the principle first formulated by Wigram V-C in Henderson v. Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.
>
> Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

32. This case requires closer analysis of the fourth and fifth principles.

33. Issue estoppel arises where a party seeks to relitigate an issue that was decided in an earlier case. While cause of action estoppel is regarded as absolute, the position is slightly more nuanced in issue estoppel. Summarising the decision in Arnold v. National Westminster Bank plc [1991] 2 AC 93, Lord Sumption observed in Virgin Atlantic, at [22]:

> "Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute but if it could with reasonable diligence and should in all the circumstances have been raised."

34. In Johnson v. Gore-Wood, Lord Bingham of Cornhill restated the rule in Henderson v, Henderson, at page 31:

> "But Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all."

35. Summarising the applicable principles, I observed in Moorjani v. Durban Estates Ltd [2019] EWHC 1229 (TCC), at [17.4]:

> "Even if the cause of action is different, the second action may nevertheless be struck out as an abuse under the rule in Henderson v. Henderson where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application:
>
> a) The onus is upon the applicant to establish abuse.
>
> b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.
>
> c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.
>
> d) The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.
>
> e) The court will rarely find abuse unless the second action involves 'unjust harassment' of the defendant."

ANALYSIS

ISSUE ESTOPPEL

36. In Serious Organised Crime Agency v. Gale (Secretary of State for the Home Department intervening) [2011] UKSC 49, [2011] 1 W.L.R. 2760, Lord Phillips observed at [1]-[2]:

> "1. The Proceeds of Crime Act 2002, as amended by the Serious Organised Crime and Police Act 2005, is designed to prevent the enjoyment of the fruits of criminal activity. Part 2 focuses on the criminal. To the extent that it is proved, in the manner prescribed, that a criminal has benefited from criminal conduct, a levy can be made upon his assets, whether or not those assets are themselves the product of his criminal conduct, by a process inaccurately described as 'confiscation'. A conviction of the criminal is a precondition to the power to confiscate.

> 2. Part 5 concentrates on the fruits of crime themselves. The [enforcement authority] is given the task of tracking down and recovering the fruits of criminal activity, whether they remain in the hands of the criminal or have been passed on to someone else - subject to exceptions for which POCA makes provision. The fruits of criminal activity can be recovered under Part 5 whether or not anyone has been convicted of the crime or crimes that have produced them."

37. There is no doubt that:

37.1 the "claim" in the Crown Court (if that is an apt expression in the criminal context) was for a confiscation order under Part 2 of the Act requiring Mr Bijou to pay so much of his benefit from crime as was then available; whereas

37.2 the claim in any civil recovery proceedings in the High Court under Part 5 of the Act will be to recover any assets that were obtained (or represent property obtained) through unlawful conduct.

The causes of action are different and accordingly there is no strict cause of action estoppel which would operate as an absolute bar to relitigation.

38. Equally, I am not persuaded that there is any issue estoppel in this case:

38.1 Viewed at a high level:

a) the issues in the Crown Court were to determine the benefit of Mr Bijou's criminal lifestyle and separately to determine the assets that were available to satisfy a confiscation order; whereas

b) the issues in the High Court will be to determine whether specific assets were obtained (or represent property obtained) through unlawful conduct.

38.2 Specifically in relation to the disputed assets:

a) such assets being discovered after the court assessed the benefit figure, the only issue in the Crown Court was whether these assets were available for confiscation irrespective of whether they were obtained legitimately or through unlawful conduct; whereas

b) the issue in the High Court will be whether these assets were obtained (or represent property obtained) through unlawful conduct, irrespective of whether they were available at the time of the confiscation proceedings.

39. Accordingly, the DPP's claim in any civil recovery proceedings that the disputed assets were obtained through unlawful conduct does not involve the relitigation of any issue decided in the Crown Court.

HENDERSON v. HENDERSON ABUSE

40. The Act expressly recognises and prevents the obvious abuse of an asset being both taken into account in determining the benefit amount in confiscation proceedings under Part 2 of the Act and being the subject of civil recovery proceedings under Part 5:

40.1 Where a civil recovery order has been made in respect of the asset, it must be ignored in calculating the defendant's benefit in confiscation proceedings: s.7(4)(a).

