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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

JOHN MARTIN

Applicant;

-v-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents.

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Before: Gillen LJ, Weatherup LJ and Weir LJ

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WEIR LJ (delivering the judgment of the court)

The nature of the application

[1] The applicant seeks the leave of this court to appeal against a decision of the Upper Tribunal (Tax and Chancery Chamber) dismissing his appeal from the decision of Judge Huddleston at the First Tier Tribunal ("F-tT") dismissing his appeal against assessments raised by the respondents ("HMRC") under Section 29 of the Taxes Management Act 1970 ("TMA") for the tax years ended 2001 to 2008 inclusive, totalling £382,687.20 together with surcharges and interest.

The background to the application

[2] On 16 March 2005 the PSNI carried out a search at the applicant's home address where they seized a quantity of counterfeit cigarettes. On 30 August 2005 the police carried out a further search operation at other addresses linked to the applicant and located the applicant at an address in Armagh where they also seized counterfeit cigarettes. At the applicant's home the police further recovered other counterfeit cigarettes in various locations.

[3] On 29 August 2006 the applicant was returned for trial on a total of eight counts. He pleaded not guilty at arraignment and his trial commenced on 13 March 2007 before HHJ Finnegan QC sitting with a jury. On 26 March 2007 the applicant was found guilty of four counts of the fraudulent use of trademarks. On 4 May 2007 the learned trial judge imposed a total sentence of 18 months imprisonment in respect of the twelve counts and a prosecution application for a confiscation order under Section 156 of the Proceeds of Crime Act 2002 ("POCA") was adjourned. The initial prosecutor's statement of information dated 22 June 2007 analysed the applicant's financial position. The application was based on the applicant's convictions for the trademark offences which are specified offences under Schedule 5 of POCA and therefore bring in the statutory assumption that the applicant had a "criminal lifestyle" in accordance with Section 223 of POCA. According to the prosecution's first financial statement the extent of the benefit obtained by the applicant from the particular criminal conduct i.e. the counterfeit cigarettes was assessed at £4,929. The total benefit to the applicant from his general criminal conduct, however, which included the statutory assumptions regarding unexplained income and transfers and tainted expenditure was assessed at £106,631. The applicant's total known realisable assets were £350,890. In a subsequent prosecutor's statement dated 28 November 2008 the total benefit derived from the plaintiff's criminal lifestyle had been reassessed as being between £55,316 and £89,921. Following the confiscation hearing at which the applicant represented himself the learned trial judge made a confiscation order in the sum of £55,316 with twelve months imprisonment in default.

[4] The applicant appealed this confiscation order and, on 14 January 2010, this court allowed the appeal to the extent that it reduced the amount of the confiscation order to £35,116. This reduction was based on further work carried out by the prosecution's financial investigator which showed possible legitimate sources for some money transfers within the applicant's bank accounts.

[5] However, in the intervening period HMRC had written on 27 February 2009 to the applicant advising him that they were commencing an investigation into his taxation affairs with a view to recovering any unpaid duties, interest and the appropriate penalties. The letter invited the applicant to arrange a meeting with HMRC to discuss the same and by further letter of 3 August 2009 HMRC confirmed a telephone conversation with the applicant on 3 June 2009 in which he had stated that his only income during the relevant period was income support and that he had passed the matter on to his solicitor. The letter went on to advise that in the absence of replies to its correspondence HMRC had made assessments of his income for the individual tax years 2000/01 to 2007/08. On 10 August 2009 HMRC issued the applicant with notices of the making of those assessments which totalled £765,374.40 for tax and national insurance assessed to be due by him. Following a meeting between HMRC and the applicant's solicitor on 10 February 2010, HMRC wrote to the solicitor on 18 February 2010 asking for production of information as to the sources of the applicant's income and details in respect of ownership of property. No such information was forthcoming, the applicant maintaining the stance that the

confiscation order under POCA discharged any tax liabilities. HMRC therefore considered the applicant's lifestyle and property holdings and formed the view that his declared and taxed earnings would have been insufficient to maintain or achieve either. It made a "best judgment" assessment of the applicant's income for the relevant years and assessed him as liable for income tax totalling £382,687.20 which with the addition of surcharges and interest brought the applicant's total assessed liability to £560,000.

