Case No: U20110135/1/2011

Neutral Citation Number: [2012] EW Misc 6 (CCrimC)
IN THE CENTRAL CRIMINAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2012

Before :

THE HONOURABLE MR JUSTICE UNDERHILL

- -

Between :

BRANDON BARNES	**Applicant**
v	
EASTENDERS CASH & CARRY PLC & Others	**Respondent/ Applicant**
v	
CROWN PROSECUTION SERVICE	**Respondent/ Interested Party**

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Mr Geraint Jones QC and Mr Marc Glover (instructed by **Rainer Hughes**) for the **Applicant**
Mr Barry Stancombe (instructed by **Blake Lapthorn**) for the **Respondent/Applicant**
Mr Michael Parroy QC and Mr Rupert Jones (instructed by **Crown Prosecution Service**) for the **Respondent/Interested Party**

Hearing dates: 7th & 8th February 2012

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Judgment

The Honourable Mr Justice Underhill :

INTRODUCTION

1. On 6 December 2010, on the application of the Crown Prosecution Service, Judge Hawkins QC at the Central Criminal Court made *ex parte* restraint orders under section 41 of the Proceeds of Crime Act 2002 ("POCA") in respect of two alleged offenders ("the Defendants"), Alexander Windsor and Kulwant Singh Hare. Neither had – or has since – been charged with any offence, but the alleged offences under investigation consist of a so-called diversion fraud, whereby the payment of duty on alcohol and tobacco was evaded: the details are immaterial for present purposes. The orders, which are in substantially identical terms, restrained the Defendants from dealing with their assets generally but also specified a number of particular assets. For present purposes I am concerned with sub-paragraphs (7)-(12) of paragraph 5 of the orders, which specified "the assets of" six companies – Eastenders Cash & Carry Plc, Eastenders (Slough) Ltd, Eastenders (Barking) Ltd, Eastenders (Birmingham) Ltd, Eastenders (Croydon) Ltd and Eastenders (Coventry) Ltd – including, in each case, a specified bank account – as being assets of the Defendants; and with paragraphs 6-14 which purport to be directed to the same companies, together with three others – Eastenders (Luton) Ltd, Eastenders (Basildon) Ltd and Eastenders (Bristol) Ltd – and to restrain them from dealing in any way with their assets. Those nine companies, to which I will refer simply as "the companies", constituted a group operating a substantial cash-and-carry business, with an annual turnover of about £150m. The Defendants each have a 20% shareholding in the parent company (Eastenders Cash & Carry plc).

2. In addition to the restraint order, the Judge made a receivership order under section 48 (2) of POCA (which I set out at paragraph 10 below) in respect of the entirety of the assets covered by the restraint order, including therefore the assets of the companies. The receiver was Mr Brandon Barnes of BDO LLP.

3. Judge Hawkins confirmed his orders following an *inter partes* hearing on 23 December 2010.

4. A restraint order under section 41 may only be made in respect of "realisable property" held by a defendant. "Realisable property" is defined in section 83, so far as relevant, as "any free property held by the defendant". (The definition of "free property", which appears at section 82, is immaterial for present purposes: there is no issue that the companies' assets were "free" in the relevant sense.) The companies were not themselves identified in the application as defendants (that is, as persons under investigation as having participated in the alleged offences: see section 40 (9) (a)); and *prima facie* it was they, and not the Defendants, who "held" their assets. Thus, to the extent that the restraint and receivership orders purported to apply to the assets of the companies, that could only be on the basis – though it is not clear that either the CPS or the Judge faced up to this point – that the corporate structure was a sham and that their assets were in truth assets of the Defendants.

5. On 26 January 2011 the Court of Appeal (Criminal Division) (Hooper LJ, Openshaw J and Sir Geoffrey Grigson) quashed the restraint and receivership orders as regards the assets of the companies on the basis that no arguable case had been shown that their assets were held by the Defendants within the meaning of section 83 ([2011] EWCA Crim 143). As Hooper LJ put it at para. 109 of the judgment:

> "…We do not think that there was sufficient material before HHJ Hawkins on the application to discharge the orders for him to decide that there was

> reasonable cause to believe that these companies are or were just a front, sham or device (to use but some of the epithets which have been used in similar cases) for a diversion fraud committed by the alleged offenders or that they are sheltering behind the façade or veil of the companies to hide their frauds, or the proceeds of their frauds; indeed the evidence before us suggest that the vast bulk of the companies' business is legitimate."

(The remainder of the orders were also subsequently quashed, but I am not concerned with that aspect.)

THE APPLICATIONS AND THE ISSUES

6. Paragraph 29 of the Judge's order provided that "the remuneration and expenses of the receiver shall be paid out of the Receivership Property" – to use the usual shorthand, that he enjoyed a lien. That provision of course reflects the normal practice as regards receivers' remuneration, but it is also the subject of explicit provision in POCA and the Criminal Procedure Rules. Section 49 (2) (d) of POCA reads:

> "The court may by order confer on the receiver the following powers in relation to any realisable property to which the restraint order applies -
>
> (a)-(c) …
>
> (d) power to realise so much of the property as is necessary to meet the receiver's remuneration and expenses."

Rule 60.6 (5) of the Criminal Procedure Rules reads as follows:

> "A receiver appointed under section 48 of the 2002 Act is to receive his remuneration by realising property in respect of which he is appointed, in accordance with section 49(2) (d) of the 2002 Act."

7. What gives rise to the present hearing is the fact that pursuant to paragraph 29 of the order the Receiver asserts a lien over the assets of the companies for the amount of his remuneration and expenses incurred during the seven weeks or so of the receivership. The total amount in respect of which the lien is asserted is £772,547.19. That includes approximately £248,000 by way of fees and £143,000 in respect of legal costs: the balance represents the Receiver's liability for sums invoiced post-discharge for goods or services supplied to the business during the period of his management, for which he is personally liable. The Receiver has retained cash in that amount following the return of the remainder of the assets to the companies.

