Easter Term
[2014] UKSC 26
On appeal from: [2012] EWCA Crim 2436

JUDGMENT

Barnes (as former Court Appointed Receiver) (Appellant) *v* The Eastenders Group and another (Respondents)

before

Lady Hale, Deputy President
Lord Kerr
Lord Wilson
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

8 May 2014

Heard on 24 and 25 February 2014

Appellant
David Perry QC
Martin Evans
(Instructed by Peters &
Peters Solicitors LLP)

1st Respondent
Geraint Jones QC
Marc Glover
(Instructed by Rainer
Hughes Solicitors)

2nd Respondent
Michael Parroy QC
Rupert Jones
(Instructed by CPS
Proceeds of Crime Unit)

LORD TOULSON (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Hughes agree)

Introduction

1. The contest in this case is about who should bear the costs and expenses of a receiver appointed under an order which ought not to have been made. The appellant, who is a former partner in a well known firm of accountants, was appointed to act as management receiver of the assets of a group of companies referred to as Eastenders ("the companies") on the application of the Crown Prosecution Service ("CPS"). The order was made under section 48 of the Proceeds of Crime Act 2002 ("POCA") but was quashed on appeal. The receiver's costs and expenses are put at £772,547. Who should bear those costs? There are three possible answers: the companies, the receiver or the CPS. The question has been considered by four judges who have arrived at three different answers.

2. The receiver applied to the Crown Court, after the order had been quashed, for permission to draw his remuneration and expenses from the assets of the companies. The application was refused by Underhill J (now Underhill LJ) in a judgment given on 4 April 2012. He held that to grant the application would infringe the companies' rights under article 1 of the First Protocol to the European Convention on Human Rights ("A1P1").

3. This provides:

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

4. In his judgment Underhill J held that in principle the liability for the receiver's remuneration and expenses should be borne by the CPS, but at that stage

there was no such application before him. After a further hearing on 8 May 2012 he made an order including the following terms:

i) The CPS was to pay the receiver's remuneration and disbursements, subject to an assessment by the taxing authority of the Crown Court under the Criminal Procedure Rules.

ii) The CPS was to pay the legal costs incurred by the receiver in the exercise of his functions as receiver.

iii) The parties were to lodge further evidence and submissions as to whether sums previously retained by the receiver should be repaid to the companies. (There is a potential argument that some of the expenses incurred by the receiver in the course of running the companies would have been incurred by them in any event, but on this appeal the court has not been concerned with points of that kind.)

iv) The CPS was to pay the companies' litigation costs in respect of the various applications relating to the receivership order.

5. In making that order Underhill J held that it was possible to interpret POCA as giving the court the right, in circumstances such as those of the present case, to order that the receiver's remuneration and expenses be paid by the CPS and not by the companies.

6. The CPS appealed to the Court of Appeal Criminal Division. The majority (Mitting and Edwards-Stuart JJ) upheld Underhill J's decision that the companies' rights under A1P1 would be infringed by an order permitting the receiver's costs and expenses to be taken out of their assets. Laws LJ, dissenting, would have held that there was no such breach and that the receiver was entitled to recover those costs out of the companies' assets under the order made in the Crown Court. The court was unanimous that Underhill J was wrong in deciding that POCA could be interpreted as giving him power to order the CPS to pay the receiver's costs.

7. The result of the majority's decision was to leave the receiver unable to recover his costs either from the companies' assets or from the CPS. They acknowledged that the outcome of the appeal would be "clearly unsatisfactory to a receiver who has undertaken work and incurred expenses in the expectation that he would be both rewarded and recompensed out of assets identified for him by the

CPS", and they added that their judgment did not "exclude the possibility that he may have a common law remedy against those who sought his appointment", but they said no more about what it might be, presumably because the matter had not been argued.

8. The receiver now appeals to this court. The principal argument advanced on his behalf by Mr David Perry QC was that Laws LJ was right and that the costs of the receivership should be borne by the companies. If that submission was rejected, his alternative submission was that Underhill J was correct to order that the costs be borne by the CPS. Mr Perry submitted powerfully that it could not be a just solution that the receiver, an officer appointed by the court, should be left without payment for acting as the court directed.

9. Mr Geraint Jones QC submitted on behalf of the companies that those judges (Underhill, Mitting and Edwards-Stuart JJ) who had concluded that to take the receiver's costs out of the companies' assets would be a breach of their rights under A1P1 were right. He also suggested that it was highly arguable that the contractual arrangements between the receiver and the CPS would entitle the receiver to remuneration by the CPS, but that was a matter between the receiver and the CPS.

10. Mr Michael Parroy QC on behalf of the CPS joined forces with Mr Perry in arguing that Laws LJ was right. If, however, the effect of A1P1 was to preclude recovery of the receiver's costs out of the companies' assets, Mr Parroy submitted that the Court of Appeal was right in its unanimous decision that POCA did not afford any basis for holding the CPS liable to the receiver. He also submitted that there was no substance in the argument that the receiver would have a contractual remedy against the CPS.