40.2 Alternatively, where the asset has already been taken into account in determining the benefit amount in the confiscation proceedings, it is not recoverable property and is not therefore liable to civil recovery proceedings: s.308(9).

41. Those provisions of themselves dispose of Mr Rudolf's argument that the prosecuting authorities must elect whether to pursue a convicted criminal's assets by way of confiscation or civil recovery proceedings but not both. Plainly Parliament intended that there might be both confiscation and civil recovery proceedings against the same individual. There should not, however, be double recovery:

41.1 In Singh, Latham LJ observed, at [18], that the purpose of s.308(9) was clearly to prevent double recovery.

41.2 Likewise, s.7(4)(a) prevents double recovery where the confiscation proceedings follow the civil recovery proceedings.

41.3 Quite apart from these particular situations, the Crown Court should not permit there to be double recovery since that would be disproportionate and be likely to involve a breach of Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms: R v. Waya [2012] UKSC 51, [2013] 1 AC 294, at [33]; R v. Edwards [2004] EWCA Crim 2923, [2005] 2 CrAppR(S) 29.

42. The possibility of relitigation abuse arising from dual proceedings was recognised by Stanley Burnton J in Director of the Assets Recovery Agency v. Kean [2007] EWHC 112 (Admin), at [41]. In Kean, the CPS was party to Chancery proceedings in which it sought to prevent Mr Kean acquiring title to a property while the Assets Recovery Agency pursued civil recovery proceedings in which it alleged that Mr Kean had acquired such property with the proceeds of crime. On the facts, there was no abuse.

43. In Simkus, Edis J said, at [102]:

> "There are technical differences between the Part 2 and the Part 5 regimes. … The NCA submits that they are so completely different in their aim and method that the technical requirements of what I shall call 'relitigation abuse' are not met. I do not accept this, because I do not think that this form of abuse is technical in its nature. I also do not think that they are so different that these differences are automatically an answer to the allegation of abuse. They are different methods of appropriating the value of the proceeds of crime. Such fine distinctions do not address the real force of this variety of abuse which is derived from the need for finality in litigation and from the injustice in proceeding against a person for the same thing over and over again. Nemo debet bis vexari is a Latin maxim which means just that: no one should be troubled twice for the same cause."

44. Although Mr Rudolf relies heavily on Simkus, Edis J himself was doubtful observing, at [102], that it stretched the rule in Henderson v. Henderson "a long way to import it from ordinary civil litigation between private parties to the present entirely different context". Nevertheless, Edis J considered the argument which was somewhat optimistic on the facts of that case since there had been no earlier confiscation proceedings. As the judge pithily

observed, Mr Simkus's argument was not that he should not be vexed twice by claims under the Act but that he should never be vexed at all.

45. Edis J added at [105]-[106]:

> "105. Where Parliament provides two different procedures which are available to the state in respect of the same subject matter, see s.240(2) of the Act, it is for the state to choose which to use. The state ought to choose the procedure which will produce the greatest benefit to the public, providing that no injustice is caused to the respondent. That is its duty, and that is what has happened here.
>
> 106. I therefore reject the submission that these proceedings are an abuse of process because of the aspect of relitigation which is involved. I consider that it is entirely misconceived. I of course leave open the question which might arise if there are confiscation proceedings in the Crown Court and civil recovery proceedings where the same assets are alleged to be part of the available amount for the purposes of confiscation and said to be recoverable property for civil recovery purposes."

46. While Mr Rudolf relies on Edis J's observation at [105] that it is for the state to choose between the two different remedies provided by the Act, I reject – for the reasons explained at paragraph 41 above – the suggestion that it is abusive *per se* for there to be both confiscation and civil recovery proceedings. Indeed, I do not consider that that was what Edis J was saying once it is recalled that the complaint in Simkus was not there had been dual proceedings but that civil recovery rather than confiscation proceedings had been commenced. Edis J was simply explaining the state's duty to choose the procedure which it considered might provide the greatest benefit to the public. Any doubt is in any event resolved by his comments at [106] since the question that Edis J left open for decision in a subsequent case was not whether dual proceedings were themselves abusive but whether there might be an abuse of process where the same assets are alleged to be part of the available amount for the purposes of confiscation and said to be recoverable property in civil recovery proceedings.