8. The companies regard that claim as wholly unjust. Putting it broadly, they say that since the Court of Appeal has held that the receivership order should never have been made it cannot be right that they should nevertheless be liable for the Receiver's costs and expenses: either he should not be entitled to enforce his claim against their assets at all, or, if he is, they should be entitled to compensation from the CPS in the equivalent amount. It is a central part of their case that if they were without a remedy in such a case that would constitute a breach

of their rights under article 1 of the First Protocol to the European Convention of Human Rights (to which I will refer for short simply as "article 1").

9. Against that background, there are two applications before me:

- The first is an application by the Receiver, made by letter from his solicitors dated 20 April 2011, for an order for remuneration and expenses in the sum claimed (or, in any event, for taxation and an interim payment), payable out of the retained assets.

- The second is an application dated 3 November 2011 (re-served on 28 November) by the companies for an order that the CPS pay them compensation equivalent to any amount payable to the Receiver. The application does not specify the legal basis of the claim.

THE STATUTORY PROVISIONS AND THE CASE LAW

10. The receivership order was, as I have said, made under section 48 of POCA, which reads as follows:

> "(1) Subsection (2) applies if—
>
> (a) the Crown Court makes a restraint order, and
>
> (b) the applicant for the restraint order applies to the court to proceed under subsection (2) (whether as part of the application for the restraint order or at any time afterwards).
>
> (2) The Crown Court may by order appoint a receiver in respect of any realisable property to which the restraint order applies."

A receivership order can thus only be made where a restraint order has been made, and in respect of the realisable property to which that order applies: as to the definition of realisable property, see paragraph 4 above. The provisions governing the making of such orders are at sections 40 and 41. I need not set them out here. Their broad effect is that an order may be made at any time after the commencement of an investigation into an alleged criminal offence, where there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct. Their essential purpose is to preserve, on an interim basis, property which may ultimately become the subject of a confiscation order.

11. Section 49 sets out the powers of a receiver appointed under section 48. I have already set out at paragraph 6 above the terms of sub-section (2) insofar as they relate to remuneration and expenses. I should also, because it is relied on in the companies' submissions, refer to sub-section (9), which reads:

> "The court may order that a power conferred by an order under this section is subject to such conditions and exceptions as it specifies."

12. Although this is not explicitly acknowledged on the face of the statutory provisions, when making orders under sections 41 and 48 the Court is not required to make a final determination that any specified assets are in fact realisable property within the meaning of section 83: that would be inconsistent with the interim nature of the orders in question, which are indeed typically made initially on a without notice application. Rather, what it does is to consider whether there is a good arguable case that the assets in question will be found to be realisable property: see *DPP v Compton* [2002] EWCA Civ 1720, at paras. 33-39. (Thus in the present case the Court of Appeal did not decide that the assets of the companies were not "held by" the Defendants but only that the material before the Court did not provide reasonable cause to believe that they were: see paragraph 109 of the judgment, quoted at paragraph 5 above.)

13. It is a necessary and well-recognised consequence of those provisions that defendants and/or third parties may be adversely affected by the operation of a restraint order, and more particularly a receivership order, in circumstances which at least arguably give rise to injustice. The statute provides for some, but limited, protection. It is necessary to distinguish three different types of case.

14. First, there may in the end be no prosecution, or the defendant may be acquitted, so that no confiscation order falls to be made. The imposition of the orders in the meantime may have caused substantial loss to the defendant himself or to others who have an interest in the assets affected by the orders. That loss will include, though it may not be limited to, his or their liability (subject to the arguments in the present case) for the costs and expenses of the receiver. He or they will in those circumstances have no recourse by way of an undertaking in damages, since a prosecutor is not required to give such an undertaking. Section 72 of POCA does provide for a right of compensation in respect of such loss, but only on very specific conditions and where there has been "serious default" on the part of the relevant authority. It reads (so far as material) as follows:

> "(1) If the following three conditions are satisfied the Crown Court may order the payment of such compensation as it believes is just.
>
> (2) The first condition is satisfied if a criminal investigation has been started with regard to an offence and proceedings are not started for the offence.
>
> (3) The first condition is also satisfied if proceedings for an offence are started against a person and—
>
> (a) they do not result in his conviction for the offence, or
>
> (b) he is convicted of the offence but the conviction is quashed or he is pardoned in respect of it.
>
> (4) If subsection (2) applies the second condition is that—
>
> (a) in the criminal investigation there has been a serious default by a person mentioned in subsection (9), and
>
> (b) the investigation would not have continued if the default had not occurred.
>
> (5) If subsection (3) applies the second condition is that—

(a) in the criminal investigation with regard to the offence or in its prosecution there has been a serious default by a person who is mentioned in subsection (9), and

(b) the proceedings would not have been started or continued if the default had not occurred.

(6) The third condition is that an application is made under this section by a person who held realisable property and has suffered loss in consequence of anything done in relation to it by or in pursuance of an order under this Part.

(7) ...

(8) ...

(9) Compensation under this section is payable to the applicant and—

(a) ...;

(b) if the person in default was a member of the Crown Prosecution Service or was acting on its behalf, the compensation is payable by the Director of Public Prosecutions;

(ba)- (f) …"

15. Secondly, the receiver may mistakenly meddle with property which is not covered by the order. *Prima facie* any such conduct would be tortious, but section 61 of POCA limits the potential liability of receivers in such cases. It provides (so far as material):

"If a receiver appointed under section 48 … —

(a) takes action in relation to property which is not realisable property,

(b) would be entitled to take the action if it were realisable property, and

(c) believes on reasonable grounds that he is entitled to take the action,

he is not liable to any person in respect of any loss or damage resulting from the action, except so far as the loss or damage is caused by his negligence."

The section is plainly directed at the kind of case where assets which are subject to the order are mixed up with assets that are not: see the passage from the judgment of Longmore LJ in *Sinclair v Glatt* set out at paragraph 22 (3) below.