Issues

11. The first question is whether the companies' rights under A1P1 would be infringed by having their assets taken to pay the receiver's remuneration and expenses. If Laws LJ was right in his view that this would not involve an infringement of their A1P1 rights, no further question arises. But if the companies are right about that issue, the second question that arises is whether the receiver is entitled to look to the CPS for reimbursement.

12. When granting permission to appeal to this court, the leave panel asked the parties to address the additional issue "whether there are any powers which could be

exercised to prevent this situation arising whatever the outcome of the appeal." It will be necessary to consider that too.

Facts

13. On 6 December 2010 the CPS applied ex parte to HH Judge Hawkins QC at the Central Criminal Court for restraint and receivership orders under sections 41 and 48 of POCA. The judge was in the course of trying a murder case and his time for hearing the application was limited. After a 40 minute hearing the judge signed the orders which he was asked to make. The evidence before the judge consisted of two witness statements made by Mr Alan Brown, a financial investigator employed by HM Revenue & Customs ("HMRC"), and their exhibits. In summary, he stated that HMRC was conducting a covert investigation into the activities of a serious organised criminal group which was believed to be responsible for evading excise duty and VAT on a large scale and laundering the proceeds. The suspected fraud involved alcohol products, which had been imported into the UK duty free, being released from bonded warehouses into the UK market without payment of duty in such a way that the true facts were concealed from HMRC by the use of buffer companies and bogus documents. The subjects under investigation included Mr Alexander Windsor and Mr Kulwant Singh Hare, referred to as the defendants in Mr Brown's statements. Company searches and other records showed that the defendants were the joint beneficial owners of the Eastenders Group parent company, which held between 50% and 100% of the shares in the other group companies. The parent company was a holding company and the trading companies were cash and carry outlets. Mr Brown suggested that the companies were a wholesale and retail arm of the criminal group responsible for the alleged fraud.

14. Mr Brown described the case as the most complex restraint and receivership case that he had ever managed in more than 20 years' experience of such work. He estimated the public loss at £23 million. Mr Brown invited the court to "lift the corporate veil" of the companies, to treat their assets as assets in which the defendants had an interest and to restrain them and the companies from dealing with those assets. He also asked the court to appoint a management receiver to run the companies. He described their activities in this way:

> "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."

15. In these circumstances Mr Brown invited the court to conclude that a receivership order would be the only effective means of ensuring that the defendants' assets could be properly managed. Terms for the receiver's appointment had been agreed with the receiver in correspondence which was exhibited to Mr Brown's statements. He said that he was unable to give a realistic estimate of the likely costs of the receivership, having regard to the nature of the assets involved.

16. The judge made orders in relation to each defendant. They were in materially identical terms and I will refer to them as a single order. The order restrained the defendant from disposing of, dealing with or diminishing the value of any of his assets, which were expressed to include the assets of the companies. It imposed a similar direct restraint on the companies, and it appointed the receiver to act as management receiver of all the assets and property identified in the order, including the business and undertakings of the companies. The imposition of the restraint and receivership order on the companies necessarily depended on the court having proper reason to regard the assets of the companies as the personal assets of the defendants. The order gave the receiver a wide range of standard powers, including the power "to realise so much of the receivership property as is necessary to meet the receiver's remuneration and expenses". As to his remuneration and expenses, the order provided:

> "The remuneration and expenses of the Receiver shall be paid out of the Receivership Property and in accordance with the letter of agreement as exhibited to the witness statement of Alan Brown made on 3 December 2010."

17. The letter referred to was a letter from the CPS to the receiver dated 29 November 2010. Under the heading "Re Kulwant Singh Hare and Alexander Thomas Windsor" the letter began:

> "We are writing to enquire whether you would be prepared to act as a management receiver pursuant to section 48 of the Proceeds of Crime Act 2010 in the above case of which the Crown Prosecution Service has conduct.
>
> You will appreciate that your appointment is dependent on an order being made by the Crown Court. This letter sets out the terms upon which we propose to seek your appointment. These terms will form part of the order for your appointment. In addition, your appointment is subject to the Framework Agreement between the Crown Prosecution Service and the panel of approved receivers, to the

provisions of Part 60 of the Criminal Procedure Rules and to the 'Capewell Guidelines' laid down by the Court of Appeal in *Capewell v Customs & Excise Commissioners* [2005] 1 All ER 900."