Proceedings before the First Tier Tribunal

[6] On 28 June 2010 the applicant lodged an appeal against the assessment to the First Tier Tribunal ("F-tT"). In the statement of case signed and submitted on behalf of the applicant by his solicitor, Mr McNamee, the history of the making of the POCA confiscation order was recited and his crucial submission was stated thus:

> "It is clear from all the above that any tax liability was encompassed within the calculation of benefit for Mr Martin which resulted in the confiscation order."

[7] This court initially had some difficulty in reliably establishing how the proceedings before the F-tT Judge on 23 August 2011 had proceeded. An opportunity was therefore given to the parties to provide statements as to what had occurred and a typewritten copy of the hearing notes of the F-tT Judge was requested and obtained. From this additional material it is now clear that evidence in support of its assessments was given on behalf of HMRC by one of its officers and that that officer was then cross-examined by Mr McNamee as to how the assessments had been arrived at with particular reference firstly, to whether a substantial dwelling house which the applicant had admittedly built was in fact erected before the initial date covered by the period of the assessments under appeal and secondly, to two documents provided by the PSNI to the criminal court dealing with the earlier POCA application, namely the PSNI statement of information dated 22 June 2007 and a benefit calculation dated 22 January 2009. It was Mr McNamee's contention that these POCA calculations and the resulting POCA confiscation order extinguished the applicant's entire liability to tax for the period covered by the POCA order. The response of the HMRC witness was that, while the POCA assessments and compensation order dealt with the proceeds of the applicant's "criminal lifestyle", HMRC was additionally concerned to establish *all* his sources of income including those from any further lawful self-employed activities which had not been declared. As the applicant had not co-operated with the HMRC investigation when requested, HMRC had been obliged to make its best estimate on the information that was available to it resulting in the assessments which were the subject of appeal.

[8] Apart from producing the two PSNI documents Mr McNamee had not provided any oral or other documentary evidence nor had the applicant been called

although in his statement to this court in clarification of what happened at the hearing he said as follows:

> "I cannot remember whether or not I was asked to give evidence at the Tribunal or whether I was tendered for cross-examination but I did not give evidence. I do remember sitting beside my solicitor pointing out errors made by HMRC during their evidence which he then put to the witnesses on my behalf."

[9] In his decision Judge Huddleston said, inter alia, as follows:

> "35. At this point it should be said that the appellant has not adduced any evidence to disprove or otherwise challenge the assessments which have been raised in this case and has sought, rather, to focus upon the effect of the Confiscation Order to ground his argument that, fundamentally, the Confiscation Order "mops up" any potential liability on the basis that a Lifestyle Confiscation Order was both sought and granted.
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> 36. Section 156 of POCA allows a criminal court the ability to assess the benefit arising from 'general criminal conduct'.
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> …..
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> 41. The original Confiscation Order was …. on appeal, reduced to £35,116. The Court's finding, in both those proceedings, was limited to the assessment of benefit derived by Mr Martin and the amount available to discharge it. In the view of this tribunal that 'benefit' does not equate (in the view of this Tribunal) with the concept of a 'liability'. By its nature, the concept of a liability – particularly one which is assessed to best judgment such as in the case of discovery assessments – is one which is of a much wider and more general application.
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> 42. To the Tribunal's mind, that particular concept was not in the mind of the Crown Court, or indeed the Court of Appeal when assessing what benefit the appellant had derived from his criminal conduct. The two are separate jurisdictions and the approaches

adopted are different even if they arise out of the same or similar facts.

