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THE HIGH COURT OF JUSTICE,
KING'S BENCH DIVISION,
ADMINISTRATIVE COURT,
DIVISIONAL COURT



No. CO/593/2022

[2022] EWHC 3709 (Admin)

Manchester Civil Justice Centre (Civil and Family Courts)
1 Bridge Street West
Manchester
M60 9DJ

Wednesday 1 November 2022

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE FORDHAM

B E T W E E N :

R (on the application of) Claimant
THE CHIEF CONSTABLE OF GREATER MANCHESTER POLICE

- and -

MANCHESTER CROWN COURT Defendant

- and -

RAJA IMTIAZ Interested Party

MR J GOSS appeared on behalf of the Claimant.

The Defendant did not appear and was not represented.

The Interested Party did not appear and was not represented.

J U D G M E N T

LORD JUSTICE POPPLEWELL:

Introduction

- 1 The claimant, the Chief Constable of Greater Manchester Police, brings a claim for judicial review, with leave of Heather Williams J, to quash the decision of the Crown Court sitting at Manchester on 9 December 2021. The Court, comprising Ms Recorder Presland and two Justices, allowed an appeal by the interested party, Mr Imtiaz, against an account forfeiture order, imposed by the Greater Manchester Magistrates' Court sitting at Crown Square on 8 September 2021, whereby the sum of £6,654 in Mr Imtiaz's bank account at Monzo Bank was forfeited pursuant to s.303Z14 of the Proceeds of Crime Act 2002 ("POCA").
- 2 Before us the Chief Constable has been represented by Mr Goss of counsel. The defendant, the Crown Court, has taken a neutral stance. Mr Imtiaz, who has been unrepresented throughout the proceedings, opposed the grant of leave and sent an email yesterday asking for the hearing to be vacated, which we refused for the reasons set out in an email to the parties, sent yesterday afternoon. He has not appeared at the hearing today.
- 3 DC Pickup was the officer at Greater Manchester Police ("GMP") responsible for investigating Mr Imtiaz. He applied for an account freezing order over the Monzo bank account, which was granted on 14 July 2020 by the Greater Manchester Magistrates' Court, sitting at Tameside, pursuant to s.303Z3 of POCA.
- 4 On 8 December 2020 DC Pickup made an application for an account forfeiture order in respect of the money in the Monzo account on the grounds that it was, or represented, property obtained through unlawful conduct and so it was recoverable property within the meaning of s.303Z14(4)(a) of POCA. The application was, in due course, supported by a signed statement from DC Pickup dated 23 February 2021. Its contents can be summarised as follows:
 1. Mr Imtiaz, then aged 33, had a criminal record comprising ten convictions between 2004 and 2019, including for offences of drug supply and possession of imitation firearms with intent to resist arrest.
 2. Following the execution of a drugs warrant at his address in 2012, there were found a quantity of high purity cocaine, cutting agents, scales, snap bags and a debtors' list, together with £3,140 in cash. Mr Imtiaz was not prosecuted in relation to these offences but a forfeiture order was made under Part 5 of POCA in respect of the cash, on the grounds that it was the proceeds of drugs supply. Mr Imtiaz unsuccessfully appealed against that order, claiming that the money had been given to him by his grandmother.
 3. On 14 March 2017 Mr Imtiaz was convicted of dangerous driving, possession with intent to supply cocaine, possession with intent to supply cannabis, and possession of heroin. He was sentenced to three years' imprisonment. There had been seized from Mr Imtiaz, following his arrest, the sum of £15,200 in cash "which subsequently set off a confiscation order following his conviction for drugs supply", in the words of para.15 of the statement. No further details were given on the confiscation order which, as will be seen, features at the heart of the issues before us. However, at para.18 of his statement, DC Pickup said:

"The activity that has taken place in this account since it was opened supports the belief covered by Greater Manchester

Police that it was being used to launder the hidden proceeds of the respondent's criminal past, which were not identified and restrained during the confiscation investigation into him.”