18. In a brief summary of the background the letter explained that HMRC was conducting an investigation into the commission of offences by the named defendants involving the evasion of VAT and excise duty on a massive scale. The letter said:

> "It is alleged that much of the fraudulent activity has been facilitated through a company known as Eastenders Cash and Carry plc and various subsidiary companies in Slough, Barking, Croydon, Birmingham and Coventry.
>
> Clearly, the effective management of these companies and their stock is an urgent priority if you are appointed…The extent to which the companies can be allowed to be allowed to continue trading will clearly be of fundamental importance…given the urgent necessity to prevent any further fraudulent trading and loss to the Exchequer."

19. The letter set out proposed terms of the appointment, including the following term as to the receiver's remuneration:

> "Your remuneration costs and expenses are to be drawn from the assets of the defendants under your management in accordance with section 49(2)(d) of the Proceeds of Crime Act and the decision of the House of Lords in *Capewell v HM Revenue & Customs* [2007] UKHL 2. You are reminded that you will have a lien over the defendants' assets for payment of your fees and that the Crown Prosecution Service does not undertake to indemnify you in relation to your fees in the event that there are insufficient assets within the defendant's estate. Your remuneration, costs and expenses are to be paid in accordance with the Framework Agreement referred to above and any deviation must be agreed in writing with the Crown Prosecution Service."

20. Clause 12.5 of the Framework Agreement provided:

> "In the case of Management and Enforcement Receivers in criminal confiscation cases, the Receiver will be remunerated from the sums that they may realise from the sale of the assets over which they are

> appointed [subject to an immaterial exception]. To the extent [that] there is any shortfall, the Contracting Bodies will not agree to grant indemnities either in full or in part."

21. Although the receivership order covered all assets of the defendants, including properties and money in bank accounts, its central purpose was to put the companies under the control of the receiver. But for the fact that the companies were trading entities, there would have been no need for a receivership order. The restraint order would have been sufficient to freeze the defendants' bank accounts and to prevent any disposal of their personal properties. The companies had around 120 employees and an aggregate turnover in the region of £150 million.

22. In order to comply with section 49(8) of POCA (set out below), the order provided that the receiver's powers of management, and power to realise property to meet his remuneration and expenses, were not to be exercised until further order of the court. This was in order to give the companies a reasonable opportunity to make representations. The matter was further considered by the judge in a brief hearing, on 14 December 2010 at the end of his normal sitting day. On the eve of that hearing the companies put in substantial evidence, but the court did not have time to consider the merits or hear detailed argument. The judge activated the receiver's powers. It was then the busiest time of the trading year, only 11 days before Christmas. The judge activated the receiver's management powers in order that their continued trading should be under the receiver's control.

23. The judge considered the companies' objections to the receivership order on 23 December 2010 at an inter partes hearing but refused to discharge it.

24. The matter came before the Court of Appeal (Hooper LJ, Openshaw J and Sir Geoffrey Grigson) on 25 January 2011. According to the judgment delivered by Hooper LJ, the appeal occupied the time of the court for 1½ days following 2 days' preparation for the hearing. The court quashed the restraint and receivership orders but took time for the delivery of its reasons in a judgment handed down on 8 February 2011 (neutral citation [2011] EWCA Crim 143). The case is reported in abbreviated form at [2011] 1 WLR 159 but in full at [2011] 2 Cr App R 71.

25. The court expressed considerable sympathy for the judge who had been given responsibility to decide at short notice whether to grant restraint and receivership orders at a time when he was occupied with the conduct of a complex jury trial. Having had a much better opportunity to analyse the evidence, it considered that Mr Brown's statements consisted largely of broad and unsupported assertions. Careful analysis of the evidence in the appendices to his statement about particular transactions exposed serious gaps. The court held that the judge had been

wrong on 6 December to find on the material before him that there was reasonable cause to believe that the defendants had benefited from the alleged criminal conduct. It postponed the drawing up of a final order in relation to the defendants (as distinct from the companies) in order to give the CPS an opportunity to adduce further evidence. The CPS subsequently made a renewed application to Mackay J, which he refused.

26. As to the companies, the Court of Appeal held that there was no good arguable case for regarding their assets as the assets of the defendants and it quashed the order in so far as it affected the companies with immediate effect.

27. In his judgment refusing to discharge the order, the judge had concluded that there was a good arguable case that the defendants had attempted to shelter behind a corporate façade, or veil, to hide their crimes and their benefits from it; and that the business structures constituted a device, or cloak or sham intended to disguise the true nature of what was going on.

28. The Court of Appeal referred to Mr Brown's statement that it was probable that the companies conducted legitimate trade and that he did not know the ratio of legitimate to illegitimate activity. It observed that by the time of the application to set aside a good deal of evidence had been filed by the companies, from which they asserted that 95% of the business was demonstrably legitimate, and HMRC had been driven to concede that they were not in a position to dispute this. The court concluded that on the material before the judge, at the time of the ex parte hearing, "there may have been" some force in the argument put forward by the CPS; but that on the application to discharge the orders there was insufficient evidence to support the judge's conclusion that there was reasonable cause to believe that the companies were just a front, sham or device behind which the defendants were sheltering in order to conceal fraud. The court said that, on the contrary, the evidence before it suggested that the vast bulk of the companies' business was legitimate. That evidence was before the court at the time when the judge made his order on 14 December activating the receiver's management powers, although the judge had not then had the opportunity of digesting it.