16. Thirdly, assets may be treated in the initial order as being realisable property, and accordingly made subject to a receivership order, but may subsequently – either at the eventual confiscation hearing or (as here) sooner – be held not to be realisable property at all because the alleged offender has no interest in them. The third party to whom the assets in fact belong may suffer loss, and will certainly do so if the receiver is entitled to take his remuneration and expenses out of the assets in question. That is the present case. The

problem is one inherent in any sort of interim relief, but in the typical scenario in the civil courts the injured party is protected by appropriate undertakings which are not however required under POCA. There is no provision in POCA specifically directed at this situation, though I shall have to consider below whether section 72 can be made to do duty in such a case.

17. The rights of parties subject to a receiver's lien in those ways have been the subject of several recent authorities. Although none deals directly with cases in the third category defined above, it is necessary to consider what guidance they may give. One complication, however, is that they are all concerned with the terms of the predecessor legislation to POCA, and specifically with the Criminal Justice Act 1988 (though POCA also replaced the similar provisions in the Drug Trafficking Act 1994). Although the scheme of the 1988 Act as regards restraint and receivership orders is broadly similar to that of POCA, there are significant differences in the details of the provisions. One difference of potential significance is that section 88 (2) of the 1988 Act provided that:

> "Any amount due in respect of the remuneration and expenses of a receiver … shall, if no sum is available to be supplied in payment of it under section 81(5) above, be paid by the prosecutor or, in a case where proceedings for an offence to which this Part of this Act applies are not instituted, by the person on whose application the receiver was appointed."

In other words, if the receiver could not be paid out of the assets he could look to the prosecutor for payment: this is described in the cases as the "statutory long-stop". There is no such provision in POCA. I should also note that section 72 of POCA is the equivalent of section 89 of the 1988 Act, though it is not identically drafted, and that section 61 is the equivalent of section 88 (1).

18. In *Re Andrews* [1999] 1 WLR 1236 restraint and receivership orders were made over the assets of a defendant under the 1988 Act. He was subsequently acquitted. The receiver exercised a lien for his remuneration and expenses. The acquitted defendant applied for an order for costs against the prosecutor, to include the amount of the receiver's remuneration. The Court of Appeal held that the expenses of the receivership did not constitute costs. Thus far the reasoning does not address any of the issues in the present applications. However the judgment of Ward LJ contains a review of the principles appearing from the common law authorities relating to liability for the remuneration of a receiver, which the Court found applied equally to the regime under the 1988 Act. These are sufficiently summarised in the headnote as follows:

> "… that a receiver appointed by the court was an officer of the court, and was entitled to recover his remuneration and expenses from the assets under the court's control; that, by seeking the appointment of a receiver, a party did not thereby become liable for his remuneration, and the court had no power before the issues in an action had been determined to order either party to pay the receiver's remuneration; that a receiver's lien gave him a continuing right to possession of the assets even after the discharge of the receivership order, and he was entitled to an order charging all the assets available to him during the currency of his receivership with the amount of his costs and remuneration …".

The Court recognised that to saddle an acquitted defendant with the receiver's remuneration and expenses could work unfairness, but it expressed the view, albeit obiter, that this was inherent in the scheme of the Act. No argument was addressed to the Court about the effect of article 1.

19. In *Hughes v Customs and Excise Commissioners* [2003] 1 WLR 177 (which was decided in May 2002, very shortly before POCA was enacted) restraint and receivership orders were, again, made over the assets of a defendant under the 1988 Act. The identified assets included assets held in the name of a company of which the defendant was a 50% shareholder: the other shareholder was his brother, who was never charged. The receiver assumed control of the company's assets. The defendant was subsequently acquitted. The case accordingly comes into my first category. The defendant, and – it appears – his brother, sought to have deleted from the order the provision which entitled the receiver to reimbursement of his remuneration and expenses from the assets in question. Hooper J (in a decision promulgated in December 2001) granted the application. The Court of Appeal allowed the receiver's appeal. (Two other cases were heard by it on the same occasion, but they do not raise any distinct point.) The issues which had been discussed obiter in *Andrews* were considered more fully and as a matter of ratio. The Court of Appeal held that on the true construction of the relevant provisions (which were less explicit than those of POCA) the receiver enjoyed his ordinary common law rights to recover his remuneration and expenses from the assets of the receivership notwithstanding the defendant's eventual acquittal. Simon Brown LJ said, at para. 50 (p. 192 D-E):

> "… persuasive though at first blush the respondents' arguments appeared, and readily though I acknowledge the principle urged by [counsel] that any doubt as to the proper construction of expropriatory legislation of this nature must be resolved in favour of the defendant, I have come to the clear conclusion that the respondents' approach can be seen to misunderstand the scheme of the legislation and to be unsustainable. Statutory receivers are to be treated precisely as their common law counterparts save to the extent that the legislation expressly provides otherwise. The statute is not to be regarded as an entirely self-contained code incorporating nothing from the common law. The fact that, unusually (although not uniquely: consider such cases as *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 and *Attorney General v Wright* [1988] 1 WLR 164), the prosecutor cannot be required to give a cross-undertaking in damages (see RSC Ord 115, r 4 (1)) does not constitute so fundamental a difference between statutory and common law receivers as to give rise to wholly discrete schemes for their remuneration."

I would note the following other points in *Hughes* as being of relevance to the present case:

(1) The Court held that that state of affairs did not involve any breach of the defendant's rights under article 1. Simon Brown LJ, who delivered the leading judgment, pointed out that it was inherent in the criminal justice process that acquitted defendants were liable to be prejudiced by the effect of the proceedings against them – most obviously by being deprived of their liberty if remanded in custody – but that it was accepted that that generally gave rise to no right of compensation. He said, at para. 56 (p. 193 G-H):

> "In my judgment it is no more unfair, disproportionate or arbitrary that [acquitted defendants] should be uncompensated too for any adverse effects that restraint and receivership orders may have had upon their assets."