4. Mr Imtiaz was released on licence and within two weeks opened the Monzo bank account. The account statement obtained under a production order of 20 October 2020 and exhibited to DC Pickup's statement showed that the £6,654 remaining in the account had been funded by two payments from one “K Hussain”, of £5,000 and £25,000, paid respectively on 26 May and 5 June 2020. DC Pickup had, in the meantime, before the production order had been obtained, already identified these payments and asked Mr Imtiaz about them, as well as seeking other details in relation to the account. In correspondence Mr Imtiaz said that Mr Hussain was a customer of a bitcoin investment advisory business, which he, Mr Imtiaz, ran and that he, Mr Imtiaz, had done due diligence checks on Mr Hussain but had not met him since 11 June 2020. In one communication Mr Imtiaz said that he had asked Mr Hussain for the documentation which DC Pickup had requested from him in order to investigate the source of the funds, but that Mr Hussain had declined to provide it to Mr Imtiaz. Mr Imtiaz produced very little documentation in response to DC Pickup's detailed request for evidence to support the alleged operation of a bitcoin business.
5. DC Pickup had identified the “K Hussain” as Khalif Hussain, with a known date of birth and address. That Khalif Hussain featured in an unrelated account-freezing investigation, which had revealed that he, Khalif Hussain, had received £100,000 in criminal proceeds from a Mr Madni, the latter being someone who was also subject to forfeiture proceedings in relation to a sum of some £92,000.
6. Khalif Hussain's tax report showed that he had not had any employment since 2017 and there was no record of any PAYE or self-assessment income for him.
7. A production order over Khalif Hussain's Lloyd's bank account revealed payments by him into bank accounts at Halifax and Barclays Bank in the name of Mr Imtiaz, of a further £170,000 – at about the same time as the two payments into Mr Imtiaz's Monzo bank account – giving a total transferred by Khalif Hussain to Mr Imtiaz between 26 May and 8 June 2020 of £200,000.
8. DC Pickup summarised GMP's case at paras.42 to 44 of his statement in the following terms:
 - “42. The respondent is a career criminal who has profited from his past criminality, namely drug dealing. There is no evidence to back up the respondent's claim that he is operating a crypto currency trading business. If this were true, there would be financial records, proof of due diligence, contracts, accountants, book-keeping records. The only material supplied by the respondent has been a few screenshots of his Coinbase and Monzo bank account, which took him 3 months to provide.
 43. From the outset the respondent has tried to frustrate this investigation by creating a lot of empty noise – something which he reportedly did during the two previous POCA

investigations against him. There has been nothing produced by the respondent to date that is near credible.

44. Within 6 months of being released from prison for a drug related offence, the respondent received bank transfers totalling £200,000 from a jobless 23-year-old who has failed to engage with this investigation from the outset and whom the respondent has been reluctant to disclose the identity of. Most of this money has been carefully laundered by the respondent and at least £70,000 has been converted into crypto-currency. What remains is subject to today's application for forfeiture and which in my opinion represents recoverable property.”

- 5 Mr Imtiaz did not attend the hearing before the magistrates at which the forfeiture order was made on 8 September 2021. In his notice of appeal Mr Imtiaz explained that his failure to attend was the result of being bedbound by Covid; and his inability to produce a medical certificate in support was the result of delays in the court office meaning that it was only shortly before the hearing that any supporting evidence was requested, by which time it was impractical for him to procure it. Nothing in fact turns on that because the appeal which took place in the Crown Court was by way of a rehearing pursuant to s.79(3) of the Senior Court Act 1981.
- 6 As to his substantive grounds for appeal, he referred to a bundle of documents which he said established that the funds in the account were not criminal proceeds. He also asserted that a finding that they were “contradicts a previous Crown Court order made in October 2019”. Although this was not stated in terms, this must have been intended to refer to the confiscation order to which DC Pickup had referred in his statement.
- 7 Mr Imtiaz prepared a written statement for the Crown Court hearing. There is an issue as to whether it was provided at the directions hearing in advance of the substantive hearing on 25 November 2021, as Mr Imtiaz asserts, or, as GMP assert, only produced and provided to GMP at the substantive hearing itself. A large part of that statement was taken up with invective against GMP, both generally and in respect of how Mr Imtiaz had been treated by GMP in the past. At the subsequent Crown Court hearing he suggested that its relevance was to explain his reluctance to engage with DC Pickup in the latter’s investigation.
- 8 As to the sums received from Mr Hussain, the statement repeated that Mr Hussain was a customer of Mr Imtiaz’s bitcoin business and had told Mr Imtiaz that he had recently sold a property and was going to buy some apartments, but that this had been put on hold due to the Covid-19 lockdown. In the meantime Mr Hussain had wanted to invest in bitcoin. Mr Hussain was said to be a family contact in that one of Mr Hussain’s family members knew Mr Imtiaz’s brother.
- 9 At paras. 36 and 37 of his statement, Mr Imtiaz referred to the POCA hearing in October 2019 at which the confiscation order had been made. He said that an agreement had been reached between him and the Crown Prosecution Service and signed off by the Crown Court Judge (as he put it). He said that the GMP were now saying the figure reached by agreement was not right, but Mr Imtiaz asserted, in effect, that GMP were bound to accept the determination which the Crown Court Judge had approved.