29. The effective period of the receivership therefore lasted from 14 December 2010 (when the receiver's management powers were activated) to 26 January 2011 (when the order was set aside by the Court of Appeal). A witness statement by the receiver's solicitor explains in broad outline how the sum claimed by the receiver is made up. The largest items were £248,220 for chargeable time recorded and £229,399 for providing manned security at the companies' sites. The reason for the latter figure being so large was that the receiver had information that many of the operatives at the sites were either unlicensed workers from overseas (some with criminal records) or had family connections to the defendants. The receiver therefore

instructed professional security staff to protect the sites and the stock. A further significant item was the cost of the receiver obtaining legal advice and representation. This amounted to £143,044. It included counsel's fees for appearance at the hearings before the judge on 14 and 23 December 2010 and at the hearing before the Court of Appeal. On the hearing of the present appeal the court was informed that no criminal charges had yet been brought in connection with the investigation but that the investigation is continuing.

Statutory Framework

30. The purpose of POCA is to prevent criminals form benefiting from their criminal conduct. The Act provides various means for achieving this aim. Part 2 provides a scheme for making confiscation orders in criminal proceedings. Sections 40 to 49 make provision for protective measures by way of restraint orders and receivership orders in order to preserve the realisable assets of a defendant or prospective defendant against whom there is a reasonable likelihood of a confiscation order being made. The conditions for making a restraint order are set out in section 40. Among other things, the court must be satisfied that there is reasonable cause to believe that the alleged defendant has benefited from his criminal conduct. It is not necessary that criminal proceedings should have been instituted, but a criminal investigation must have begun. If the necessary conditions are satisfied, the court may make an order under section 41 prohibiting "any specified person from dealing with any realisable property held by him". Realisable property is defined in section 83 as any free property held by the defendant (or by the recipient of a tainted gift). Under section 82, property is "free" for this purpose unless it is already the subject of a forfeiture or deprivation order made under another statute such as the Terrorism Act 2000. A restraint order may be made subject to exceptions and the court may make such other order as it believes is appropriate for the purpose of ensuring that the restraint order is effective. A disclosure order is a common example.

31. Section 42 provides for applications to vary or discharge a restraint order, and section 43 provides for an appeal to the Court of Appeal by a person affected by the decision on such an application.

32. As a supplement to a restraint order, section 48(2) provides that the Crown Court may appoint a receiver in respect of any realisable property to which the restraint order applies.

33. Since the appointment of a management receiver is by its nature an interim measure before any criminal proceedings have been determined, when appointing a receiver under section 48 the court does not have to make a final determination that

the relevant property is realisable property within the meaning of the Act. It is enough that on the documents a good arguable case arises for treating the relevant assets as the realisable property of the defendant: *Crown Prosecution Service v Compton* [2002] EWCA Civ 1720.

34. Section 49 provides so far as material:

> "1) If the court appoints a receiver under section 48 it may act under this section on the application of the person who applied for the restraint order.
>
> 2) The court may by order confer on the receiver the following powers in relation to any realisable property to which the restraint order applies -
>
> a) power to take possession of the property;
>
> b) power to manage or otherwise deal with the property;
>
> c) power to start, carry on or defend any legal proceedings in respect of the property;
>
> d) power to realise so much of the property as is necessary to meet the receiver's remuneration and expenses.
>
> …
>
> 4) The court may by order authorise the receiver to do any of the following for the purpose of the exercise of his functions-
>
> a) hold property;
>
> b) enter into contracts;
>
> c) sue and be sued;

d) employ agents;

e) execute powers of attorney, deeds or other instruments;

f) take any other steps the court thinks appropriate.

5) The court may order any person who has possession of realisable property to which the restraint order applies to give possession of it to the receiver.

…

8) The court must not –

a) confer the power mentioned in subsection (2) (b) or (d) in respect of property, or

b) exercise the power conferred on it by subsection (6) in respect of property.

unless it gives persons holding interests in the property a reasonable opportunity to make representations to it.

…

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

35. Section 61 provides:

"If a receiver appointed under section 48…-

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

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

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

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

36. Section 63 provides that any person affected by a receivership order may apply to the Crown Court to vary or discharge the order. Section 65 provides for appeal to the Court of Appeal against decisions under various sections including 48, 49 and 63.

37. Section 66 provides:

"(1) An appeal lies to the Supreme Court from a decision of the Court of Appeal on an appeal under section 65.