(2) Likewise, as regards third parties, Simon Brown LJ pointed out at para. 58 that a third party in the position of the defendant's brother had the right to apply to seek the variation or discharge of any order which adversely affected him. He also noted that section 82 (4) of the 1988 Act (the equivalent of section 69 (3) (a) of POCA) required the Court to exercise its powers with a view to allowing an innocent third party to retain or recover the value of any property held by him; and he drew attention to section 88 (1) (i.e. what is now section 61). He concluded, at p. 194E:

> "It is difficult to regard this legislation as riding roughshod over the rights of innocent third parties."

(3) Arden LJ in her concurring judgment also drew attention to the various safeguards in the statutory provisions for both defendants and third parties, pointing out in particular that the right to compensation under sections 88 (1) and 89 (1) "could in an appropriate case include reimbursement of receivership costs and expenses" (see para. 67, at p. 196D). While noting the limited nature of the circumstances in which compensation could be awarded, she continued:

> "… the proportionality of a restriction of this nature on compensation for unconvicted defendants has to be viewed in the light of the legislature's view that restraint and receivership orders properly made are in the public interest. So viewed, in my judgment the restriction is proportionate when viewed against the aim sought to be achieved."

(4) Arden LJ did, however, note one possible lacuna in the legislation. She said, at para. 68 (p. 196 F-G):

> "A discrete issue arises about the absence of a right to compensation for defendants who were never charged and third parties who are affected by a receivership order where the defendant was never charged. Such persons have no right to compensation because section 89 (1) only applies if proceedings have been instituted but the defendant has been acquitted (or pardoned). It is not clear why these third parties and defendants are excluded from section 89 (1). The point has not been argued, but I would reserve for argument in a future case the question whether in a situation where there is a serious default by the prosecutor there would be a violation of Convention rights if compensation were not available for this group of persons."

That particular lacuna has been closed in the drafting of section 72 of POCA, but what is significant is that Arden LJ contemplated that it might involve a breach of the rights of the defendant or a third party under article 1.

20. In the meantime the appellant in *Andrews* had made an application to the ECHR that his liability for the receiver's costs involved a breach of his rights under article 1. In *Andrews v United Kingdom* (application no. 49584/99), which was decided in September 2002 (shortly after the enactment of POCA), the Court rejected the claim as inadmissible. The decision post-dated *Hughes* by a few months, but the reasoning is essentially similar.

21. In *Capewell v Revenue and Customs Commissioners* [2007] 1 WLR 386 the issue, again, was whether a receiver appointed under the 1988 Act was entitled to a lien for his remuneration and expenses. The House of Lords held that he was, but the case was argued on a very narrow ground, namely whether the position as established in *Hughes* had been changed by the terms of rule 69.7 of the Criminal Procedure Rules (which I need not set out here): it was not contended that *Hughes* was wrongly decided. Lord Walker, who delivered the only substantive speech, did, however, make some more general observations. He specifically endorsed the reasoning in *Andrews* and *Hughes* as to the applicability of the common law rules about receivership to the regime under the 1988 Act. He said, at para. 26 (p. 395 E-H):

> "[The scheme of the 1998 Act] is for the receiver's remuneration and expenses to be paid out of the receivership assets, but in a way which counts towards satisfaction of any confiscation order, … If an individual subject to a restraint order is not ultimately convicted and made subject to a confiscation order, section 89 of the 1988 Act gives a statutory right to compensation in some circumstances. But Parliament has deliberately framed the right to compensation in narrow terms. That is an aggrieved individual's only right to compensation as such. He would not normally have the benefit of an undertaking in damages since (as Simon Brown LJ observed in *Hughes*' case, at para 50) a prosecutor cannot be required to give an undertaking in damages as a condition of obtaining the appointment of a receiver. An aggrieved individual's only other recourse would be to challenge the amount of the receiver's remuneration … . There is a similar scheme under the 2002 Act … but in these new provisions it is made perfectly clear that receivership expenses and remuneration are to come out of the assets subject to the receivership."

In para. 27 (at p. 396 B-C) he observed:

> "A receiver takes on heavy responsibilities when he accepts appointment, and he is entitled to the security of knowing that the terms of his appointment will not be changed retrospectively – even if an appellate court later decides that the receivership should have been terminated at an earlier date."

22. In *Sinclair v Glatt* [2009] 1 WLR 1845 a receivership order had been made under the 1988 Act in relation to property in respect of which the defendant held the legal title but where the entire beneficial interest belonged to his wife. The primary issue was whether such property constituted realisable property of the defendant. The Court of Appeal held that it did. On that basis the case also fell into the first category that I have identified. Three points of relevance to the present case should be noted:

(1) The receiver had argued in the alternative that even if the third party was entitled to have the receivership order varied so as to remove the assets in question from the scope of the order, he was nevertheless entitled to exercise his lien in respect of remuneration and expenses during the period that the order had remained in force. On that hypothesis the case would fall into the third category, and the receiver's submission is essentially the same as that made by the Receiver in the present case; but Longmore LJ, who delivered the leading judgment, expressly declined to consider it since the question did not in the event arise (see para. 17, at p. 1851G).

(2) There was some discussion of whether the effect of the decision involved a breach of the rights of the wife under article 1, since assets to which she held the entire beneficial title might be charged with liabilities for which she had no responsibility. Longmore LJ noted, at para. 25 (p. 1854 B-C) that:

> "[Counsel for the receiver] recognised that in an extreme case (for example where a party wholly unconnected with the defendant stood to lose an entire asset because it was eaten up by the receiver's costs) article 1 might have a part to play when the court came to decide how much the receiver was entitled to claim and from which asset that amount was payable."