The Law

- 10 Before turning to what happened at that hearing, it is convenient to set out the relevant statutory provisions and the law which applies to them. Although the application for an account forfeiture order was made under Part 5 of POCA, it is necessary to refer also to provisions in Part 2 of POCA, because at the very heart of Mr Goss's submissions on behalf of GMP is the criticism that the Recorder mistakenly thought that the Crown Court was dealing with a Part 2 application.
- 11 Part 2 of POCA is concerned with confiscation orders. They can only be made upon the conviction of the defendant and are part of the sentence for the offence of which he or she has been convicted. The court is bound to make an order in the recoverable amount under s.6(5), unless to do so would be disproportionate. A recoverable amount is identified in s.7 as the lesser of the defendant's benefit from criminal conduct – dealt with in s.8 – and the available amount – dealt with in s.9. Where a defendant has a criminal lifestyle his benefit from criminal conduct is to be determined by reference to general criminal conduct, not merely the particular criminal conduct of which he had been convicted. Section 10 then applies assumptions which, broadly speaking, place the burden of proof on the defendant to prove that receipts and assets, which have been identified, come from legitimate sources. Section 76 deals with the necessary connection with the benefit and/or conduct which must be established in order for the benefit to be treated as a benefit from criminal conduct for the purposes of s.7 and s.8. Section 16 forms part of the Act dealing with the procedural steps which have to be taken, and provides that the prosecutor must serve a statement with specified information, and that that information must include the alleged benefit from criminal conduct and how it is made up.
- 12 Part 5 of POCA provides for civil remedies for the recovery of the proceeds of crime. Unlike confiscation orders under Part 2, which require a conviction, civil recovery orders under Part 5 can be made where there has been no conviction of any person. Section 240 provides:
- “General purpose of this Part
- (1) This Part has effect for the purposes of -
- (a) enabling the enforcement authority to recover, in civil proceedings before the High Court or Court of Session, property which is, or represents, property obtained through unlawful conduct,
- (b) enabling property which is, or represents, property obtained through unlawful conduct, or which is intended to be used in unlawful conduct, to be forfeited in civil proceedings before a magistrates' court or (in Scotland) the sheriff and, in certain circumstances, to be forfeited by the giving of a notice.
- (2) The powers conferred by this Part are exercisable in relation to any property (including cash) whether or not any proceedings have been brought for an offence in connection with the property.”
- 13 Section 303Z was inserted into Part 5 of POCA by the Criminal Finances Act 2017 and came into force on 31 January 2018. It fulfils the general purpose identified in s.240(1)(b)

and provides for seizure and forfeiture orders over money held in accounts maintained with banks, building societies, electronic money institutions and payment institutions. Section 303Z3 provides that in England and Wales a magistrates' court can make a freezing order over money in a relevant account (subject to a statutory minimum):

“(2) ... if satisfied that there are reasonable grounds for suspecting that the money held in the account (whether all or part of the credit balance of the account) -

(a) is recoverable property ...”

- 14 Section 303Z14 enables the magistrates' court in England and Wales to make a forfeiture order in respect of a frozen account where there has been an account freezing order in accordance with (4), which provides:

“The court or sheriff may order the forfeiture of the money or any part of it if satisfied that the money or part -

(a) is recoverable property ...”

- 15 Section 304 identifies what amounts to recoverable property. It provides:

“(1) Property obtained through unlawful conduct is recoverable property.”

- 20 Section 308 is headed “General Exceptions”. Subsection (9) is in these terms:

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

(a) an order under section 6 ...”

- 21 Section 241(1) identifies what is meant by “unlawful conduct”. It includes conduct taking place within the jurisdiction, which is criminal under the law of England and Wales, and also conduct taking place abroad provided it is criminal, both under the local law of the place where it takes place and under our domestic criminal law. Section 241(3) provides that the standard of proof in determining whether unlawful conduct has occurred is the balance of probabilities. In *Serious Organised Crime Agency v. Gale* [2011] 1 WLR 2760, Lord Phillips of Worth Matravers PSC confirmed at para.4 that the burden of proof was on the applicant to establish the unlawful conduct to that civil standard of proof.

