Neutral Citation Number: [2011] EWCA Crim 143
Case Nos: 201100203D5 & 201100210D5 & 201100209D5 & 201100208D5 & 201100209D5 & 201100205D5 & 201100204D5

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HHJ HAWKINS QC
RST016/2010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2011

Before :

LORD JUSTICE HOOPER
MR JUSTICE OPENSHAW
and
SIR GEOFFREY GRIGSON

- -

Between :

(1) ALEXANDER WINDSOR (Defendant)
(2) KULWANT SINGH HARE (Defendant)
(3) AVTAR SINGH HARE (Defendant)
(4) PELVINDER KAUR HARE (Interested Party)
(5) EASTENDERS CASH & CARRY PLC AND OTHER INTERESTED PARTIES — **Appellants**

- and -

THE CROWN PROSECUTION SERVICE — **Respondent**

Mr O Pownall QC and **Mr R Ashiq** appeared for **Alexander Windsor**
Mr J Pickup QC and **Mr R Ashiq** appeared for **Kulwant Singh Hare**
Mr A Jones QC and **Mr R Bowers** appeared for **Avtar Singh Hare & Pelvinder Kaur Hare**
Mr G Jones QC and **Mr M Glover** appeared for **Eastenders Cash & Carry plc and others all instructed by Messrs. Anami Law, Epping, Essex.**
Mr B Stancombe and Mr C Convey appeared for the **Crown Prosecution Service**

Hearing dates: 25th & 26th January 2011

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Judgment

Lord Justice Hooper :

All members of this court have contributed to the preparation of this judgment.

1. This is an appeal against the making of restraint and receivership orders.

2. On Monday 6 December 2010 HHJ Hawkins QC was sitting at the Old Bailey trying a murder case with the jury due to be sent out the following Monday. During the morning he heard an *ex parte* application by counsel for the respondent (who did not argue the appeal) for restraint and receivership orders under Part 2 of the Proceeds of Crime Act 2002 ("POCA"). A number of the orders made are the subject matter of this appeal. He was told that those persons whose assets it was intended to restrain were to be arrested on the following day and that search warrants would be executed.

3. During what was only a 40 minute hearing the judge signed various restraint and receivership orders affecting five alleged offenders (two of whom have not appealed), affecting Pelvinder Hare, affecting a group of companies which for convenience we shall call "the Eastenders group" and other companies. We compare that period of 40 minutes with the time it took us to determine only one issue, namely a day and a half following two days' preparation for the hearing.

4. Pelvinder Hare and the Eastenders group are not alleged offenders but are interested parties. The three alleged offenders, described as defendants in the orders, who have appealed are Alexander Windsor, Kulwant Hare and Avtar Hare.

5. We shall look at the material relied upon by the respondent below. It is sufficient to say at this stage that in correspondence to the Court of Appeal Criminal Division the solicitor for the respondent described the alleged fraud in this way:

> My career dealing with Customs work now spans over 23 years and for the last 20 years I have specialised exclusively in cases involving the restraint and confiscation of the proceeds of crime. I believe I can fairly state that this is the most complex restraint and receivership case I have ever managed, more so even that the case of Louis Glatt in which we have all been involved for the last 15 years…. The restraint and receivership application itself was very complex and the paperwork it generated substantial…. This case is far removed from what might be described as a "typical" restraint case.

6. Those companies in the Eastenders group which were active at the time of the order were involved in a wholesale cash and carry business supplying general groceries along with wines, beers and spirits. They had a total turnover in the region of £150 million and employed some 120 employees. All customers of the business are required to be VAT registered.

7. The shares in the holding company Eastenders Cash and Carry PLC (incorporated in 2002) are divided equally between Alexander Windsor and Kulwant Hare. The ownership of the shares in the subsidiary companies is divided between the holding company and a number of minority shareholders who appear as interested parties represented by Mr Geraint Jones QC.

8. The orders were made the day before search warrants were executed and the five defendants were arrested. Following their arrests the defendants were not charged but released on "police bail" until June 2011.

9. After an *inter partes* hearing HHJ Hawkins refused on December 23 to discharge or vary the orders made on 6 December, giving his reasons for his refusal on 4 January.

10. During the hearing before us we granted leave to appeal and during and at the end of the appeal hearing we announced our various conclusions. Counsel then drew up an agreed order to reflect those conclusions and we now give our reasons. Included within that draft order was an agreed variation of the order relating to Pelvinder Hare and we need say no more about her or that variation.

11. Some days before the appeal hearing (which lasted two days) we directed that the court would resolve first whether the respondent had shown on 6 December that there was reasonable cause to believe that the three alleged offenders had benefited from the criminal conduct alleged against them. That was the first ground of appeal. A second ground related to the alleged failure to quantify the benefit from the alleged criminal conduct and what is said to be an error on the part of the judge to restrain all of the assets of the three alleged offenders in the absence of a calculable benefit figure. A third ground related the judge's conclusion that a restraint order was needed to prevent dissipation of the realisable property to which the order applied. A fourth ground challenged the finding, implicit in the decision of 6 December, that the assets of the Eastenders group were realisable property held by the alleged offenders, Kulwant Hare and Windsor. There were other grounds, including a ground alleging that the reasons of the judge on 4 January were wholly inadequate, which it is not now necessary to determine.

12. Mr James Pickup QC argued the first ground with Mr Stancombe replying on behalf of the respondent.

13. During the second day of the hearing we concluded that the first ground of appeal succeeded and that the judge was wrong on 6 December to find on the material before him that there was reasonable cause to believe that the three alleged offenders who have appealed had benefited from the alleged criminal conduct. In the light of that conclusion, it was not necessary for us, nor indeed possible, to resolve the second ground of appeal relating to the alleged failure to quantify the benefit and the third ground relating to the risks of dissipation.