47. This case therefore involves the very question left open by Edis J. Unfortunately, Singh was not cited to Edis J. Although obiter, Latham LJ answered the question in clear terms in that case at [18]-[19]:

> "18. The purpose of s.308(9) was clearly to prevent double recovery. Its effect is to ensure that the only mechanism for recovery in relation to property taken into account if a confiscation order has been made is that provided for under the confiscation order.
>
> 19. But if criminal proceedings are brought, but no confiscation order is made, or the property in question has not been taken into account in determining benefit for the purpose of any confiscation order that has been made, I can see no justification under the 2002 Act for precluding the claimant from seeking to obtain a recovery order in relation to the proceeds of crime."

48. I respectfully agree. No doubt that is why the draftsman of the Act was astute to limit the terms of s.308(9) to cases where the asset had been taken into account in determining benefit

in the confiscation proceedings. Further, I do not consider that it can properly be argued that the question of whether the disputed assets were obtained (or represented property obtained) through unlawful conduct could or should have been raised in the Crown Court. While central to any civil recovery proceedings, such question was irrelevant to the application to recalculate the available amount in the confiscation proceedings.

49. Nevertheless, and lest I am wrong in those conclusions, I propose to analyse Mr Bijou's application by reference to Henderson v. Henderson principles. In my judgment, a broad merit-based assessment would not support Mr Bijou's abuse argument:

49.1 The disputed assets were not considered when the Crown Court assessed the benefit in this case. That was not a matter of oversight since these assets and the funds from which the property and car were later purchased had not been identified or disclosed by the time that the original confiscation order was made.

49.2 There was not, and could not have been after a period of six years had elapsed after conviction, any application under s.21 to reassess the benefit figure.

49.3 Mr Rudolf's argument that, but for the six-year limitation, the disputed assets would have been declared part of the benefit figure does not advance Mr Bijou's claim since the effect of such reassessment of the benefit figure would have been to increase the benefit sum by £1,628,360 (the then value of the disputed assets). Had that happened then, given that it is now known that there were yet further available assets, Mr Bijou would eventually have become liable to pay the full increased benefit sum. While in that eventuality s.308(9) would have prevented civil recovery proceedings in respect of the disputed assets, that would be little comfort after being ordered on pain of imprisonment to pay over £3.5 million by way of the amended confiscation order. It is in any event hypothetical.

49.4 As I have already explained, the confiscation order was made *in personam* such that it did not lead to the confiscation of any identified asset but rather required Mr Bijou to pay a sum of money that had been found to be available. Accordingly, where a defendant's net assets exceed the sum payable under a confiscation order, it is a matter for the defendant's free choice as to which assets to realise to comply with the order.

49.5 While the Crown Court's finding that the full benefit figure was available for confiscation was made in part on the basis of the disputed assets, it transpired that there were yet further assets that were also available and from which Mr Bijou actually discharged the confiscation order.

49.6 Had the defendant elected to realise the disputed assets to discharge the confiscation order, there could be no question of it being an abuse to bring civil recovery proceedings in respect of yet further assets that had been obtained through unlawful conduct.

49.7 Following the discharge of this confiscation order from other available assets, there is equally nothing unfair about subsequently seeking to recover the disputed assets that the DPP contends were obtained (or represented property obtained) through unlawful conduct but which were neither taken into account in determining the benefit amount nor used to meet the confiscation order.

49.8 There is no question of the DPP misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before. As already indicated, the question of whether the disputed assets were obtained (or represented property obtained) through unlawful conduct simply did not arise in the Crown Court.

49.9 Mr Bijou is not the victim of unjust harassment and can defend any civil recovery proceedings, should he seek to do so, on their merits.

49.10 There is in any event a mechanism in Part 5 of the Act to ensure that a recovery order is not made in terms that would be incompatible with the respondent's human rights: s.266(3).

50. Accordingly, I dismiss this application.