- 22 Section 242 of the Act provides:

“(1) A person obtains property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct.

(2) In deciding whether any property was obtained through unlawful conduct -

(a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct,

(b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.”

- 23 It is not necessary, for an order to be made under Part 5 of POCA, for the applicant to show that a specific crime has been committed. It is sufficient if the applicant establishes matters which constitute a particular kind, or kinds, of unlawful conduct by or in return for which the property was obtained (see for example *Director of the Assets Recovery Agency v. Szepietowski* [2007] EWCA Civ. 766 and *Director of the Assets Recovery Agency v. Olupitam* [2008] EWCA Civ. 104; [2008] CP Rep 24 421).

The Crown Court Hearing

- 24 At the hearing before the Recorder and the Justices in the Crown Court, the appellant appeared in person and the GMP were represented by Mr Samson of counsel. At the beginning of the hearing the Recorder indicated that although it was Mr Imtiaz’s appeal, she would ask Mr Samson to go first because then Mr Imtiaz would know what he had to deal with. Mr Samson indicated that his only witness was DC Pickup, whose statement the Recorder confirmed the court had read. Mr Samson indicated that the burden of proof was on Mr Imtiaz to prove on the balance of probabilities that the money in the account was legitimate. The Recorder asked Mr Imtiaz whether he agreed and Mr Imtiaz confirmed that he did.
- 25 Shortly thereafter she told Mr Imtiaz that the burden was on him to prove that the monies had been come by legitimately. The burden, she said, was not on GMP “because there has already been convictions so there is an assumption that it is illegal unless you prove otherwise”. She then went on to explain what was meant by the “civil standard of proof”, which she was suggesting was borne by Mr Imtiaz.
- 26 This was the first point at which the hearing got off on the wrong footing. The burden under Part 5 of POCA was, and remained throughout, on the GMP to prove on a balance of probabilities that the money in the account was from unlawful conduct. The burden would only have been on Mr Imtiaz had the court been dealing with a confiscation order under Part 2 and the s.10 assumptions been applicable. The account of what had happened at the outset which I have set out suggests that the Recorder was labouring under the misapprehension that the principles which had to be applied were those which applied to an order under Part 2 and that the s.10 assumptions were engaged. As a layperson Mr Imtiaz can readily be forgiven for not appreciating the error which was being made in the face of the assertion by counsel for the GMP and the explanation which had been given by the Recorder – her language, referring to an assumption applying because of the convictions, is the first of a number of indications that she thought the court was dealing with an application for a Part 2 confiscation order. A Part 5 order is not dependent on a conviction, does not involve assumptions, and does not impose a burden of proof on the person resisting it to prove that the source of the funds is legitimate.
- 27 The Recorder then invited Mr Samson to call DC Pickup and for him to give evidence-in-chief, summarising the main points in his statement, as well as verifying his statement as a whole. That is what DC Pickup did. He confirmed that for the purpose of the application

the focus was on the source of the two payments made by Mr Hussain of £5,000 and £20,000 (sic).