14. However the Court decided that we should suspend (or postpone) the effect of the final order in so far as it related to the first ground to permit the respondent to make a speedy fresh application to a judge sitting in the Crown Court. Mr Alun Jones QC objected to that course. We asked for further written submissions on this issue which we have now received. The respondent and the other two appellants did not support Mr Jones. For reasons which we shall give below, it is our view that we have the power to suspend in these circumstances. The order quashing this part of the decision of HHJ Hawkins on 6 December will come into effect when the judge hearing the application announces his decision on the application and, in any event, no later than a date which we shall fix after the case management hearing referred to below.

15. Because the fresh hearing was, as we understood the situation, expected to start next Monday the 7th of February, this judgment has had to be produced in haste. Since sending out a draft to the parties, we have learnt that the hearing would not start on that day and that there will be a case management hearing on the day that this judgment is handed down.

16. We did however hear and determine with immediate effect the fourth ground challenging the judge's implicit finding on 6 December that the assets of the Eastenders group were the realisable assets of the two alleged offenders, Kulwant Hare and Windsor, and should therefore fall within the restraint order preventing them from disposing of their assets. The effect of this part of the order was to close down the business at the busiest time of the year. The 6 December order also appointed a receiver with power to take possession of the property of the group. On December 15 HHJ Hawkins gave the receivers further power including the power to manage the property of the group and to realise so much of the receivership property as was necessary to meet his remuneration and expenses. With that power the receiver could recommence trading and did so but only on 18 December, some 15 days after the stores had had to cease business following the service of the 6 December order on the following day.

17. Mr Geraint Jones argued the fourth ground and Mr Convey replied on behalf of the respondent.

18. At the end of the second day's hearing we announced our conclusion that the fourth ground succeeded and that the assets of the Eastenders group were not in any event realisable property held by the two alleged offenders and that it followed that the order appointing a receiver in relation to the assets of the group had also to be quashed.

Statutory framework

19. Part 2 of the Proceeds of Crime Act makes provision for the making of confiscation orders in England and Wales following conviction and the making of restraint and receivership orders both before and after proceedings have been started. In this case the orders were made before the proceedings were started. As we have said the alleged offenders have not been charged.

20. Section 40 lays down a number of conditions one of which has to be satisfied before a restraint order may be made. Section 40(1) states:

> The Crown Court may exercise the powers conferred by section 41 if any of the following conditions is satisfied.

21. Section 40(2) provides:

> The first condition is that—
>
> (a) a criminal investigation has been started in England and Wales with regard to an offence, and
>
> (b) there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct.

22. Section 40(9)(a) provides that, if the first condition is satisfied, "references in this Part to the defendant are to the alleged offender".

23. Section 41(1) provides that:

> If any condition set out in section 40 is satisfied the Crown Court may make an order (a restraint order) prohibiting any specified person from dealing with any realisable property held by him.

24. In this case the specified persons in the orders included the alleged offenders, other named persons, companies in the Eastenders group and other companies.

25. Section 42 makes provision for applications to discharge and vary restraint orders.

26. By virtue of sections 43 and 89 any person affected by an order refusing to vary or discharge a restraint order may with leave appeal to the criminal division of the Court of Appeal.

27. Section 43(3) provides:

> On an appeal ... the Court of Appeal may—
>
> (a) confirm the decision, or
>
> (b) make such order as it believes is appropriate.

28. Section 46 provides:

> (1) Evidence must not be excluded in restraint proceedings on the ground that it is hearsay (of whatever degree).
>
> (2) Sections 2 to 4 of the Civil Evidence Act 1995 (c 38) apply in relation to restraint proceedings as those sections apply in relation to civil proceedings.
>
> (3) Restraint proceedings are proceedings—
>
> (a) for a restraint order;
>
> (b) for the discharge or variation of a restraint order;
>
> (c) on an appeal under section 43 or 44 [appeal to the Supreme Court].
>
> (4) Hearsay is a statement which is made otherwise than by a person while giving oral evidence in the proceedings and which is tendered as evidence of the matters stated.
>
> (5) Nothing in this section affects the admissibility of evidence which is admissible apart from this section.

29. As we shall see below, Rule 61.8 of the Criminal Procedure Rules provides that section 2(1) of the Civil Evidence Act 1995 does not apply to evidence in restraint proceedings and receivership proceedings. (The power to make this Rule comes from section 2(2) of the Civil Evidence Act 1995 and section 91 of POCA.)

30. Section 3 of the Civil Evidence Act 1995 provides:

> (3) Rules of court may provide that where a party to civil proceedings adduces hearsay evidence of a statement made by a person and does not call that person as a witness, any other party to the proceedings may, with the leave of the court, call that person as a witness and cross-examine him on the statement as if he had been called by the first-mentioned party and as if the hearsay statement were his evidence in chief.

31. The relevant rule of court in restraint and receivership proceedings is Rule 61.6(2), set out below.

32. Section 4 of the Civil Evidence Act 1995 provides:

> 1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
>
> (2) Regard may be had, in particular, to the following—
>
> (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
>
> (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
>
> (c) whether the evidence involves multiple hearsay;
>
> (d) whether any person involved had any motive to conceal or misrepresent matters;
>
> (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
>
> (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

33. No reference was made to this section in the course of the hearings before HHJ Hawkins (or so it appears) and no reference was made to it in the course of the hearing of the appeal, notwithstanding that the statements of Mr Brown and Ms

Joanne Coppey on which the respondent relied on December 6 to obtain the orders were almost all hearsay.