(2) An appeal under this section lies at the instance of any person who was a party to the proceedings before the Court of Appeal.

(3) On an appeal under this section the Supreme Court may –

i. confirm the decision of the Court of Appeal, or

ii. make such order as it believes is appropriate."

38. Section 72 gives power to the Crown Court to order payment of such compensation as it believes is just in cases where an order has been made under the part of the Act which includes receivership orders, but there are a number of conditions. There must have been serious default by, among others, a member of the CPS. The default must have been such that the investigation would not have continued if it had not occurred (or, where criminal proceedings were instituted, that the proceedings would not have started or continued). Moreover, under section 72(6) the application must be made by a person "who held realisable property" and has suffered loss in consequence of something done in relation to it by or in pursuance of the order.

39. Section 72(6) presents a drafting problem because section 83 confines the meaning of realisable property to property of the defendant or a tainted gift. If

construed literally, it would therefore not extend to property of a third party which was wrongly made the subject of a receivership order. This could present an obstacle for a person in the position of the companies in this case, but it is not necessary to try to resolve that problem for present purposes.

40. The Act does not contain any provisions about the application of funds obtained by a management receiver (other than section 49(2)(d) which empowers the court to give power to the receiver to realise so much of the property as is necessary to meet his remuneration and expenses), but that is explicable because of the interim nature of a management receivership.

41. The task of the management receiver is essentially to hold and protect the assets. Where criminal proceedings result in the making of a confiscation order, the court may appoint an enforcement receiver under section 50. For collection purposes, a confiscation order is treated in the same way as a fine; payment is made thorough the magistrates' court. Section 55 contains provisions about how the justices' chief executive is to deal with sums received on account of the amount payable under a confiscation order. They must be applied first in the payment of expenses properly payable to an insolvency practitioner and next in the payment of the remuneration and expenses of a receiver appointed under section 48, to the extent that they have not been met by the exercise of a power conferred under section 49(2)(d) (that is, to the extent that they have not been met by the receiver selling assets in order to meet his own remuneration and expenses). Under analogous provisions of the Criminal Justice Act 1988, which POCA replaced, section 88(2) contained a long stop provision in the following terms:

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

42. By contrast, POCA contains no provision for payment of the receiver's remuneration and expenses by the prosecutor or applicant for the receivership order.

43. The Criminal Procedure Rules include a part dealing with receivership orders. Rule 60.6 provides:

> "(1) This rule applies where the Crown Court appoints a receiver under section 48 or 50 of the Proceeds of Crime Act 2002…

(2) The receiver may only charge for his services if the Crown Court-

a) so directs; and

b) specifies the basis on which the receiver is to be remunerated.

…

(4) The Crown Court may refer the determination of a receiver's remuneration to be ascertained by the taxing authority of the Crown Court…

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

(6) A receiver appointed under section 50 of the 2002 Act is to receive his remuneration by applying to the magistrates' court officer for payment under section 55(4)(b) of the 2002 Act."

Domestic Case Law

44. At common law it is an established general principle of receivership that a court appointed receiver is entitled to look for payment of his proper expenses and remuneration to the assets placed by the court in his control, and that the receiver has a lien over these assets for that purpose. It is also established that this principle applies as much to a receiver appointed under a statutory scheme as to any other court appointed receiver, unless the statute otherwise provides: *Capewell v Revenue and Customs Commissioners* [2007] UKHL 2, [2007] 1 WLR 386, especially paras 18-21.

45. This is the first case in which this court has had to consider the compatibility of the application of that general principle with A1P1, in circumstances where the relevant assets were not the property of the defendant (or prospective defendant) and ought never to have been put into the hands of the receiver. In *In re Andrews* [1999] 1 WLR 1236 a father and son were prosecuted for VAT fraud. In the course of the proceedings restraint and receivership orders were made against them under the Criminal Justice Act 1988. The son was convicted but the father was acquitted. The receiver used some of the proceeds of the father's assets to cover his legal costs and

expenses. The father claimed to recover this sum from the receiver by way of costs but, as Aldous LJ observed, the claim was really a claim for compensation dressed up as an application for an award of costs. The Court of Appeal held that the receiver was entitled to charge his costs and expenses against the assets in receivership but added that no argument had been addressed to the court about possible breach of A1P1.