- 28 When he came to be cross-examined by Mr Imtiaz, he was asked to explain what he was suggesting was the illegitimate nature of that money in Mr Hussain's account, to which DC Pickup replied that it was his belief that the two payments represented money which Mr Imtiaz had himself earned in his drug dealing prior to his conviction for that offence, which Mr Hussain had then laundered for him and was, thereafter, paying back to Mr Imtiaz after the latter's release from prison. Mr Imtiaz then asked DC Pickup whether that meant that he was saying that the prosecution, his (Mr Imtiaz's) barrister and the judge at the confiscation hearing, had all made a mistake in agreeing on "the figure that was all settled", to which DC Pickup replied, "I am saying not all of the money was accounted for".
- 29 Mr Imtiaz was then in the course of putting to DC Pickup that the order made at the time was binding, when the Recorder intervened to seek to clarify the position. She pointed out that there were two separate things; one being the amount of the order, which she, at that stage, described as a forfeiture order; but the other being the profit which Mr Imtiaz had made from his drug dealing. During the course of those exchanges Mr Imtiaz confirmed that the amount which was generated from his criminal activity had been agreed upon, and that it was roughly about £16,000 and that it had been paid.
- 30 The Recorder then asked Mr Samson whether he could shed any light on the position, suggesting that there would normally be information calculating the profit, which she did not have. Mr Samson indicated that he did not have it either. The Recorder observed that there was therefore "a hole in the case" because "the £6,600 has to go against some estimated criminal profit". She said that the Crown Court normally had a sheet of how much was alleged to have been earned from the criminal activities and how much the defendant had in assets "and without that we cannot make any order".
- 31 This was the second indication that the Recorder thought that she was dealing with a confiscation order under Part 2, describing in shorthand the exercise of determining criminal benefit and the available amount in order to determine the recoverable amount, and referring to what would usually be available in the form of a s.16 statement from the prosecuting authority.
- 32 The Recorder asked DC Pickup to confirm that that is what would normally occur, and he confirmed that although he was not "a trained confiscator", as he put it, that was his understanding of confiscation proceedings. He said that as part of his investigation he had considered the previous confiscation proceedings, although it was not dealt with in his statement, and that the confiscation order had been satisfied in full by Mr Imtiaz.
- 33 The Recorder intervened to say that what would have been expected to be in his statement was something along the lines of "based on the facts of the sentencing he would have been making X amount of money, and we therefore want this money against that".
- 34 This was the third indication that she thought the court was dealing with a confiscation order because she thought that the court had to be satisfied that the money in the frozen account had to be proved to have come from the offence of which he had been convicted in 2019 whereas that was not necessary for a Part 5 order. The Recorder made that clear in a later passage, during exchanges with DC Pickup, in which she said that he had not in his statement said that he thought the profit from the 2019 offence was more than £6,600 and had not said anything about how much it was.

- 35 DC Pickup's response was at first that he did not think that any benefit figure had been calculated during the confiscation proceedings because it was just deemed that the available amount was what was seized. But he then went on to say that there was a benefit figure, but to confirm that he did not know what the benefit figure was.
- 36 The Recorder then suggested to Mr Samson that under POCA there had to be two figures, a benefit figure and a recoverable figure. It was clear that she was, at that stage, talking about the POCA order the court was then being asked to make, not the order which had been made in October 2019, because she said that the recoverable figure was only £6,654 but "you need a benefit figure because what does the recoverable go against?" She put to Mr Samson that it was a problem that the benefit figure was not in DC Pickup's statement. After further exchanges she said to Mr Samson that, "Without a benefit figure you cannot go anywhere". Mr Samson did not disagree. The Recorder then said that she would give Mr Samson a short time, until 3.00 p.m., to make enquiries (the hearing had started at about 2.15 p.m.).
- 37 When the hearing resumed Mr Samson confirmed that he was not in a position to identify the benefit figure in the confiscation order, or to explain how it had been calculated, still less to put evidence of those matters before the court. He made it clear that he had no instructions to concede that the application could not succeed without them. But he did not seek to advance any further argument to meet the Recorder's suggestion that, without such evidence, the court could not make the order which was being sought.
- 38 The Recorder then announced the court's decision that the appeal would be allowed:

"... because the Crown Court has offered no evidence as to the benefit figure, which is the very starting point, because in order for the Crown and the government to take any proceeds of crime they have to first calculate what those proceeds of crime would be for the relevant offence, and in the circumstances I have no evidence ... of what that figure might be ..."

The grounds

- 39 It is very unfortunate that the Recorder and the Justices were not given the assistance that they could reasonably have expected from Mr Samson, counsel for the GMP then appearing, as to the nature of the application and the relevant principles. He failed to correct the Recorder's misapprehension that the application fell to be decided on the principles applicable to a Part 2 confiscation order arising on conviction of the drug dealing offence. It is clear that that was what the Recorder was doing and that was a fundamental error. That is the first ground for judicial review, which we find made out.
- 40 Its consequence was that the Crown Court made the following further errors, which formed the subject matter of Grounds 2, 3 and 5 namely,
- a. Ground 2: the Crown Court erred in law by failing to approach the appeal by reference to whether, as a matter of fact on the evidence, the conditions in s.303Z14(4)(a) were made out;
 - b. Ground 3: the Crown Court erred in law in treating findings in the confiscation proceedings as though they were determinative of the separate forfeiture proceedings; and

- c. Ground 5: the Crown Court erred in law by requiring the GMP to prove that the contents of the frozen Monzo account were part of Mr Imtiaz's benefit from offences of which he had been convicted.