34. Section 48(2) of POCA provides that:

> The Crown Court may by order appoint a receiver in respect of any realisable property to which the restraint order applies.

35. Provisions similar to the provisions relating to restraint orders provide for applications to discharge and vary and a right of appeal with leave.

36. It is now established that the receiver's professional fees, litigation costs and expenses will come out of the realisable assets in respect of which the receivership order applies, even if the person against whom the restraint order has been made is not charged or, if charged, is not tried or, if tried, is acquitted: see *Capewell v HMRC* [2007] 1 WLR 386, [2007] UKHL 02.[1] Compensation is only payable in the event of serious default (see section 72).

37. Section 69 provides that the powers of the court to make and vary a restraint order or a receivership order and the powers of the receiver:

> (a) must be exercised with a view to the value for the time being of realisable property being made available (by the property's realisation) for satisfying any confiscation order that has been or may be made against the defendant;
>
> (b) must be exercised, in a case where a confiscation order has not been made, with a view to securing that there is no diminution in the value of realisable property;

38. Section 91, as amended, provides:

> In relation to—
>
> (a) proceedings under this Part, or
>
> (b) receivers appointed under this Part,
>
> Criminal Procedure Rules may make provision corresponding to provision in Civil Procedure Rules.

39. Pursuant to this section, the Criminal Procedure Rule Committee has made a number of Rules.

40. Part 57 applies to all proceedings in the criminal courts under POCA. Rule 57.7 provides:

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[1] Rule 59.4 of the Criminal Procedure Rules provides:
The Crown Court must not require the applicant for a restraint order to give any undertaking relating to damages sustained as a result of the restraint order by a person who is prohibited from dealing with realisable property by the restraint order.

> (1) Any witness statement[2] required to be served by this Part or by Parts 58 [confiscation proceedings], 59 [restraint proceedings], 60 [receivership proceedings] or 61 [restraint and receivership proceedings] must be verified by a statement of truth contained in the witness statement.
>
> A statement of truth is a declaration by the person making the witness statement to the effect that the witness statement is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true.
>
> The statement of truth must be signed by the person making the witness statement.
>
> If the person making the witness statement fails to verify the witness statement by a statement of truth, the Crown Court may direct that it shall not be admissible as evidence.

41. Rule 57.8 and 57.9 make provision for expert evidence in proceedings under Part 2 of POCA.

42. Rule 59.1 makes provision for applications for restraint orders. It provides, in so far as relevant to this appeal:

> (2) The application may be made without notice.
>
> (3) The application must be in writing and supported by a witness statement which must—
>
> (a) give the grounds for the application;
>
> ...

43. Rule 59.8 (8) provides:

> The applicant for a restraint order must—
>
> (a) serve copies of the restraint order and of the witness statement made in support of the application on the defendant and any person who is prohibited from dealing with realisable property by the restraint order

44. Rule 60.1(3) provides in relation to applications for a receivership order and in so far as relevant to this appeal:

[2] Defined in Rule 57.1 as meaning: a written statement signed by a person which contains the evidence, and only that evidence, which that person would be allowed to give orally.

> The application must be in writing and must be supported by a witness statement which must—
>
> (a) give the grounds for the application;
>
> ...

45. Rule 61(3) provides:

> Applications in restraint proceedings and receivership proceedings are to be dealt with without a hearing, unless the Crown Court orders otherwise.

In this case the Court must, rightly, have directed that an oral hearing was required to consider the applications which were to be granted on 6 December.

46. Rule 61.5 provides:

> (1) When hearing restraint proceedings and receivership proceedings, the Crown Court may control the evidence by giving directions as to—
>
> (a) the issues on which it requires evidence;
>
> (b) the nature of the evidence which it requires to decide those issues; and
>
> (c) the way in which the evidence is to be placed before the court.
>
> (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
>
> (3) The court may limit cross-examination in restraint proceedings and receivership proceedings.

47. Rule 61.6 provides:

> (1) The general rule is that, unless the Crown Court orders otherwise, any fact which needs to be proved in restraint proceedings or receivership proceedings by the evidence of a witness is to be proved by their evidence in writing.
>
> (2) Where evidence is to be given in writing under this rule, any party may apply to the Crown Court for permission to cross-examine the person giving the evidence.
>
> (3) ...

48. Rule 61.8 provides:

> Section 2(1) of the Civil Evidence Act 1995 (duty to give notice of intention to rely on hearsay evidence) does not apply to evidence in restraint proceedings and receivership proceedings.

49. Rule 61.9 provides:

> (1) This rule applies where, in the course of restraint proceedings or receivership proceedings, an issue arises as to whether property is realisable property.
>
> (2) The Crown Court may make an order for disclosure of documents.
>
> (3) Part 31 of the Civil Procedure Rules 1998 as amended from time to time shall have effect as if the proceedings were proceedings in the High Court.

50. Part 73 makes specific provision for appeals in restraint and receivership proceedings. Rule 73.7 provides:

> (1) Every appeal will be limited to a review of the decision of the Crown Court unless the Court of Appeal considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
>
> (2) The Court of Appeal will allow an appeal where the decision of the Crown Court was—
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the Crown Court.
>
> (3) The Court of Appeal may draw any inference of fact which it considers justified on the evidence.

Reasonable cause to believe that the alleged offender has benefited from his criminal conduct

51. The statutory test is clear: the applicant for a restraint order must satisfy the judge that there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct.