But he observed that in the instant case "none of the parties can say that they have no connection with [the defendant]". Likewise, Elias LJ in his concurring judgment said, at para. 42 (pp. 1857-8):

> "Given the potential injustice of the operation of this principle, I would not rule out the possibility that in an appropriate case article 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms could limit the costs and expenses recoverable from an innocent third party, and I do not read the judgment of the Court of Appeal in [*Hughes*] as excluding that possibility."

(3) There was some discussion of the relevance or otherwise of section 88 (1) (i.e. what is now section 61 of POCA). Longmore LJ observed that the section was primarily concerned with a different situation, namely that of "persons who have an interest in the receivership assets but no connection at all with the defendant (e.g. cases where the wrong address of a house or the wrong registration number of a car is given in the order)" (p. 1855D). But he continued:

> "But the sub-section does show that Parliament did contemplate cases in relation to which the receivership order might cover

> assets not owned by the defendant. It might well be that the receiver incurs expenditure in preserving or managing such assets; in such cases he may be immune from suit but will still need to recover his costs out of the assets."

23. In *Re Pigott* [2010] EWCA Civ 285, a Judge had made a restraint and receivership order under the 1988 Act (which remained in force on the particular facts of the case) over property registered in the name of one party (L) on the basis that it constituted the realisable property of a different party (P). The Court of Appeal upheld the order on the basis that there was a good arguable case that the property did indeed belong beneficially to P (applying *Compton*: see paragraph 12 above). Rix LJ, however, made some general observations about P's potential liability for the costs of the receivership if it were subsequently held that the property in question was, after all, not realisable property. He said:

> "53. As for the costs of the receivership, I would add the following remarks. It is established that in the ordinary case a receiver is entitled to a lien on receivership assets for the costs of the receivership: *Capewell* and *Glatt*. That is certainly true where the assets are those of the criminal defendant (*Capewell*) and also where the assets are beneficially owned by a third party but in the bare legal ownership of the defendant (*Glatt*). In *Glatt* counsel for the RCPO submitted it was also true even where an interested party was able to show that the assets were not "realisable property" at all and thus was entitled to have them taken out of the receivership. However, Longmore LJ said that no decision need be made on that point in that case (at para 17). That, however, is a point raised by the present case. So it is not clear that, if Mr [L] were to succeed in showing that [P] had no interest at all, ... the property would be liable for the receiver's costs. Even so, that remains a question for another day.
>
> 54. In any event, and despite the decision in *Capewell*, it may be possible, as my Lord, Lord Justice Wilson remarked in the course of argument, in an appropriate case, for a management receivership order to be made subject to a special term that, if it should be shown in due course that property subject to the order is after all not "realisable property" but wholly in the legal and beneficial ownership of a third party, then the costs of the management receivership should be borne, not by the property, but, in the absence of any other source, by the RCPO. It seems to me to be at any rate arguable that such a special term could be imposed by the court pursuant to section 77(8), which provides that a management receiver may be appointed "subject to such exceptions and conditions as may be specified by the court". After all, section 88 (2) of the CJA 1988 provides for a statutory long-stop … ."

(Section 77 (8) of the 1988 Act is the equivalent of section 49 (9) of POCA.)

24. I should mention for completeness that following the conclusion of the argument I was sent a copy of the very recent decision of the Court of Appeal in *An Informer v A Chief Constable* [2012] EWCA Civ 197; but it seems to me to contain nothing material for present purposes.

25. The various observations made in those cases are instructive but, as I have said, none of them deals directly with a "third category" situation, namely where a receiver seeks to be paid his remuneration and expenses out of property which was wrongly made the subject of the receivership order. Such a situation was contemplated in both *Sinclair v Glatt* and *Re Pigott*, but in neither did the issues to which it gives rise fall for decision.

ARTICLE 1

26. As I have already noted, the companies rely to a considerable extent on the effect of article 1, and it is apparent from the cases cited above that the Court of Appeal has recognised that article 1 may have a role to play in the construction and/or application of the statutory provisions governing the Receiver's right to recover his costs and expenses. It accordingly makes sense to start by considering the submission that to make the companies liable for the Receiver's costs involves a breach of their article 1 rights; and to consider the specific statutory provisions in the light of my conclusion on that issue.

27. I should as a matter of form set out the full terms of article 1, which are as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

In truth, however, the message of article 1 falls to be established not so much by reference to its detailed wording as from the jurisprudence which has developed. The essential questions arising under it were summarised by Simon Brown LJ in *Hughes* as being:

> "whether the measures taken are (i) in the public interest, (ii) appropriate for achieving its aim, (iii) proportionate, and (iv) achieve a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's right"

(see para. 53, at p. 193 B-C).

28. In my view it would be a breach of the companies' rights under article 1 if they had ultimately to bear the burden of the Receiver's costs and expenses. Although *Hughes* establishes that the legitimate objects of the confiscation provisions may justify the adverse effects of a receivership order on third parties – see paragraph 19 (2) above – that was in the context of an order which had been properly made, notwithstanding the eventual acquittal (or non-prosecution) of the alleged offender, and where the adverse effects on the third party were the consequence of his having the misfortune to share an interest in property with someone reasonably suspected of involvement in serious crime. But the situation seems to me fundamentally different where the adverse effect on the third party is the result not of his sharing property rights with the alleged offender but of his property being treated, wrongly and without sufficient evidence, as property in which the alleged offender has an interest. It does not seem to me that the public interest justification endorsed in *Hughes* has any application to such a case: the third party's assets are simply confiscated to fund the execution of an order that should not have been made in the first place.