41 In his written objections to leave, Mr Imtiaz suggested that the GMP had agreed before the Crown Court that they could not succeed in the absence of the evidence, which the Recorder said was missing. The transcript of the hearing shows that to be mistaken. Mr Samson made it clear that he was not making a concession that evidence of a benefit figure was necessary, and that he had no instructions to do so.

42 That is sufficient to quash the decision and remit the matter for a fresh hearing of the appeal in the Crown Court, subject to consideration of the impact, if any, of s.31(2A) of the Senior Court Act 1981 which provides:

“The High Court -

(a) must refuse to grant relief on an application for judicial review ...

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.”

43 Although this is not an issue which has been raised by Mr Imtiaz, given that he has not appeared before us and is an unrepresented litigant, we think it right that we should consider it and examine the question whether it would be highly likely that the outcome would not have been substantially different if the errors which have been identified had not occurred. That involves a consideration of s.308(9), which we have cited, and whether the absence of evidence of the precise benefit figure and the way in which it had been calculated would have been highly likely to have led to the same result had it been addressed through the prism of the s.308(9) exception.

44 Having considered that question I have concluded that the court might very well have taken a different course, had it appreciated that the significance of the benefit figure was in relation to the potential application of the s.308(9) exception. That is for one or other of three reasons:

1. The burden of proof lay upon Mr Imtiaz, not GMP, to prove on the balance of probabilities that the exception applied. The absence of evidence as to the benefit figure and the basis of its calculation could not, therefore, be a ground for dismissing the appeal without considering the other evidence in the case.
2. The court would have been entitled to conclude that the Monzo account money had not been taken into account in calculating the benefit figure in the confiscation order on the evidence which was already before the court, notwithstanding that it had no evidence of the precise figure or how it was calculated.
3. Even if the burden of proof had been on the GMP, and the evidence of the benefit figure and how it was calculated had been critical to the outcome of the appeal, the Crown Court might well have granted the GMP an adjournment to another date to obtain the evidence had it understood its relevance to be for the purposes of the s.308(9) exception.

I will take each of those in turn to explain, in a little further detail, why I regard each of those as reasons why the result might well have been different.

The Burden of Proof

- 45 Mr Goss has submitted that the applicant does not bear the burden of proving that the exception in s.308(9) does not apply, but rather that it is for the respondent both to raise the issue and, if raised, to prove the application of the exception on the balance of probabilities. I agree for the following reasons.
- a. The general rule is that he who asserts must prove (see for example *Joseph Constantine Steamships Line Ltd v. Imperial Smelting Corporation Ltd* [1942] AC 154 at p.174). It is for the respondent to assert that what is otherwise recoverable property, as a product of unlawful conduct, as established by the applicant, is taken out of the realm of recoverable property by an application of one of the exceptions in s.308.
 - b. The variety of exceptions, which are contained in s.308 of POCA mean that it would be impose an unworkable burden on the applicant to have to prove that none of them apply in every single case. Moreover the information in respect of them will typically be exclusively within the knowledge of the respondent and which only the respondent will be in a position to raise. Section 308(3), for example, excepts property if it has been used to satisfy a judgment in a civil claim based on the unlawful conduct in question. Section 308(1) excepts property in the hands of a *bona fide* purchaser for value without notice. Sections 308(4) to (7)(a) except property which has been applied pursuant to orders made under various statutory provisions.
 - c. The same is true generally of confiscation orders. While the confiscation order in this case arose out of an investigation by the same police force as brought the forfeiture application that will not necessarily be the case. It cannot be said that the applicant for a Part 5 forfeiture order will always be able, by virtue of its knowledge of prior proceedings, to collate and present evidence as to the absence of an exception under s.308(9).
 - d. Conversely there is no substantive prejudice to respondents in bearing the burden under s.308(9), or indeed under s.308 more generally. It will be within the knowledge of the respondent whether the exception can be relied on, and the evidence in support will generally be in the respondent's hands. To the extent that such evidence may unusually lie in the applicant's hand, applicants are under a duty of disclosure in civil proceedings in the magistrates' court (see *R (Clearing) v. Highbury Corner Magistrates' Court* [2006] EWHC 1869 (Admin) [34]).