52. The respondent relies upon a passage in *Jennings v. CPS* [2006] 1 WLR 182, [2005] EWCA Crim 619 para. 44, which we set out below (paragraph 99), in which Laws LJ refers to uncertainties and unanswered questions.

53. Before charge – and all the more so before arrest – there will be many uncertainties. The law does not require certainty at this stage but uncertainty is not in itself a reason for making a restraint order as some of the respondent's submissions might suggest. The court must sharply focus on the statutory test: is the judge satisfied that there is a reasonable cause to believe that the alleged offender has benefited from his

criminal conduct? It is that test which the court must apply and it requires a detailed examination of the material put before it. The presence of uncertainties does not prevent there being reasonable cause to believe, but the judge must still be satisfied that there is reasonable cause to believe.

54. The prosecution relies heavily upon the fact that the hearing is ex parte, that the decision whether to grant a restraint order will normally be made upon written evidence and that, as Rule 59.1 provides:

> (3) The application must be in writing and supported by a witness statement which must—
>
> (a) give the grounds for the application

55. In our view, nothing in the Rules purports to (or indeed could) lessen the obligation to show reasonable cause.

56. At this stage we express our concerns that HHJ Hawkins was being tasked with the responsibility to decide whether to grant restraint and receivership orders during a complex jury trial. As we have said, the hearing before him lasted only 40 minutes and that compares with the time it took us to determine only this issue, namely a day and a half following two days' preparation for the hearing. It is of note that when, on the first day of the hearing, we asked Mr Stancombe to give us an overall summary of the fraud he was unable to do so. We do not criticise Mr Stancombe for this. He had only become involved in the case for the first time a few days earlier and was dependent as we were on the statement of Mr Alan Brown.

57. An application of this complexity should be listed before a judge with sufficient time to read and absorb the papers and with sufficient time to conduct a proper hearing. It would, in our view, be preferable to list applications of this complexity before a High Court Judge sitting in the Crown Court with experience of complex frauds or a Circuit Judge with similar experience.

58. We also express our concerns that HHJ Hawkins was being faced with having to make a decision in the knowledge that all the arrangements had been made for the arrests and the execution of the search warrants to occur the next day. We were told that the papers for the application arrived in the Central Criminal Court only the day before. In an application of this complexity the hearing should have been listed some days before the day on which the arrests were to occur.

59. Given that applications of this kind are made *ex parte* and given the draconian consequences of restraint orders and receivership orders, it is vitally important, in the interests of the absent alleged offenders, that the hearing is as fair as is possible in the circumstances. Giving those affected an early opportunity to apply to set aside or vary the restraint orders and receivership orders (whilst important) is not a substitute for a fair *ex parte* hearing.

60. We add this. It has often been said when interpreting the confiscation legislation in a manner adverse to those affected by Part 2 orders that it is "draconian". Judges asked to exercise their discretion to make restraint (and receivership) orders of the kind with

which this appeal is concerned should bear in mind the draconian consequences of such orders, albeit of course applying the legislation and, in particular, section 69.

The evidence before HHJ Hawkins on the first ground of appeal

61. In so far as the first ground of appeal is concerned, the relevant evidence is very largely to be found in the statement of Mr Alan Brown dealing with Kulwant Hare and we shall concentrate on that statement.

62. During the course of argument we were told that the material put before the Crown Court sitting in Bristol to obtain search warrants was not the same material as was put before HHJ Hawkins on 6 December and that the latter was a reduced version of the former. We understand that hearing before the Crown Court judge in Bristol took place a few days earlier. The test of "reasonable cause to believe" applies to both the application for a search warrant and the application for restraint orders before HHJ Hawkins. Mr Alun Jones suggested that the reason less material was put before HHJ Hawkins than was put before the court to obtain the search warrants, was because the material placed before HHJ Hawkins had to be disclosed to those affected by the restraint and receivership orders. Mr Stancombe was unable to help us, not having been involved with the applications for search warrants. It is in our view difficult to see why the material before the two courts should not be the same (subject of course to PII) or indeed why the two applications were not made to the same judge.

63. Mr Brown is a financial investigator who had the conduct of an investigation into the financial affairs of a number of persons. In paragraph 5 he states that he makes the witness statement from

> …information supplied to me by Douglas McGill, an officer of HMRC who is in charge of the criminal investigation and from information and material collected by me and my colleagues in the course of my financial investigation.

64. On the second day of the hearing the respondent sought to introduce into evidence a witness statement from Mr McGill, albeit that, before seeking to do so, the respondent had been very critical of the appellants for seeking to rely upon a statement from the appellant Windsor with two large volumes of exhibits. It seems clear that almost all of what Mr McGill was saying could have been put before HHJ Hawkins on 6 December.

65. For reasons which we shall explain below we declined to admit the statements of either Mr McGill or Mr Windsor.

66. In paragraph 6 of his statement Mr Brown states that HMRC is conducting "a covert investigation into the activities of a serious and organised criminal group (OCG) who is believed to be responsible for large scale evasion of Excise Duty, Value Added Tax and the subsequent laundering of the proceeds of these criminal activities". Thereafter Mr Brown makes numerous references to the OCG including within its members those against whom the orders were sought. We all found objectionable (although, of course, not fatal) the many references to OCG as an established fact.

67. In paragraph 9 Mr Brown said that Eastenders group operates "as a wholesaler and the retail arm of the OCG selling the non-duty and VAT paid alcohol into the markets from a number of locations." He went on to say that on the execution of the search warrants "a substantial amount of stock will be found and the companies will need to be run (if they legitimately can) thereafter." He continued:

> ….A receiver is therefore required to conduct the trade of the companies in their interests and those of the defendant as well as to preserve assets for the making of any confiscation order in the event of prosecution and conviction.