46. An argument based on A1P1 was raised in *Hughes v Customs & Excise Commissioners* [2002] EWCA Civ 734, [2003] 1 WLR 177. Nicholas Hughes was charged with VAT fraud. Nicholas was the joint owner of a company with his brother Timothy, each holding 50% of the shares. Timothy was never charged. A restraint and receivership order was made against Nicholas, preventing the company from dealing in any way with its assets. Nicholas was acquitted but the assets of the company were used to meet the receiver's costs and expenses. The Court of Appeal held that there was no breach of A1P1. Simon Brown LJ said:

> "55. I entirely accept that an acquitted (or indeed unconvicted) defendant must for these purposes be treated as an innocent person… I cannot accept, however, that for this reason it must be regarded as disproportionate, still less arbitrary (another contention advanced by the respondents), to leave the defendant, against whom restraint and receivership orders have been made, uncompensated for such loss as they may have caused him – unless, of course, by establishing 'some serious fault' on the prosecutor's part he can bring himself within the strict requirements of section 89.
>
> 56. It is common ground that acquitted defendants are not, save in the most exceptional circumstances, entitled to compensation for being deprived of their liberty whilst on remand or indeed for any other heads of loss suffered through being prosecuted. In my judgment it is no more unfair, disproportionate or arbitrary that they should be uncompensated too for any adverse effects that restraint and receivership orders may have had upon their assets."

47. As to the position of Timothy, Simon Brown LJ said at para 58 that the court should be astute, wherever possible, to protect the rights and interests of third parties, but that it was "difficult to regard this legislation as riding roughshod over the rights of innocent third parties".

48. In that case Timothy's interest in the company was inextricably tied up with that of his brother and there was no suggestion that the order was not properly made.

Hughes was cited with approval in *Capewell*, but not on this point because in *Capewell* there was no argument about A1P1.

49. In *Capewell*, a receivership order was properly made against the defendant under section 77(8) of the Criminal Justice Act 1988. The known assets of the defendant comprised some properties, some cars, some bank accounts and an unincorporated financial services business. The order provided for the receiver's remuneration and expenses to be taken from the receivership assets. The receivership order was made on 30 January 2003. After about a year an application was made by the defendant for the discharge of the receiver. The application was heard by Lindsay J in April 2004 and was dismissed. The defendant appealed against that decision. While the case was pending in the Court of Appeal, a fresh application was made for the discharge of the receivership, which on this occasion was not opposed by the receiver. On 13 October 2004 Davis J ordered that the receiver be discharged on the "pragmatic grounds" that "all the parties agreed that the expenditure and sums involved mean it simply does not make sense for the receiver to continue in office". The defendant continued with his appeal against the dismissal of his earlier application, and the Court of Appeal held that Lindsay J had misdirected himself in his approach to that application. The court found it difficult to assess how matters would have proceeded if the judge had asked himself the correct questions but it inferred that the date of discharge would have been likely to have been brought forward and, doing the best it could, it estimated that the likely date of discharge would have been 1 June 2004.

50. The defendant submitted that the Revenue and Customs (who had obtained the order) should be responsible for the receiver's remuneration and expenses for the period of four and a half months from 1 June 2004 to the date when the receivership order was discharged. The Court of Appeal considered that this would be just, and that it had power to make such an order under a recently introduced provision of the Civil Procedure Rules.

51. The issue before the House of Lords was whether the relevant rule, CPR r 69.7, gave the court such power. The House of Lords held that the new rule did not introduce a fundamental change in the general law of receivership or in the position of receiverships under the 1998 Act or other comparable statute powers. As a further reason for reversing the Court of Appeal's decision, Lord Walker observed at para 27 that a receiver takes on heavy responsibilities when he accepts appointment, and he is entitled to the security of knowing that the terms of his appointment will not be changed retrospectively, even if an appellate court later decides that the receivership should have been terminated at an earlier date. The issue for the House of Lords was therefore narrow. It was not disputed that the assets had been properly put into the hands of the receiver and there was no suggestion of a possible violation of A1P1.

52. In *Sinclair v Glatt* [2009] EWCA Civ 176, [2009] 1 WLR 1845 the defendant was convicted of money laundering offences. In the course of the proceedings a restraint and receivership order was made against him relating to assets including properties of which he was the legal owner. The defendant's former wife intervened claiming to be the beneficial owner of certain property and her claim was upheld. The receivership order was held to have been properly made, because the defendant was the legal owner of the property, and the Court of Appeal upheld the receiver's claim to be entitled to a lien over it for his remuneration, costs and expenses. There was no argument about A1P1, but Elias LJ said obiter at para 42 that, given the potential injustice of the operation of the principle that the receivers can recover their costs and expenses from the receivership assets, he would not rule out the possibility that in an appropriate case A1P1 could limit the costs and expenses recoverable from an innocent third party. He added that he did not read the judgment of the Court of Appeal in *Hughes* as excluding that possibility.

European Case Law

53. Mr Perry relied on a number of cases in which the Strasbourg Court held that interim restraints imposed on a defendant's liberty or use of his property in the course of criminal proceedings did not contravene the Convention or A1P1. Mr Jones submitted that these decisions were distinguishable and he referred to other decisions of the court about the general interpretation of A1P1 in support of his case.

