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Judgment: approved by the Court for handing down | *Delivered:* **20/02/2015**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

R

v

RICHARD DEWART

MORGAN LCJ (ex tempore)

Introduction

[1] This is an appeal by the appellant Richard Dewart against the confiscation order made on 4 April 2014 following his conviction on 5 November 2012 in respect of one offence of making false tachograph recordings, contrary to Section 1 of the Forgery and Counterfeiting Act 1981. He was sentenced on his plea of guilty to 18 months' imprisonment suspended for 3 years and on 4 April 2014 the court made a confiscation order in the sum of £66,982 to be paid by 3 October 2014 with 18 months in default in the event of non-payment.

[2] This is a case in which we have had the benefit of considerable written submissions from both the appellant and the respondent and we are grateful to both counsel for the industry which they showed in relation to tackling this recent case law.

[3] The background to the case is in essence taken from the skeleton argument of the appellant. The appellant is the principal of a family haulage business which was not run as a limited company. He pleaded guilty to a single catchall charge of forgery relating to the tachograph records for several of his lorries operating in Great Britain over a 3-month period. The charges involved the use of electronic units fitted to the tachograph which enabled the drivers to bypass the tachograph and drive for longer periods of time than that permitted in law and indeed at a speed in excess of that which was supposed to govern the lorries. The appellant's fleet of lorries was examined and it was confirmed that the conduct occurred in

respect of vehicles operating in Great Britain. No device was found in Northern Ireland.

[4] During the period of offending the prosecution totalled the value of the invoices for the days when they believed offending tachograph vehicles were used and although they estimated a figure in excess of £100,000, Harbinson Mulholland calculated the figure as £66,982. Harbinson Mulholland also carried out an exercise in relation to the profitability of Mr Dewart's business and contended that, applying the ratio shown in his accounts, the profit gained by the business in relation to this activity was £5,068 and it was contended that that was the appropriate sum that the learned trial judge ought to have found.

[5] The prosecution accepted this is not a criminal lifestyle case and that the appellant enjoys a modest lifestyle with his family. The financial investigators sought to re-open the issue of whether all the tachograph charts had been produced but the learned judge rightly declined to draw any inference in relation to missing tachograph records since these had not been part of the Crown case. The Proceeds of Crime legislation provides for the making of these orders in Section 156 and the recoverable amount is defined in Section 157. Benefit is defined in Section 224 and as a result of the decision in R v Waya it is also necessary to take into account Article 1 of the First Protocol.

[6] The appellant's grounds of appeal are essentially that (i) the learned judge incorrectly concluded that the figure sought by the prosecution was proportionate on the facts of the case and that (ii) he failed to consider whether a figure other than advanced by the prosecution and defence would be proportionate and essentially the same point in the third ground of appeal. The cases indicate, particularly from R v May and approved and followed by this court, that there are essentially three questions that have to be posed in any such exercise. The first is has the defendant benefited from relevant criminal conduct and there is no issue about that in relation to this case. The second is if so, what is the value of the benefit obtained, and in carrying out that exercise, in light of R v Waya, it is necessary to take into account the Article 1 Protocol 1 rights of the appellant. The third is to define the recoverable sum which means taking into account the assets that are open to the appellant. The issue of the need to comply with Article 1 Protocol 1 has also recently been examined by the European Court in Paulette v The United Kingdom and what the court in that case found was that the appellant who had had a confiscation order approved by Court of Appeal in England and Wales had not been afforded a reasonable opportunity to put his case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake. The issue is whether the requisite balance is maintained in a manner consonant with the appellant's right to the peaceful enjoyment of his possessions within the meaning of Article 1 Protocol 1.

[7] There are a number of cases now post R v Waya which seek to deal with the distinctions that inevitably need to be drawn in the course of certain business

activities and these are probably most helpfully set out in the decision in R v King at paragraphs 32 and 33. In paragraph 32 the court said that the authorities revealed that there is a clear distinction to be drawn between cases where the goods or services are provided by way of a lawful contract where payment is properly paid for legitimate services but the transaction is tainted by associated illegalities such as bribery and cases where the entire undertaking is unlawful the example being Beasley where the brand name wheel trim were forged items.

[8] When making a confiscation order the court will need to consider among other things the difference between these two types of cases. The divide is not easy to determine because cases differ to a great extent but it is relevant that the court in King then went on say that if the transaction was inherently unlawful because of the manner in which it was conducted that finding militates in favour of making an order that is directed at the gross takings of the business. Those strictures show that it is necessary for the court in each case to look carefully at the particular circumstances in which the application is made.

[9] In this case the particular circumstances were that a group of lorries owned by the appellant were fitted up so as to ensure that they could engage in delivery work in an entirely unlawful way. This was unlawful in the sense that it evaded capture under the regulations, unlawful in the sense that it thereby enabled the lorries to travel at speeds in excess of what would otherwise have been permitted and in light of that finding which is helped by the statement which we have obtained from Mr McGranaghan as a result of the adjourned hearing to earn profits. It seems to us that this is a business which was founded entirely on unlawfulness and that that pointed strongly towards the proposition that proportionality was satisfied where it followed that the Order should remove the gross takings of the business. We do not find that having regard to the underlying entire unlawful nature of the business that there is anything disproportionate in interfering with the appellant's peaceful enjoyment of the amounts that he received by making an order in respect of the gross takings.

[10] For those reasons we think that the learned trial judge correctly analysed the appropriate order in this case and therefore dismiss the appeal.