68. Mr Stancombe repeated during the course of argument the proposition that it was in the interests of the companies and the appellants that the receiver be appointed. Not only is the proposition a very doubtful one, it is difficult to see how a judge on an ex parte application could normally take this into account.

69. Mr Brown then refers to a 1997 previous conviction for a similar offence. Other statements dealing with the other alleged offenders showed that three others had also been involved in that criminality. At the *ex parte* hearing counsel referred to this information right at the start. Of course such convictions are relevant but they play only a limited role in the decision whether there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct.

70. In his statement Mr Brown explains what he says is the nature of the fraud:

> Essentially the fraud is operated either by:
>
> (1) the straightforward smuggling into the UK of alcoholic goods obtained abroad, with no UK duty or VAT being accounted for or paid; or
> (2) the more sophisticated method of diverting non duty paid, bonded, alcohol products in transit to the UK home market without payment of the required duties.

71. We do not believe that there was any evidence before the judge to support the first of those propositions. Straightforward smuggling from a member State involves the payment of the excise duty and VAT thereon in that State.

72. We were told towards the end of the hearing by counsel for the companies and minority shareholders that the alleged fraud concerned only wine and beer and not spirits. That was not contradicted.

73. Having given a helpful explanation of the role of Accompanying Administrative Documents ("AAD"), Mr Brown went on to say:

> 22. On 16th October 2008 French authorities intercepted a UK registered HGV belonging to Trident Continental Transport Ltd. The vehicle was found to be travelling from Belgium with a consignment of beer which had earlier been loaded at the bonded warehouse Demetrans Logistics sprl. An AAD

> produced by the lorry driver showed the consignee as IEFW, a French bonded warehouse. A search of the driver's cab however uncovered a second and effectively duplicate AAD on which the consignee was shown as Rangefield Import Export Ltd. The matter was brought to the attention of the Belgian authorities who subsequently conducted a full audit of Demetrans in December 2009. It was discovered that Demetrans, which stored mainly UK branded beer and other wines and spirits, did not buy or sell any goods in its own name and had also never supplied or released any goods for consumption on the Belgian market. Documents produced to the Belgian authorities revealed that goods were despatched from Demetrans on to other bonded warehouses in France including IEFW, which was itself a supplier to Demetrans, and that Demetrans also despatched goods, apparently owned by Super Brew (Europe) Ltd, to the UK bonded warehouse Rangefield. There appeared to be no sound commercial reason for such movements considering the apparent additional logistics costs incurred, particularly in the case of UK produced products. One of the haulage companies regularly used in these movements was Trident Continental Transport Ltd.

74. Whilst we accept that if Demetrans was exporting to this country beer and wine exported to Belgium from this country, that would be suspicious, it does not follow, given the number of stores in Calais and elsewhere supplying the British "booze cruise" trade, that there would be no sound commercial reason for supplies to IEFW (not on the evidence linked in some proprietary or conspiratorial way to the appellants).

75. We add that the fresh evidence which the appellants served just before the appeal hearing taken at face value gives an explanation for what happened on this day.

76. We make one further point about this paragraph. As we understand it, bonded warehouses do not hold alcohol to their own account. If this is right, then it would have been better if the name of the company(ies) for which IEFW and Rangefield were to hold the alcohol had been included in this paragraph.

77. Mr Brown continued:

> 23. The Belgian investigation also revealed that, in December 2007, Eu80,000 and Eu70,000 had been provided by Eastenders Cash and Carry and Super Brew (Europe) respectively, apparently to pay costs incurred in setting up Demetrans. These included a deposit to rent the warehouse premises, purchase of handling equipment and office costs.

78. At the stage of showing reasonable cause, this seems to be a significant fact, which with many other facts could be a basis for a holding of reasonable cause. Mr Brown then wrote:

> The Belgian authorities *suspected* that a fraud was being conducted utilising the Demetrans bonded warehouse. Their investigations *appeared to* confirm that regular consignments of alcohol were despatched under cover of duplicate AADs, one showing IEFW as the consignee and the other showing Rangefield. It was *suspected* that goods were being transported to the UK and that any consignment not checked at the UK border was being diverted on to the UK market. It was also *suspected* that if a consignment was intercepted by UK authorities, the Rangefield AAD would be produced and the goods delivered there. (Emphasis added)

79. Whilst not wishing to lay down precise guidelines for the preparation of statements made for the purposes of obtaining restraint orders, it does seem to us that, without more, this does not provide a judge with the kind of material on which to make a finding of *reasonable* cause.

80. Mr Brown continued:

> 24. The Belgian authorities recovered all inward and outward AADs from Demetrans. These purported to show that since commencing operations in July 2008, Demetrans had supplied 148 consignments of alcohol to Rangefield and 925 consignments to IEFW. It is *believed* that the goods which on paper were consigned to IEFW were diverted to the UK. I have been informed that 925 diverted consignments would equate to a loss of revenue in excess of £23m.

81. Mr Stancombe told us the respondent does not suggest (at least at this stage) that the duty and VAT on the 148 consignments to Rangefield were evaded. The material before HHJ Hawkins did not suggest that the 148 consignments were intercepted by UK authorities as "was also suspected".