54. In *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35 the Strasbourg Court was sharply divided over the proper interpretation of A1P1. A forceful minority judgment favoured holding that the second paragraph (beginning "The preceding provisions shall not, however, in any way impair the right of a State...") qualified the whole of the first paragraph. The majority held that A1P1 contains three separate and distinct rules. The first rule, expressed in the first sentence, is a rule of general application which recognises every person's right to peaceful enjoyment of his possessions. The second rule, in the second sentence, deals with measures which deprive a person of his possessions. Deprivation is permissible if, but only if, it is "in the public interest and subject to the conditions provided for by law and by the general principles of international law". The third rule deals with the state's power to enforce laws controlling the use by a person of his property but is not relevant to cases of deprivation of property, which are governed by a combination of rules 1 and 2.

55. The court also stressed, at para 69, that for the purpose of deciding whether there has been a breach of the first rule,

> "the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of article 1."

56. In *James v United Kingdom* (1986) 8 EHRR 123, para 37, the court clarified what it meant by A1P1 comprising "three distinct rules". The court said that the three rules were not "distinct" in the sense of being unconnected. The second and third rules were concerned with particular instances of interference with the right to peaceful enjoyment of property and were therefore to be construed in the light of the general principle clearly enunciated in the first rule. The court rejected an argument that the "public interest" test in the deprivation rule is satisfied only if the property is taken for the use or benefit of the public at large. It held that a taking of property effected in pursuance of legitimate social, economic or other policies may be "in the public interest"; that the margin of appreciation open to a national legislature in implementing social and economic policies is a wide one; and that the court will respect its judgment as to what is in the public interest unless that judgment is manifestly without reasonable foundation (paras 39 to 45).

57. However, in order for a taking of private property to be compliant with A1P1, not only must the measure under which the property is taken pursue a legitimate aim in the public interest, but there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The court in *James* repeated its statement in *Sporrong* that a "fair balance" must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, and it added that the requisite balance will not be found if the person concerned has had to bear an individual and excessive burden (para 50).

58. The court held that the requirement in the deprivation rule that the taking must be in accordance with "the general principles of international law" does not apply to a taking by a state of the property of its own nationals (para 66). However, the court stated that the requirement that any taking shall be "subject to the conditions provided for by law" refers not merely to municipal law but relates also to the quality of the law, requiring it to be compatible with the rule of law and not arbitrary (para 67).

59. In *Lithgow v United Kingdom* (1986) EHRR 329 the court held that the phrase "subject to the conditions provided for by law" requires the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions (para 110). As to the need for a reasonable relationship of proportionality between the means employed and the aim sought to be realised, and the requirement

that a balance must be struck between the general interest to the community and protection of the individual's fundamental rights, it said that the taking of property without reasonable compensation would normally constitute a disproportionate interference (paras 121 to 151).

60. The cases of *Sporrong*, *James* and *Lithgow* contain important statements of general principle (as this court recognised in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868), but they were not cases of property being taken for purposes connected with criminal proceedings. In that context I come next to the cases on which the receiver and the CPS rely.

61. In *Raimondo v Italy* (1994) 18 EHRR 237 the applicant was arrested and placed under house arrest on charges relating to his association with the Mafia. As an interim measure some of his property was seized. The proceedings ended in his acquittal. He claimed that the seizure of his property was a violation of his rights under A1P1 but his complaint was dismissed. The court held that the seizure, as a provisional measure intended to ensure that property which appeared to be the fruit of unlawful activities carried out to the detriment of the community could subsequently be confiscated if necessary, was justified by the general interest. In view of the extremely dangerous economic power of an organisation like the Mafia, it could not be said that taking the step of seizing the property at an early stage of the proceedings was disproportionate to the aim pursued. There was an additional complaint that the property was not only seized but confiscated. However, the confiscation order was rescindable and had in fact been rescinded. In practical terms it entailed no additional restriction to the seizure, and therefore the respondent state was held not to have overstepped the margin of appreciation available to it.

62. The acquitted defendant in *Andrews* (referred to in para 45) took his case to Strasbourg: Application No 49584/99, 26 September 2002. He complained that the use of his assets to cover the receiver's legal costs and expenses was a breach of his rights under A1P1 but his complaint was dismissed as manifestly ill-founded. The court observed that the applicant had not argued that there was insufficient evidence on which to base the charges made against him; that he had specifically referred to his close involvement with the transport company when declaring his assets; that the proper administration of the affairs of the company was obviously in the applicant's own interest; and that he was consulted by the receiver in the monitoring of the company. The court said:

> "Having regard to these considerations, the Court is not persuaded that the applicant was required to bear an individual and excessive burden through having to fund the costs and expenses incurred by the receiver . . . It is true that the applicant was ultimately acquitted of the charges brought against him. However, it is equally true that at the time of the

> execution of the Restraint and Receivership Orders there was a case against him which required to be answered, and necessary steps had to be taken to preserve assets in respect of which he had more than a peripheral interest. In these circumstances, and having regard also to the absence of any arbitrariness in the impugned decisions, the Court does not consider that the authorities can be said to have failed to strike a fair balance between the applicant's property right and the general interests of the community."