29. I reach that conclusion as a matter of principle, but there is some support for it in some of the observations quoted in my review of the cases above. Arden LJ's dicta in *Hughes* – paragraph 19 (4) – are directed to a different situation, but they at least show that where there are inadequate safeguards for the interests of alleged offenders and third parties in this field that may give rise to a breach of article 1. As for what I take to be the implicit endorsement by Longmore LJ of the concession by counsel for the receiver in *Sinclair v Glatt* that article 1 "may have a role to play" in deciding to what extent the receiver can look to the assets of a third party for payment, and Elias LJ's more explicit observation to the same effect – see paragraph 22 (2) – it is important to note that those observations were made in the context of a case where the third party's assets were properly treated as realisable property. The present case is *a fortiori* because the alleged offender had no interest in the companies' assets. As for *Re Pigott*, it must be accepted that Rix LJ did no more formally than leave the question open, but it is possible to detect in the passage quoted at paragraph 23 above (including the reported suggestion of Wilson LJ) some recognition that it is wrong in principle to leave the third party bearing the burden of the receiver's remuneration and expenses in such a case.

30. I should note one point which has given me pause. In *Sinclair v Glatt* Longmore LJ held that there could be no breach of article 1 in that case because "none of the parties can say that they have no connection with [the defendant]", and Elias LJ specifically used the term "innocent" third party (see paragraph 22 (2) above). The point is not fully developed, but the thinking appears to be that an adverse impact on a third party that may be disproportionate in the case of a stranger may be justifiable where the parties are sufficiently closely associated. In the present case the companies are evidently closely associated with the alleged offenders, who have a substantial (though not a controlling) interest in their parent company. They may also, though this is not established, have been used to some extent in the carrying out of the alleged offences. It could be argued that it would be wrong to find a breach of article 1 if it turns out that they, or their controlling minds, were implicated in any wrongdoing that is eventually proved (and if that were the case it would follow that it was not possible to reach a view at this stage about whether such a breach had occurred). But I think that that approach would be wrong in principle. In *Sinclair v Glatt*, as I have already observed, the third party had an interest in realisable property – that is, he shared

property with the alleged offender – and the order was accordingly properly made, however harsh its impact. In those circumstances I can see how the nature or degree of the third party's association with the alleged offender might be a relevant consideration in deciding whether he should bear the resulting costs (though of course neither Longmore LJ nor Elias LJ expressed any concluded view). The case seems to me to be different where the third party's property is unequivocally his own, and there was accordingly no basis for a receiver being appointed over it. If there is sufficient ground for believing that the companies themselves were not innocent in relation to the alleged offending, the right course is for them to be treated as alleged offenders in their own right. Mr Parroy told me that the companies were in fact now themselves the subject of an investigation, but that was not the basis on which the order was sought or made.

31. I make it clear that the effect of my conclusion on the article 1 issue is only that the ultimate burden of the Receiver's remuneration and expenses should not fall on the companies. That is not inconsistent with them remaining primarily liable provided that they are able to pass the burden to the CPS by way of a claim for compensation or indemnity.

32. Accordingly, the issue for me is whether the Court is empowered by the provisions of the Human Rights Act 1998 to give effect to any of those alternatives. Mr Jones relied on section 6 of the Act, which provides (so far as material) as follows:

> "*Acts of public authorities*
>
> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section "public authority" includes—
>
> (a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature, ...
>
> (4)-(6) ... ."

He submitted that since sub-section (3) makes it clear that the Court is a public authority I am obliged by sub-section (1) to produce an outcome which is compatible

with article 1, i.e. one in which the companies do not bear the ultimate burden of the Receiver's remuneration and expenses.

33. But it is not as simple as that. The Crown Court's powers in this connection derive from POCA. If a Convention-compliant outcome cannot be achieved within the terms of POCA the effect of sub-section (2) (a) is that the primary duty under sub-section (1) does not apply. The real issue is thus about the construction of POCA, and the crucial provision of the 1998 Act is section 3, which provides (so far as material) as follows:

> "*Interpretation of legislation*
>
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) ..."

I was not referred to any authority on the correct approach to section 3, but its effect is well-established following a series of authoritative decisions. I have borne in mind particularly *Ghaidan v Godin-Mendoza* [2004] 2 AC 557: I note that Lord Rodger in his speech refers at paras. 106-110 of his speech (pp. 594-6) to the point made above about the interconnection of the operation of sections 3 and 6.

34. There are in principle three ways in which the companies could be relieved of the burden of paying the Receiver's remuneration and expenses:

(1) The Receiver could be disentitled to recover for his remuneration and expenses altogether.

(2) He could be disentitled to recover from the companies but allowed to claim from the CPS.

(3) He could be entitled to claim from the companies but they could be entitled to claim over against the CPS.

I consider those alternatives in turn. It is fair to say that the second alternative only emerged in the course of Mr Jones's oral submissions, and on several rather particular bases (see paragraphs 44 and 47 below); but the essential issue was adequately before me.

(1) IS THE RECEIVER DISENTITLED FROM RECOVERING ALTOGETHER ?

35. Mr Jones's overarching submission was that since it would be a breach of the companies' article 1 rights to have to pay the Receiver's remuneration and expenses I was obliged by section 6 (1) not to make any order having that effect. But that is only an argument for adopting one of the three alternatives identified above. It is not a reason for adopting this one. It is in fact plain that, irrespective of whether this course would be open to me having regard to the terms of POCA, to deny the Receiver his remuneration altogether is an unacceptable way of vindicating the companies' rights and would involve remedying one injustice only by creating another. The Receiver took charge of the companies' assets as an officer of the court, and incurred expenditure and liabilities accordingly, on the faith of a court order which was valid and effective until discharged by the Court of Appeal, and which afforded him a secure source of remuneration, subject only to the risk that the value of the receivership assets might prove insufficient – which is a wholly different kind of risk from the risk that the property might not be realisable property at all. He had no responsibility for the fact that the order was wrongly made. It would be intolerable that he should not be entitled to be paid, from one source or another, his proper fees and for his proper expenditure. As Lord Walker observed in *Capewell*, albeit in a slightly different context, a receiver is entitled to know that the terms of his appointment will not be changed subsequently (see paragraph 21 above).