82. In our view it is not possible to make the jump from what is set out in paragraph 22 of Mr Brown's statement to the conclusion that 925 consignments were diverted in the way described, without more evidence. Mr Stancombe argued that the material to be found later in the statement dealing with money transfers (not easy material to follow) supports a conclusion that there was reasonable cause to believe that 925 consignments had been diverted. We do not agree that that was enough to turn suspicion about the 925 consignments into reasonable cause.

83. The fresh evidence relied upon by the appellants, taken at face value, severely undermines the proposition that 925 consignments had been diverted. The evidence consists of detailed print outs showing that wines and beer sent by Demetrans to IEFW was for the account of a company which (on the limited material before us) was not connected to the appellants.

84. Mr Brown continued:

> 25. During their examination, the Belgian authorities also noted a further 38 AADs showing goods consigned to a bonded

> warehouse in Spain. I have been informed that the stamps on the consignee copies of these AADs have been proved to be false and it is *suspected* that the goods involved *may* also have been diverted to the UK market. (Emphasis added)

85. In our view this not sufficient to fill the gaps. One may suspect that Demetrans may have been involved but that is not enough.

86. Mr Brown then wrote:

> The HMRC investigation has confirmed that suspicions of the Belgian authorities and that an attack on the UK tax regimes has been committed and is ongoing. It has revealed that bonded alcoholic products, primarily UK produced brands, have, in the first instance, been exported to bonded warehouses on the continent, namely IEFW and Cotrama Logistique in France. It has also been noted that since the intervention by the Belgian authorities a further bonded warehouse, Gold Drink Tomasz Szuba in Aachen, Germany, appears to have been utilised by the OCG.

87. We do not see how the judge can rely upon such a broad and unsupported statement to find "reasonable cause". Without being too prescriptive, it is vital that the judge is given the material on which he can reach the conclusion himself or herself that there is reasonable cause. He cannot find it just because he is told that an investigation has confirmed the suspicions of the Belgian authorities.

88. Mr Stancombe seemed to be suggesting that these kinds of unsupported assertions are typical of statements of this kind. We hope not.

89. At paragraphs 28 and 29 Mr Brown describes a consignment of Gallo and Echo Falls wine apparently being diverted in September 2010 under cover of a Rangefield AAD to Eastenders (Slough) Ltd using, for the last stage, a transport company which (as we understand the evidence before the judge) was not linked to the appellants. That seems to us to be an important piece of evidence but, as presented to the judge, is only a single occurrence.

90. Mr Brown continued:

> It is not currently known what records may exist at Eastenders (Slough) in relation to this consignment but it is suspected that any paperwork will be false, probably originating from one of the suspected buffer traders, to give the appearance that the alcohol has been purchased legitimately.

91. This passage has to be reading the context of a list elsewhere in the statement of alleged buffer traders and one missing trader.

92. It does not, of course, follow from the absence of such records that there could be no reasonable cause. But, all members of the court had great difficulty in understanding

how the alleged fraud was said to have been carried through after consignments of goods on which duty is alleged to have been evaded had reached Eastenders.

93. We do not propose in this judgment to go through the rest of the statement. There is certainly evidence of suspicious financial transactions. However the failure in the first part of the statement to show that there was reasonable cause to believe that 925 consignments were diverted seems to us to be fatal. We make one further point. In paragraph 56 Mr Brown is, in effect, inviting the judge to rely (in part) upon the detention on some seventeen occasions of alcohol from Eastenders stores in the period 2007-2010. We went through those detentions and, whilst not reaching a final view, it seemed to us that only about one could have any relevance to the issues before HHJ Hawkins.

The restraint and receivership orders in so far as they affected the Eastenders group and the minority shareholders

94. As we have already said, at the end of the hearing on the second day we held that, with immediate effect, the assets of the Eastenders group were not realisable property held by the two alleged offenders and that it followed that the order appointing a receiver in relation to the assets of the group had also to be quashed. We did not postpone the making of the final order as we had done in relation to ground 1.

95. Mr Geraint Jones on behalf of the companies and the minority shareholders stressed the effect which these orders have had upon the companies. First, as is well known, pre-Christmas business is particularly important to cash and carry businesses especially that part of the business dealing with drinks. The effect of imposition of the restraint and receivership orders has been to deprive the companies of much of the benefit of that profitable business. Secondly, although these cash and carry drinks companies do a high volume of business, the profit margins are very slender and they simply cannot sustain the very high costs of the receivership. By the time of the appeal the receiver's professional fees, litigation costs and expenses had already amounted to some £435,000. This is substantially more than his estimate in a statement dated 10 December, in a figure of £178,000 for two months had been put forward. Thirdly, the making of the orders has alarmed the companies' other creditors; in particular, their bankers have become concerned about the security of their loans, their suppliers are claiming the return of unpaid goods, pursuant to retention of title clauses, and are understandably reluctant to make new deliveries. The cumulative effect of these factors is that if these orders are allowed to continue, it is in the highest degree probable that the companies will become unable to continue to trade. So the stakes are very high.

96. The judge gave these reasons for his orders. In his judgment on the *ex parte* application on 6th December, he said this (at page 22H – 23C):

> In relation to Kulwant Hare [and] Windsor... , the court is asked to restrain assets held in the name of the companies that are concerned in this fraud. There is evidence, in my view, that the company is involved and the company has been used to hide the individual's crime or their benefits from it. The companies - - I have been shown a chart - - operate under the Eastenders name, controlled and substantially owned by Kulwant Hare and

> Windsor. ... [S]o I grant the restraining orders that are applied for in this case and are set out in the bundle of papers'.