43. We agree with HMRC's proposition that one must first establish, through assessment and, if not by that then dialogue with the taxpayer, and ultimately appeal to this Tribunal, the tax which is properly due and payable. This Tribunal is empowered to hear appeals specifically within that domain and, where assessments are raised to best judgment, then this Tribunal often hears evidence as to why the assessment should be reduced or, indeed, altered.

44. As indicated above the onus of proof in relation to those proceedings falls squarely upon the appellant.

45. Subsequent to the settlement of what tax is properly due and payable, it then is logical that one looks at the terms of any confiscation order which may be in existence (and any payment made under it) to see to what extent that tax liability may already have been met by payments made to the Crown to ensure that there is no double recovery.

46. That, to this Tribunal's mind, relates, however, to the question of enforcement rather than to the calculation of tax. It is clear that the question of enforcement falls outside the jurisdiction of this Tribunal, but it is accepted by HMRC that in no circumstances can there be double recovery for the same amount. This is a position which has been acknowledged by them and endorsed in the Crossman case.

47. Mr McNamee sought to rely on Crossman as authority for his proposition that the confiscation order identified the maximum liability which can arise.

48. With respect, this Tribunal does not agree with that proposition or, indeed, his interpretation of that case. In certain circumstances it may be the case that the proceedings under POCA do indeed encompass an assessment of all of the tax liability which may or may not be due in particular circumstances but that

> can only be determined after the assessment process has been undertaken.
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> 49. There is no evidence before us, however, to indicate that that was the analysis carried out by the criminal courts in this case. Indeed, the assessment periods cover a much wider period than the six year period encompassed within the Confiscation Order itself and it remains HMRC's position that the appellant was carrying out taxable activities throughout that wider period failing, for each of the relevant tax years, to make the appropriate tax returns.
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> 50. It is that which has led them to issue the discovery assessments which are in point.
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> 51. Had evidence been adduced as to inaccuracies or other deficiencies in those assessments, then this tribunal would have taken that evidence into account. As it is, no such evidence was produced and, therefore, as the onus of proof has not been discharged by the appellant, this Tribunal finds that the assessments must stand.
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> 52. The appeal is dismissed."

Permission to appeal to the Upper Tribunal

[10] The applicant applied for permission to appeal to the Upper Tribunal and on 17 January 2013 permission was granted by a different F-tT Judge on the ground that it was reasonably arguable that the decision contained an error of law, although he did not specify what he thought that might be.

Proceedings before the Upper Tribunal

[11] The appeal was heard by Warren J on 20 March 2015 and on 19 June 2015 his written decision dismissing the appeal was released. At the appeal before him the applicant was represented by Mr Ronan Lavery QC and the respondent by Mr Hanna QC both of whom also appeared before us and to whom we are indebted for their clear and comprehensive written and oral submissions. Before Warren J the same proposition as that rejected by Judge Huddleston was again advanced. In the course of a long and detailed judgment Warren J set out the history of the applicant's non-co-operation with the HMRC investigation into his tax affairs leading to the raising of the "best judgment" assessments and the continued non-co-operation thereafter. Warren J pointed out that the submission that the POCA

confiscation order concluded in the applicant's favour his appeal to the F-tT had not, as it might have, been raised as a preliminary point so that, if it failed, the appellant and his solicitor could then have placed evidence before the F-tT seeking to displace the amounts of the assessments, the burden being on the taxpayer to do so. Instead the appellant had chosen to present no evidence at all. As Warren J put it:

> "50. … Had he done so the evidence on each side could have been tested. The judge would have known the factors relied on by HMRC to show that Mr Martin must have undeclared income and he would have had Mr Martin's explanation. He would then have been in a position to decide whether Mr Martin had been overcharged by the assessments. Instead Mr Martin, as I have said, buried his head in the sand. I am afraid he is the author of his own misfortune if his argument on the effect of the Confiscation Order fails. Mr Lavery asked how Mr Martin could have gone further than he did to meet HMRC's assertion that he had undisclosed income. The answer to that is that he could have engaged in discussions with HMRC and, as an important first step, answered the reasonable requests for information which had been made in the HMRC letter of 18 February 2010.
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> 51. In a case where the taxpayer and HMRC both present evidence, the F-tT will have before it the material on which HMRC rely to justify the opinion the tax is due and will have such material as the taxpayer can produce to explain why that opinion is wrong. It will be a rare case, I suggest, where the F-tT presented with all the evidence will be unable to decide whether the taxpayer is overcharged the tax or not. It will be a rare case where the facts are so finely balanced that the decision turns on the burden placed on the taxpayer.
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> 52. But where the taxpayer presents no evidence at all to the F-tT, the position is different. The F-tT does not then need to address the particular facts and circumstances relied on by HMRC and to decide whether the taxpayer's evidence and explanations displace the opinion which HMRC have formed. In such a case there is no material on which the F-tT could rely in order to decide that that opinion was incorrect and that the taxpayer was overcharged by

> the section 29 assessment. This was the position in relation to Mr Martin. In the absence of the Confiscation Order, Mr Martin's appeal would, to repeat, have been bound to fail."

[12] Warren J noted that HMRC had agreed with the appellant that there must be no double recovery of tax so that the payment already made by him under the POCA confiscation order should be taken account of at the enforcement stage to the extent to which any of it may match his tax liability so that his obligation to pay the amounts of the present assessments would be reduced by the extent of any such overlap. However he held that the amount paid under POCA was not a payment of tax, explaining the matter in this way:

> "42. In my view, HMRC's approach is correct, test this by way of an example. Consider a case where a criminal lifestyle order is made against a taxpayer, resulting in a confiscation order of £Y. Suppose that as part of his criminal conduct, he has made a profit of £X in relation to a particular offence so that confiscation of that profit of £X is included in the figure £Y. The payment of £Y does not include a payment of the tax which would be due on the profit of £X; rather, the inclusion of the £X is designed to take away from the offender the profit which he has made. The tax consequence of making that profit is entirely separate. There may, in fact, be no tax at all; for instance, the taxpayer might have losses against which he could set the profit. There is, it seems to me, no question of the Crown Court, when fixing the amount £Y, having to break the £X part of that amount into two elements, one the tax on the £X and the other the net figure after tax. However, for the taxpayer to pay tax on the profit of £X which had already been confiscated would be to effect double recovery in relation to the offence; the taxpayer would lose the benefit of his criminal activity and yet still be liable to pay tax on it as though he had retained it. It is not because payment under the confiscation order discharges the tax that the taxpayer avoids double recovery; rather it is because it would be unjust for the Crown to recovery twice. Whether this injustice is avoided as a matter of legal right once the taxpayer has met his obligations under the confiscation order or whether it is a matter of concession on the part of HMRC does not matter. The point is that the tax

> liability for which an assessment can be raised is a liability in respect of the profit of £X.
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> 43. This approach is, I consider, supported by consideration of the position before the taxpayer has actually met his obligations under the confiscation order. At that stage, he cannot contend that the relevant tax has been paid. He may refuse, or find himself unable, to meet his obligations under the confiscation order. It cannot, in my judgment, be suggested that the mere making of the confiscation order discharges the obligation to pay tax. HMRC would remain entitled to make an assessment in the full amount. It would be at the enforcement stage that account would fall to be taken of any amount which had, by then, been paid under the confiscation order."

[13] Having therefore rejected the applicant's argument in relation to the effect of the POCA compensation order and recorded the fact that the applicant had given no evidence to the F-tT to displace the assessments he dismissed the applicant's appeal in his decision released on 19 June 2015.