36. Mr Jones sought to defuse that basic unfairness by submitting that the Receiver could have protected himself by obtaining a contractual indemnity from the CPS prior to accepting appointment, and that in failing to do so he had taken a conscious commercial risk. I was told that in the past such indemnities had been included in the standard collateral agreements made between the CPS and firms putting themselves forward for appointment under section 48 (or its predecessors). But in my view the Receiver was plainly entitled to proceed on the basis of the Rules as they stand, which include rule 60.6 (5), and of the Court order that was made, under which – as I have said – he was assured payment, subject only to the risk of the assets proving insufficient, which is a risk of a different kind and one which the Receiver was in principle in a position to assess. (Indeed I suspect that the abandonment of the practice of requiring such indemnities reflects the clarification obtained in *Capewell* and/or by the more explicit drafting of POCA and rule 60.6.)

37. Mr Jones had, however, an argument which did not depend on the 1998 Act. He pointed out that the power under section 49 (2) (d) was to permit the receiver to take his remuneration and expenses from any "realisable property" to which the restraint order applied; and he submitted that since the companies' assets had now been held not to be realisable property that power had no application. But in my view (and subject to paragraph 44 below) the draftsman must have proceeded on the basis that any property subject to a restraint order must for these purposes be considered to be realisable property, notwithstanding that the Court's order to that effect would inevitably have been made on an interim basis. If it were otherwise, the receiver would be at the mercy of a subsequent decision that the order had been wrongly made and would – in the absence of a "statutory longstop" of the kind omitted from POCA – have no sure recourse for his remuneration or expenses. Such a result must be unacceptable.

38. Accordingly I reject the argument that the Receiver is not entitled to recover his remuneration and expenses from anyone. I turn to the question whether the court has, however, power to direct that he recover from the CPS rather than from the companies.

(2) SHOULD THE RECEIVER RECOVER FROM THE CPS RATHER THAN THE COMPANIES ?

39. There is obvious justice in the proposition that the prosecutor rather than the third party whose assets have been wrongly made the subject of a receivership order should bear the burden of the receiver's remuneration and expenses. It is well recognised that in the equivalent situation of a civil freezing order justice requires that the party seeking the order on an interim basis should be responsible for any cost or expense if the case on the basis of which the order was made is eventually rejected. In the case of an application under POCA the mechanism of an undertaking in damages is conventionally regarded as being unavailable, though it is noteworthy that Rix and Wilson LJJ in *Re Pigott* contemplated that the court might impose conditions on the making of an order that had the same effect: see paragraph 23 above. But the justice of the case is even stronger in the present case because, as the Court of Appeal has held, the receivership order was wrongly made even on an interim basis: that is, there was (unlike in *Re Pigott*) no evidence that rendered it even sufficiently arguable that the assets of the companies were in truth assets of the Defendants. Even if the Court was itself at fault in acceding to the application, the responsibility for making an application on that basis was that of the CPS.

40. The question, however, is whether POCA can be construed, even with the benefit of section 3, in such a way as to enable the court to make such an order.

41. If POCA is read literally, or indeed according to its natural meaning, it is clear that the answer is that it cannot. It is true that, as Mr Jones pointed out, the language of section 49 (2) (d) is in form permissive only. Nevertheless, the Act must be read as a whole; and it is in my view clear that its scheme is that a receiver appointed under Part 2 is to be remunerated, and remunerated only, out of the receivership assets. That has been authoritatively held to be the position under the 1988 Act (subject to the "stopgap" provision previously in section 88 (2)) – see, most obviously, *Capewell* (paragraph 21 above) – and the situation is clearer still under POCA, both because section 49 (2) (d) is more explicit than anything in the 1988 Act and because even the stopgap of section 88 (2) has now been (presumably deliberately) removed. What is more, Parliament has given thought to the question of persons adversely affected by the making of restraint and receivership orders and has in section 72 provided for a limited remedy by way of compensation.

42. But that is not the end of the story. As is clear from *Ghaidan*, it is permissible to "interpret" domestic legislation in a way which departs radically from the ordinary meaning of the statute, so long only as the interpretation "goes with the grain" of the legislation – or, to put it more pedestrianly – does not go against any of its fundamental features. I need not lengthen this judgment by setting out the well-known passages from, in particular, the speeches of Lord Nicholls and Lord Rodger.

43. I have not found it easy to decide whether it is permissible to construe POCA as giving the court a right to require a prosecutor to pay the receiver's remuneration and expenses in order to give effect to the article 1 rights of the third party in a case like the present. My initial view was that the features which I have enumerated at paragraph 41 above meant that it was indeed a fundamental feature of the statutory scheme that the only source for the receiver's remuneration was the receivership property. But on reflection I have come to the conclusion that that is too crude an approach. In my opinion, what both the draftsman of the statute and the various courts which have analysed its effect (or, strictly, that of the 1988 Act) were contemplating was the situation where a receivership order is made over realisable property. It is indeed a fundamental feature of the legislation that in such a case the receiver is entitled to a lien over the property made subject to the order; and even it could be said that in some circumstances that might involve a breach of the article 1 rights of persons with an interest in such property I doubt if section 3 could be invoked to produce any different result. However I do not see that it is a fundamental feature of the statutory scheme that that rule should apply even where the property is not realisable property and has been wrongly included in the order: that is a different situation altogether. Of course, it is not a situation for which the Act expressly provides; but if the problem is only one of failure to include a provision safeguarding Convention rights, rather than of actual contradiction, section 3 is up to the job of supplying the omission. I would accordingly "interpret" POCA as giving the court the right, in circumstances such as those of the present case, to order that the receiver's remuneration and expenses be paid by the CPS and not by the companies. As was made clear in *Ghaidan*, it is unnecessary that I formulate the precise terms of a provision to be read into the Act: it is enough that I identify its effect in the present case.