97. In the course of his judgment upon the application to discharge that order on 4th January, he said this (at page 31 C – E):

> I conclude that there is a good arguable case that Kulwant Hare and Alexander Windsor have attempted to shelter behind a corporate facade, or veil, to hide their crimes and their benefits from it; and also that the business structures constitute a device, or cloak, or sham that is an attempt to disguise the true nature of what was going on, so as to deceive third parties or the court.

98. We consider that there is considerable force in Mr Jones's criticisms of the judge's reasons: the judge did not seek to identify the nature and extent of those assets of the company in which the alleged offenders might have a beneficial interest, or which might represent their benefit from criminal conduct; he did not make any attempt to separate the proceeds of crime from the proceeds of legitimate trading; he did not advert to the consequences of the orders upon the companies or their minority shareholders, or indeed to the other creditors of the companies.

99. We have been referred to many cases; for present purposes, we think that we need only to make clear that we have had in mind the guidance of Laws LJ in *Jennings v CPS*, at paragraph 44:

> 44. When a restraint order is applied for, the court is not only ignorant of the defendant's future fate at the hands of the jury. There may be other defendants; the court is, of course, equally ignorant of the jury's future view of them. Indeed it may be unclear who, if anyone, will stand his trial beside the defendant whom the court is considering. There may be large unanswered questions as to the respective roles of different defendants, as to who did what with the crime's proceeds, and the ultimate extent and destination of those proceeds. There may be other uncertainties. In all these circumstances, it may often be appropriate in a case where there are several prospective defendants to make restraint orders against each of them, so as to protect, as against each, the whole sum which represents the proceeds of the crime so far as the court can at that stage ascertain it. While of course the Crown must lead evidence as to the amount of the proceeds, and the defendant's acts in getting- "obtaining"- the proceeds, and also the defendant's assets so far as they are known, the exercise is quite unlike the later exhaustive investigation undertaken by the trial judge in deciding what, if any, confiscation order to make. At the restraint order stage the court makes no final decision as to the defendant's "benefit" or "realisable property". It is concerned only, as I have said, to make a protective order so that in the particular case the satisfaction or fulfillment of any confiscation order made or to be made will be efficacious. Given the court's obligation under section 82(2) of the 1988 Act, there will be

> cases where it will advisedly make orders to preserve the same sum of money in the hands of multiple defendants.

100. We have found further valuable guidance in the judgment of Ouseley J in *In re D* [2006] EWHC 254 Admin, we quote from paragraph 17:

> … There is a risk … in using the phrase "piercing the corporate veil" as if it had a specific defined meaning to be applied in the same way in all contexts. In my judgment the real question which a judge faced with an application for a restraint or receivership order is whether the order of the extent sought and now obtained is appropriate or necessary in view of the … legislative objectives … The question whether the effect of such an order is to pierce the corporate veil or whether some particular test related to that concept requires to be satisfied is not, in my judgment, the ultimate object of the inquiry which the court has to carry out. The object of the Act is to enable proceeds of crime to be ascertained, protected and realised. The first question therefore is whether there are corporate assets which should be treated as the defendant's assets and the second question is whether, if that is the case, a restraint and receivership order of the extent sought is necessary. The position, in my judgment, is the same where there is an intermingling of the assets of a criminal, who is seeking to evade the effect of the confiscation order, with the assets of innocent business partners in a company. If it is established that some or all of the assets of the company are to be treated as assets of the defendant, the question of how their intermingling with the assets of someone who is innocent of wrongdoing is to be dealt with, is a matter for resolution by deciding whether an order should be made and if so on what terms, rather than a matter which has to be resolved by simply asking whether the corporate veil should be pierced. As I have said, the question is whether it is necessary to impose an order of the terms sought bearing in mind that there would be, necessarily, someone who is innocent whose interests would be adversely affected by such an order. This involves a balancing of interests as is inherent in the statutory provisions …'

101. Mr Convey, for the respondent, relied on Mr Alan Brown's statement at paragraph 63, which, dealing with Kulwant Hare, reads as follows:

> I also invite the Court to lift the corporate veil on the Eastenders [group] ..., treat the assets of these companies as assets in which the [Kulwant Hare] has an interest and restrain him (and the relevant company) from dealing with those assets. I ask that this Court complement this with an order appointing a receiver in order to all the companies to run [sic], if they can. As I have said, the evidence set out above indicates that they are the wholesale and retail arm of the OCG. It is through these companies that the non-duty and non-VAT paid alcohol is sold

> onto the legitimate market. It is probable that these companies also conduct legitimate trade, in the sense that they buy and sell duty and VAT paid goods as well. *However I do not know the ratio of legitimate to illegitimate activity. ...* .' (Emphasis added)

102. Mr Convey strongly argues that those involved in organizing frauds on this scale will take care to distance themselves from the proceeds and that frauds on this scale can only be carried out through elaborate corporate structures. Here, he contends, there is an obvious risk that the diverted goods have been sold off through the Eastenders group and the proceeds, amounting to many millions of pounds, have then been laundered through the 'buffer' companies, which he has identified.

103. On the material before HHJ Hawkins, at least on the *ex parte* hearing, there may have been some force in it. However, by the time that application was made to set the orders aside, on the 20th/21st December, a good deal of evidence had been filed by the companies. They claimed that the vast bulk of their business – amounting they suggested to fully 95% – was by way of dealing in beers and wines bought directly from so called 'blue chip' publicly quoted companies; the duty (and VAT) on these goods would be paid as they were dispatched. This, they claimed, was demonstrably legitimate business. The Customs have now been driven to concede before us that they are not in a position to dispute this. So it seems to us that we must proceed on the basis that 95% of this business of the companies is or may well be legitimate.

