



## PRESS SUMMARY

14 November 2012

### **R v Waya (Appellant) [2012] UKSC 51** ***On appeal from [2010] EWCA Crim 412***

**JUSTICES: Lord Phillips, Lord Walker, Lady Hale, Lord Judge, Lord Kerr, Lord Clarke, Lord Wilson, Lord Reed, Sir Anthony Hughes**

### **BACKGROUND TO THE APPEALS**

In 2003 the Appellant purchased a flat in London for £775,000. To do so, he paid £310,000 from his own resources and was provided with the remaining balance of £465,000 by a mortgage lender, on the basis of false statements he made about his employment record and earnings. In April 2005, that mortgage was redeemed as the Appellant remortgaged the flat to a different mortgage lender. On 10<sup>th</sup> July 2007 at Southwark Crown Court, the Appellant was convicted of obtaining a money transfer by deception in relation to the false statements he made to the initial mortgage lender. He was sentenced to 80 hours community punishment, and the Crown sought a confiscation order under the Proceeds of Crime Act 2002 ('POCA') in respect of the purported economic benefit that the Appellant obtained from his crime. On 25<sup>th</sup> January 2008 the judge made a confiscation order for £1.54m, which amounted to the increased market value of the flat at that time less the £310,000 paid by the Appellant at the time of the initial purchase. On 25<sup>th</sup> March 2010, the Court of Appeal reduced the order to £1.11m, which amounted to 60% – the percentage of the initial value of the property provided by the mortgage lender as a result of his false statements – of the flat's increased market value.

The Supreme Court, sitting as a bench of seven justices in May 2011, heard argument on whether someone in the position of the Appellant could be said to have gained a benefit from his crime and, if so, how such a benefit should be identified. But the Court then identified a further issue, that is whether the confiscation provisions of POCA could potentially give rise to a confiscation order which breaches Article 1 of the First Protocol ('A1P1') of the European Convention on Human Rights ('the Convention'), which protects the right to peaceful enjoyment of one's possessions. In March 2012, the Court reheard the case in relation to that topic and issues related to it.

### **JUDGMENT**

The Supreme Court unanimously allows Mr Waya's appeal. Lord Walker and Sir Anthony Hughes, with whom Lady Hale, Lord Judge, Lord Kerr, Lord Clarke and Lord Wilson agree, give the leading judgment in which they substitute a confiscation order of £392,400. Lord Phillips and Lord Reed, in their partially dissenting judgment, express the view that the confiscation order should be quashed entirely.

### **REASONS FOR THE JUDGMENT**

- The effect of A1P1 jurisprudence is to require that confiscation orders made under POCA must be proportionate to the aims of that Act [11-12, 20]. s.3(1) of the Human Rights Act 1998 requires, so far as it is possible to do so, that legislation must be read and given effect by the courts in a way that is compatible with Convention rights. The Court therefore holds that the Crown Court should only make confiscation orders which would be proportionate in each case [12-16]. However, this does not amount to giving general discretion to judges to fit confiscation orders to the facts and justice of a case [24]. Such discretion was previously removed from judges by Parliament [4].
- To assess whether a particular confiscation order would be disproportionate, it is important to note that the aim of POCA is to remove the proceeds of crime from criminals, rather than to act as a deterrent [2, 21-22]. If to make such an order would effectively constitute an extra punishment, such as in a case

where a defendant has already restored the losses his crime caused to the victim and has therefore gained no benefit, it would be disproportionate for the court to do so [28-29]. However, in the present case the Appellant gained a benefit in the form of an increase in value of the flat that his fraud enabled him to buy. It is therefore not a case in which any confiscation order would be disproportionate [35].

- The Court identifies the property initially ‘obtained’ by the Appellant ‘as a result of or in connection with’ his crime, under s.76(4) POCA, as the bundle of rights and liabilities arising from the contractual arrangements made between the Appellant, the vendor and the mortgage lender prior to completion of the purchase, which had no market value. To say he obtained the £465,000 loan is legally inaccurate, as it was never his or in his possession [53]. To say he obtained the whole flat ignores his £310,000 payment, would be disproportionate, and neither a fair nor a purposive application of s.76(4)[46-47].
- In situations where a defendant derives further property – for example, by sale or mortgage – from the property that he initially obtained by his crime, s.80(3) POCA operates to enable the courts to trace the derived property back to the initially-obtained property. [56-58]. This enables the courts to value the benefit of the crime in such cases, and is why the Court required to identify the property initially obtained by the Appellant in this case [43-44].
- s.79(3) POCA requires that lawfully co-existing interests in property be valued individually. As such, the Court holds that the Appellant’s interest in the flat, at the time the confiscation order was made, was a limited interest subject to the mortgage lender’s co-existing interest in the flat. However, s.79(3) must not apply with the effect that a defendant who perpetrates an acquisitive crime, such as theft, gains an essentially worthless interest because the right of restoration of the true owner falls to be deducted as a co-existing interest. If that were so, the value of property obtained by a defendant in such cases would invariably be nil, rendering the confiscation provisions of POCA ineffectual [64-69].
- The benefit that the Appellant obtained from his crime following completion of the purchase, which could be traced back to the bundle of rights and liabilities he obtained prior to completion, was 60% of any increase in the flat’s market value over its acquisition price. This percentage corresponds to that of the initial acquisition price of the flat which, in the form of the loan of £465,000, he obtained dishonestly [70]. There was no evidence before the court as to other assets which at the confiscation date represented the sum that the Appellant realised from the remortgage, so this cannot be considered as part of his benefit [74]. Noting a minor adjustment to account for the Appellant’s repayment of part of the principal sum secured by the remortgage, the Court therefore substitutes a confiscation order of £392,400 [76-81].
- Lord Phillips and Lord Reed agree with the most important aspect of the majority judgment, namely their analysis and resolution of the A1P1 issues arising from POCA. Their dissent pertains to the way POCA should apply to mortgage transactions in view of that analysis [82-83].
- Applying the language of s.76(4) POCA, Lord Phillips and Lord Reed identify the property initially obtained as the flat itself [104-109]. Accounting for the co-existing interest of the lender under s.79(3), the value of that property to the Appellant was £310,000, which was the amount he himself paid upon purchase [110]. Paradoxically, the more principal a defendant has repaid, the greater the value the property will be to him under POCA and therefore the greater the confiscation order [113]. To avoid each of these POCA effects leading to a disproportionate confiscation order where they arise, the judge should tailor that order under A1P1 [108, 111, 113].
- Further, Lord Phillips and Lord Reed do not agree with the majority that the Appellant’s benefit under POCA was 60% of the flat’s increase in value over the acquisition price [95-96]. Applying the express provisions of POCA, his benefit was £987,400, which is the difference between the flat’s value and the mortgage at the time the confiscation order was made. However, to confiscate this sum would be disproportionate [114]. In reality, the benefit he obtained was the extent to which the terms of his mortgage loan were more generous due to his misrepresentations. That figure could be calculated by the Crown Court if the case was remitted to it, but it would be just to quash the order in the circumstances of this case [115-125].

*References in square brackets are to paragraphs in the judgment.*

**This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)**