44. The result thus achieved is the same as would have been reached if a condition had been imposed by Judge Hawkins of the kind floated in *Re Pigott*: see paragraph 39 above. Mr Jones submitted that I could take that very route by imposing such a condition retrospectively under rule 49 (9). I do not think that particular route is open to me (though I draw some comfort from the fact that Rix and Wilson LJJ were clearly attracted to the result), since I do not see how I could attach a condition retrospectively to an order which has been fully executed and indeed now discharged. I am obliged to be more straightforward and to assume a power to make a direct order to the necessary effect rather than resorting to conditions (or undertakings). But I do not think that that is unacceptable in principle. If one puts to one side the preconceptions based on a century of practice (as it is necessary in this context to do), there is nothing inherently surprising in a court which is asked to make a receivership order having the power to require the party seeking the order to be responsible for the receiver's remuneration and expenses (as indeed was the position under the 1988 Act).

45. There is not in fact formally before me an application by the Receiver for an order that the CPS pay his remuneration and expenses. The Receiver's stance before me was, understandably, that he should be entitled to exercise his lien and that the CPS and the companies could argue between themselves about an indemnity. The argument that the liability should fall on the CPS was essentially developed by Mr Jones rather than the Receiver, as part of his argument that it should not fall on the companies (and, as I have noted above, only rather belatedly). It may therefore be

that as a matter of form I should not make an order at this stage as between the Receiver and the CPS. But the substance of my decision is that the CPS is indeed liable and that for that reason the companies are not. That being so, I have considered whether there is a difficulty about my making, as myself a Judge of the Crown Court, a decision which would be in substance inconsistent with the order of Judge Hawkins: paragraph 29 of his order decides the question of liability in principle, and all that is formally before me is an application by the Receiver for a consequential order providing for assessment. But there is no objection to a Judge of co-ordinate jurisdiction varying a previous order where there has been a material change of circumstances. The decision of the Court of Appeal discharging the receivership order seems to me to be such a change.

46. I have also considered whether I should be inhibited in making the order in question by the fact that, as I was told, the Receiver's "letter of engagement" from the CPS stipulated that he had no recourse against it if he was unable to recover his remuneration and expenses from the property subject to the receivership. On a strict view that might be said to be immaterial: the companies ought not to be liable simply because the Receiver has signed away a right to recover against the CPS which he would otherwise have enjoyed. But the truth is that I do not believe that that provision can be reasonably construed as covering a situation like the present, where the receivership order is made over property which is not realisable property at all, as opposed to the case where the receiver's expenses have turned out to be higher, or the property less valuable, than the receiver initially judged when accepting appointment.

47. This conclusion means that I need not consider two other bases on which Mr Jones argued that the liability for the Receiver's remuneration and expenses should lie on the CPS. For the record, they were that the remuneration and expenses should be treated as costs (in which connection he referred to *Gale v Serious Organised Crime Agency* [2010] 1 WLR 2881); or that they were caught by the undertaking that the CPS was required to give to third parties. I will only say that I found neither of them convincing.

48. I should make it clear that all that it is necessary for me to decide is whether the court has the power to order the prosecutor to pay the receiver's remuneration and expenses in the circumstances of the present case – that is, where an order has been made that should not have been made even on an interim basis. It may well be that the reasoning should apply equally to a case of the *Re Pigott* type, i.e. where the order is properly made but where the property in question is eventually held not to be realisable property; but I need not express a definitive view about that.

(3) COMPENSATION/INDEMNITY FROM THE CPS

49. It was Mr Jones's case that if the Receiver's lien were effective, section 72 of POCA (as to which, see paragraph 14 above) could be read so as to impose on the CPS an obligation to indemnify the companies against, or compensate them for, their liability under the lien. It is clear that that could not be the case on any natural reading. At least the first two of the conditions specified in the section are not met. As for the first, there has been no acquittal, nor has the investigation concluded. (Despite a rather faint submission to the contrary from Mr Jones, I am sure that the phrase "proceedings are not started" in sub-section (2) must connote a definitive decision not to prosecute following the conclusion of the investigation.) As for the second, even if

the decision to seek restraint and receivership orders over the companies' assets constituted a serious default "in the investigation" (which is debatable), it is not a default which would have brought the investigation to an end as required by sub-section (5) (b). There is also a problem about the third condition, since the companies did not in the event hold realisable property; but if that were the only difficulty it could perhaps be overcome, since it could be argued that the orders had (necessarily) been made on the basis that the companies' assets were realisable property (cf. paragraph 37 above). But Mr Jones submitted that all those difficulties could be overcome using the weapon of section 3 of the 1998 Act, and that the conduct of the CPS in seeking an order over the companies' assets on so obviously flawed a basis constituted "serious default".

50. My conclusion on the previous issue means that it is strictly unnecessary for me to express a view on this submission. But in my view if section 3 is effective at all it works more appropriately by the route defined above than by attempting to fashion a right to compensation out of section 72. In the situations to which it applies it represents a careful and considered balance struck by Parliament which on *Ghaidan* principles could not be set aside by resort to the 1998 Act. It does not apply in the present situation because, if I am right in my conclusions above, the companies have suffered no relevant "loss" for which they require compensation.

51. Mr Jones appeared initially to seek some support from section 61 of POCA; but in the end he accepted that it could not assist him. Quite apart from anything else, it is concerned with the liability of the receiver and not of the prosecutor.

CONCLUSION

52. The result of the foregoing is that I make no order on the Receiver's application because I believe that his right of recovery is not against the companies but against the CPS. I make no order either on the companies' application because it does not arise. The parties, who have considered this judgment in draft, wish to have time to consider what consequential orders should be made. I will accordingly at this stage simply adjourn the hearing to a date to be fixed (before me) on the first available date after May 7th, with an estimate of one day: I take that estimate as a matter of prudence and the parties should inform the Court if a lesser estimate will suffice. Each party should lodge and serve a skeleton argument, setting out the draft order they propose, by no later 23 April, with skeleton arguments in reply to be served by no later than 30 April. The parties are agreed that permission to appeal can only be given by the Court of Appeal: had the decision lain with me I would certainly have granted permission since the issues are novel and difficult.