104. The companies do not for one moment concede that the remaining 5% is illegitimate; they do however buy from other suppliers; they do make 'due diligence' enquiries about these other suppliers, they say that they reasonably believe that duty is paid on these other goods.

105. Furthermore, the companies argue that their claims that this can be immediately confirmed – or for that matter refuted – by an examination of the bar codes on the bottles and on the packs and pallets in which the goods are delivered and stored, which will allow the Customs to 'track and trace' the goods to determine whether duty has been paid or not; and if not, they have the power to seize the goods and condemn them.

106. In answer to this, Mr Stancombe relied on *Re H and others*, (the only report of which we have is at [1996] 2 All ER 391), where the Court of Appeal Civil Division upheld a restraint order on a company having concluded that the defendant had used the corporate structure as a device or façade to conceal his criminal activities. In that case the evidence suggested that the company was owned and used by the defendant as to 75% for his own criminal purposes. This, it seems to us, is very different from the case we have here where at least 95% of the business seems to be legitimate.

107. Mr Stancombe had sought to argue that some support for his contention that the companies were engaged in fraud on a grand scale was to be found in seventeen or so seizures that have already been made from the companies. These seizures are dealt with at paragraph 56 of Mr Brown's statement. But Mr Windsor has dealt with each of these cases in paragraphs 30 – 46 of his statement. With the possible exception of the single instance of the case set out at paragraph 56 (4) of Mr Brown's statement (which does or may concern goods which went through Demetrans), none of these

instances are examples of the fraud as now alleged by the prosecution. On a detailed analysis, we do not think that these seizures advance the prosecution argument at all.

108. We note also the submission of Mr Jones that there is no evidence that the receiver has in fact been prevented by the respondent from selling on and after 18 December the wines and beers in stock on 7 December, the day of the searches and arrests.

109. In these circumstances, 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 suggests that the vast bulk of the companies business is legitimate.

110. If the Customs believe that there remain undutied goods in the companies' possession, then they have adequate powers to enter the premises and to "track and trace" the goods, so as to confirm whether or not duty has been paid. Indeed after the first day of the appeal hearing they announced to Kulwant Hare and Windsor their intention to do this.

Does this Court have the power to suspend the effect of the final order in relation to the first ground to permit the respondent to make a speedy fresh application to a judge sitting in the Crown Court

111. As already mentioned, Section 43(3) provides:

> On an appeal ... the Court of Appeal may—
>
> (a) confirm the decision, or
>
> (b) make such order as it believes is appropriate

112. As we have already set out, Rule 73.7 (1) provides:

> Every appeal will be limited to a review of the decision of the Crown Court unless the Court of Appeal considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

113. Both these provisions give the court a wide power.

114. In the light of the fact that, on the face of the material before HHJ Hawkins, there were a number of suspicious very high value financial transactions, in the light of the fresh evidence upon which the respondent wished to rely before us which, on a quick reading, might well fill in a number of gaps, in the light of what appears to us to be a failure on the part of the respondent to understand what is required in a statement showing reasonable cause and in the light of the legislative steer in section 69 (see above paragraph 37), we decided that, in the interests of justice, we should hold a rehearing unless the interests of justice could be satisfied by suspending the effect of the order pending a further application in the Crown Court.

115. Any rehearing will involve the examination of the already fresh evidence from the respondent and any further evidence relied upon by it and of the two large volumes of fresh evidence upon which the appellants now rely. The advantage of permitting a fresh application would be to save the valuable time of three judges of this very busy Court and would allow the loser the chance of an appeal.

116. In our view the wide powers given to the court permit us to suspend the order. In practice this Court quite often suspends orders. For example if a conviction is to be quashed then the Court may suspend the making of the final order to permit the prosecution time to consider whether to seek a retrial (we accept that the court is unlikely to do this if the appellant is in custody and would be entitled to be released if the conviction is quashed). The Court sometimes delays the formal order allowing an appeal against sentence to permit arrangements to be put in place to assist the appellant on his release.

117. We drew the attention of Mr Jones to the case of *Ahmed v HM Treasury* [2010] 2 AC 534. In that case the Supreme Court had no doubt that an order suspending the effect of the final order could be made. Mr Jones rightly points out that the majority refused to suspend the effect of the final order on the grounds that to do so "might obfuscate the effect of the judgment" (paragraph 8). He submits that we should take the same view.

118. Mr Jones also relied upon Article 1 of the First Protocol. In our view the proviso is applicable here.

119. Mr Jones submits that the judge on the application could not make a restraint order if there is already one in existence. We have dealt with this submission by making the order set out in paragraph 14 above.

120. Mr Jones makes other practical objections which, it seems to us, are likely to be overcome by consent.

121. Mr Jones submits that the procedure we have adopted is very unfair to his client, encourages the CPS to be, in effect, "sloppy" and would result in a situation where there would be no point in appealing a restraint order. Any unfairness to the appellant must be weighed against the considerations we have outlined above in paragraph 114. We do not believe that the CPS would be encouraged by this order to be "sloppy" in the future. Not only has the CPS had to bear the costs but, in some future case, the CPS cannot be sure that another Court would do what we have done.

122. For these reasons we reject the submissions of Mr Alun Jones.

Conclusion

123. We invite counsel to draw up an agreed order reflecting this judgment. Counsel should consider whether any order is required regarding the public dissemination of the judgment in its current form pending any trial.

124. To the extent to which there are any issues outstanding the parties should submit written submissions and the order should set out a time table for such submissions which are likely to be resolved on paper.