The application to this court for leave to appeal

[14] The appellant then applied to Warren J for leave to appeal to this Court which application was rejected and the applicant thereupon applied to this court for leave to appeal pursuant to the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 S.I. No. 2834 which provides so far as material:

> "2. Permission … for leave to appeal to the Court of Appeal in Northern Ireland shall not be granted unless the Upper Tribunal, or where the Upper Tribunal refuses permission, the Appellate Court considers that –
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> (a) the proposed appeal would raise some important point of principle or practice; or
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> (b) there is some other compelling reason for the relevant appellant court to hear the appeal."

[15] Inevitably, in order to determine whether either limb of the statutory test has been satisfied, it became necessary for this court to go at some length and in some detail into the history of the POCA confiscation order and the proceedings before F-tT and before the Upper Tier Tribunal and we did so, adjourning at one point as we

have said to enable clarity to be given to what exactly had occurred in the way of evidence - giving before the F-tT.

The arguments of counsel

[16] In advancing his argument that this court should grant leave, Mr Lavery contended that two matters qualified as important points of principle or practice:

(i) What is the correct approach to be taken to a judicial determination of income in a lifestyle confiscation hearing during a subsequent assessment of income tax?

(ii) What is the proper approach to double recovery in law and in practice?

Further, he identified as "other compelling reasons for the court to hear the appeal":

(i) That Warren J had misdirected himself on evidential issues (which he enumerated) so as to create a procedural irregularity.

(ii) That Warren J misdirected himself on the burden of proof in a criminal lifestyle confiscation case.

(iii) That where as here it is agreed between the parties that there must be a mechanism for ensuring that there is no "double recovery" of income tax following the applicant's earlier satisfaction of the compensation order there is in fact no such mechanism in place.

[17] Mr Hanna's pithy response to Mr Lavery's submissions was:

(i) The right of appeal can be on a point of law only.

(ii) The applicant had not identified any point of law raising "some important point of principle or practice".

(iii) Neither had any other "compelling reason" been shown as to why the court should hear an appeal on any identified point of law.

(iv) HMRC had agreed that there ought not to be double recovery and undertook to enquire into and take account of any or all of the monies already paid on foot of the compensation order to the extent to which they would constitute double recovery. To put the matter in its practical context, the ultimate compensation order had amounted to £35,116 so that, at the highest tax rate of 40% prevailing during the taxation periods covered by it, the maximum credit potentially available to set against the present assessments would be around £14,000.

Consideration

[18] The high hurdle to be surmounted in order to persuade this court to entertain an appeal from the Upper Tribunal was previously considered by the court in McMahon t/a Irish Cottage Trading v Commissioners for Her Majesty's Revenue and Customs GIR8657. The judgment of the court was delivered by Girvan LJ who referred to PR (Sri Lanka and Others) v Secretary of State for the Home Department [2012] 1 WLR 73, a decision of the English Court of Appeal in which Carnwath LJ delivered the judgment of a court which also consisted of Lord Neuberger MR and Sir Anthony May P. The headnote to the report neatly summarises the principles that emerged in relation to the "second tier appeals test".

> "Article 2 of the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 … (which provides that except where the Upper Tribunal was exercising an original jurisdiction permission to appeal from the tribunal to the Court of Appeal shall not be granted unless the tribunal or, where the tribunal refuses permission, the court considers that the proposed appeal would raise some important point of principle or practice or that there is some other compelling reason for the court to hear the appeal) applies the same test to appeals from the Upper Tribunal as applies to second appeals from other courts. However, in the new context created by the establishment of the Upper Tribunal as an expert appellate forum for most tribunal appeals, the point of principle or practice should be not merely important but one which calls for attention by the higher courts, specifically the Court of Appeal, rather than being left to be determined within the specialist tribunal system, to the quality of which members of the senior judiciary contribute by regularly sitting in them. On an application for permission to appeal from the rejection by the Upper Tribunal of an asylum appeal the question is not whether the nature of the asserted claim would, if its factual basis were established, risk drastic consequences, but whether there is a compelling reason why the issue in which the claimant has failed twice at the two tiers of the tribunal system, which are competent to determine matters of that kind, should be subjected to a third judicial process."