- 46 Accordingly the absence of evidence before the Crown Court from the GMP, as to whether the money in the Monzo account had been taken into account in calculating the benefit figure under the 2019 confiscation order, would have formed no good reason for dismissing the appeal by reference to s.308(9). The burden was on Mr Imtiaz to show that it had.

Other Evidence

- 47 The court had evidence that the confiscation order was made in the sum of £15,200 and the court was told by Mr Imtiaz, in the course of the exchanges, that the benefit figure was about £16,000. The court had evidence that what was left in the Monzo account derived

from £30,000, which came from Mr Hussain's bank account, as part of a series of payments over a period of about ten days into a number of Mr Imtiaz's accounts which totalled £200,000.

- 48 There was, therefore, evidence which could have supported a finding that DC Pickup was correct in the belief – that he expressed at para.18 of his statement – that the Monzo account contained proceeds of Mr Imtiaz's criminal past “which were not identified and restrained during the confiscation investigation”. Such a finding could properly have been made without knowing the exact benefit figure or exactly how it had been calculated. The Crown Court might or might not have reached that conclusion, but such a conclusion cannot be said to be highly unlikely.

Adjournment

- 49 We have seen the Crown Court record of the confiscation order made on 1 October 2019 and the confiscation order itself, as made on that day, and amended on 10 October 2019. They make it clear that the benefit figure was in fact £15,500.50 and that it simply represented the cash which had been seized upon Mr Imtiaz's arrest on that occasion.
- 50 Had that material been before the Crown Court it might properly have been satisfied that s.308(9) was not engaged at all, on one or other of two bases. The court might properly have concluded that the sum of money in the Monzo account, and which came from Mr Hussain, was from unlawful conduct by Mr Hussain – or others whom Mr Hussain was assisting – rather than the conduct of Mr Imtiaz which gave rise to the conviction. That would have been a proper conclusion given the size of the total sums transferred by Mr Hussain to Mr Imtiaz – £200,000 – by contrast to the relatively modest quantity of cash – about £15,000 – and drugs – about 11.5g of cocaine – which were seized in that offence. Alternatively the court might properly have concluded that had the money in the Monzo account been the product, ultimately, of the money of Mr Imtiaz's own drug dealing, it had not been taken into account in calculating the benefit figure, which merely represented the cash seized on arrest. There had also been seized on that occasion some 14 kilograms of the cutting agent, Benzocaine, which was suggestive of a substantial dealing in quantities which would produce far more than the £15,000-odd which was seized. GMP were not bound by any agreement reached by the Crown Prosecution Service as to the scale of the dealing or the benefit at the time the confiscation order was made.
- 51 The question therefore arises as to whether it could be said to be highly unlikely that the court would have adjourned to another day to enable the evidence to be put before the court. Had it been looking at the matter as one which arose under s.308(9), there would have been factors pointing in each direction. On the one hand, consideration of resources and the efficient administration of justice would have weighed against granting an adjournment in a case involving a relatively modest sum of money. On the other hand, the question of whether the Monzo account money had been included in the calculation of the benefit figure in the confiscation order was not squarely raised in Mr Imtiaz's notice of appeal. Rather, the point which was then being raised was the erroneous one that the GMP were bound by any agreement made by the Crown Prosecution Service and endorsed by the court. The question of whether the Monzo account money had been included in the calculation of the benefit figure in the confiscation order might be said to have been raised in Mr Imtiaz's statement, although only obliquely. But there was a dispute as to whether the GMP had received that statement before the hearing itself. In those circumstances the court might very well have taken the view that the GMP were not at fault in not having come prepared with the relevant information about the benefit figure, or, at the lowest, the degree of the

fault was not such that it should be shut out from the opportunity of being granted time to produce it.

- 52 I have not overlooked the fact that the Crown Court in this case did in fact exercise its discretion to grant no more than a short adjournment on the day. However, had it been viewing the relevance of the benefit figure in the confiscation order through the prism of its relevance to the potential engagement of s.308(9), it would have had to consider factors in relation to GMP's culpability for not coming forearmed with material, which were very different from those which would arise if, as the court erroneously thought, GMP had always needed to establish the conditions for a Part 2 confiscation order arising out of the specific conviction and, therefore, ought to have included the information in what was, in effect, a s.16 statement. Accordingly, in my view the court might well have granted an adjournment to another day.

Disposal

- 53 I would therefore accordingly make an order quashing the decision and remitting the appeal to be re-heard in the Crown Court.

Mr JUSTICE FORDHAM:

- 54 I agree.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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