[19] While that case happened to relate to asylum appeals this court in the Irish Cottage Trading case applied the PR (Sri Lanka) and Others test to the facts of the Irish Cottage Trading case which was concerned with revenue and held that the evidence before the Lower and Upper Tribunals provided a clear basis for the conclusion at which each had arrived and, though sympathetic to the plight of the applicant in that case who was agreed to have been the innocent victim of fraudulent activity by others, refused leave to appeal.

[20] In Tanfern v Cameron-MacDonald and Another [2000] 1 WLR 1311 the English Court of Appeal considered the identical hurdle created by Section 55(1) of the Access to Justice Act 1991 in relation to second appeals. Brooke LJ said as follows:

> "42. This reform introduces a major change to our appeal procedures. It will no longer be possible to pursue a second appeal to the Court of Appeal merely because the appeal is 'properly arguable' or 'because it has a real prospect of success'. The tougher rules introduced by a recent Court of Appeal Practice Direction for 'second Tier Appeals' related only to cases where a would-be appellant had already lost twice in the courts below. The new statutory provision is even tougher – the relevant point of principle or practice must be an important one – and it has effect even if the would-be appellant won in the lower court before losing in the appeal court. The decision of the first appeal court is now to be given primacy unless the Court of Appeal itself considers that the appeal would raise an important point of principle or practice, or that there is some other compelling reason for it to hear this second appeal.
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> 43. All courts are familiar with the litigant, often an unrepresented litigant, who will never take 'no' for an answer, however unpromising his/her cause. Under the new appeals regime, however, such litigants must appreciate that the general rule will be that the decision of the appeal court on first appeal will be the final decision. If they wish to pursue the matter further, and to incur the often quite heavy costs involved in paying the court fee and preparing the appeal papers, the Court of Appeal may dismiss their application quite shortly, saying that the appeal raises no important point of principle or practice, and that there is no other compelling reason for the court to hear the appeal."

[21] In his decision Warren J carefully reviewed the authorities concerning the principles to be applied to the review of a "best judgment" tax assessment. Those principles are:

(i) The onus is upon the appellant by *satisfactory evidence* to show on the balance of probabilities that the assessment ought to be reduced or set aside.

(ii) The assessment is prima facie right and remains right until the appellant shows it is wrong.

(iii) The taxpayer must, as a general rule, show not only negatively that the assessment is wrong but also, positively, what correction should be made to make it right or more nearly right.

(iv) If the Commissioners (now the F-tT) having heard his case are uncertain where the truth lies they must dismiss the appeal and uphold the assessment.

[22] This court considers in agreement with Warren J that in choosing to found himself solely upon the proposition that the POCA compensation order extinguished the right of the respondent to raise its assessments under Section 29 of TMA and in failing to co-operate with the respondent both before the assessments issued and thereafter and further failing, though present at the hearing, to give evidence to F-tT such as would displace the amounts of the assessments raised the applicant made fatal errors. It may have been that his only income from any source whether legal or illegal for the years covered by the assessments was in fact no more than the amount assessed under the POCA compensation order but once the assessments had been raised it was for the applicant to positively displace them *by evidence.* This he entirely failed to do. Indeed Mr Lavery tacitly acknowledged the making of that fatal error when he indicated that if the appellant were given leave to appeal to this court he would seek to persuade us to refer the matter back to the F-tT. Not only is this court not satisfied that any important point of principle or of practice has been identified or that any other compelling reason has been shown as to why an appeal should be heard, it further considers from all that it has heard that the decisions arrived at by Judge Huddleston and Warren J could not have been other in the light of the way in which the applicant chose to present his case. We discern no error of law on the part of either Tribunal. Accordingly, leave to appeal to this court is refused.