The government in *Andrews* accepted that there had been an interference with the applicant's right to the peaceful enjoyment of his property. The applicant argued that there had been a deprivation of his property within the meaning of the second sentence of A1P1. The court considered that the initial seizure had been an exercise of control over the use of the property, in order to ensure that it would be available for payment of revenue owed by him in the event of his conviction, and that payment of the receiver's costs out of the property should be regarded as part of the exercise by the state of the rights reserved to it under the second paragraph of A1P1 and therefore served a legitimate aim. I have no difficulty with the court's view that there was a legitimate aim, but that is different from the question whether there was a deprivation of assets. The court seems to have regarded the payment of the receiver as money spent on the preservation of the applicant's property and therefore not a deprivation; in other words, expenditure of funds for the benefit of the property was not to be regarded as a deprivation. That would account for the court's emphasis on the fact that "the proper administration of the affairs of the company was obviously in the applicant's own interest" and that he was consulted by the receiver in the monitoring of the company. If so, that was a conclusion on the particular facts of that case, rather than a principle of law of general application, and its relevance was to the court's judgment about whether the applicant was required to bear an individual and excessive burden.

63. In *Benham v United Kingdom* (1996) 22 EHRR 293 the applicant was committed to prison by a magistrates' court for non-payment of a community charge. The Divisional Court held on appeal that the magistrates had been wrong to do so. The applicant complained that his imprisonment was a violation of his rights under article 5 and that he had an enforceable right to compensation under article 5(5). The Strasbourg Court rejected his complaints. It held that his detention had been lawful within the meaning of article 5 because it was carried out pursuant to a court order. The subsequent finding that the court had erred under domestic law in making that order did not retrospectively affect the validity of his period of detention. His detention had not been arbitrary. There was no suggestion that the magistrates had acted in bad faith or that they had not attempted to apply the relevant legislation correctly. The law which the magistrates had to apply was not straightforward. Their decision had been erroneous but they had acted, albeit mistakenly, within their lawful jurisdiction.

64. By contrast, in *Frizen v Russia* (2005) 42 EHRR 388 the Court held that a confiscation order made by a Russian criminal court was unlawful and involved a violation of the applicant's rights under A1P1. The husband was convicted of fraud. She was not herself charged with any criminal offence. After his conviction the court made a confiscation order in respect of her husband's property and it included in the confiscation order a vehicle which the applicant maintained had been bought from money which she had borrowed and belonged to her. However, it failed to identify any legal basis justifying the confiscation.

Judgment of Underhill J

65. Quoting from the judgment of Simon Brown LJ in *Hughes*, Underhill J said that the essential questions arising under A1P1 were whether the measures taken were (i) in the public interest, (ii) appropriate for achieving their aim, (iii) proportionate and (iv) achieved a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's rights.

66. He concluded that it would be a breach of the companies' rights under A1P1 if they had ultimately to bear the burden of the receiver's costs and expenses.

67. Underhill J distinguished *Hughes* on the grounds that in that case the order had been properly made, notwithstanding the eventual acquittal (or non-prosecution) of the alleged defender, and the adverse affects on the third party were the consequence of his having the misfortune to share an interest in property with someone reasonably suspected of involvement in serious crime. Underhill J continued:

> "But the situation seems to me fundamentally different where the adverse effect on the third party is the result not of his sharing property rights with the alleged offender but of his property being treated, wrongly and without sufficient evidence, as property in which the alleged offender has an interest. It does not seem to me that the public interest justification endorsed in *Hughes* has any application to such a case: the third party's assets are simply confiscated to fund the execution of an order that should not have been made in the first place."

68. Underhill J referred to some remarks in *Sinclair v Glatt* which could be taken as suggesting that an adverse impact on a third party might be disproportionate in the case of a stranger but justifiable where the parties were sufficiently closely

associated. He noted that in the present case there was a close connection between the companies and the alleged offenders, and that it might be the case (as yet unproved) that the companies had been used to some extent in carrying out the alleged offences. He accepted that where the third party and the alleged offender shared an interest in property the nature of their association might be relevant in deciding whether the third party should bear the resulting cost of the receivership, but he regarded the case as different where the third party's property was unequivocally his own and there was no basis for a receiver being appointed over it. If there was sufficient ground for believing that the companies themselves were not innocent in relation to the alleged offending, the right course in his view was for the companies to be treated as alleged offenders in their own right.

69. Underhill J went on to consider the position of the receiver and the CPS. He observed that to deny the receiver his remuneration would be an unacceptable way of vindicating the companies' rights and would involve remedying one injustice only by creating another. The receiver took charge of the companies' assets as an officer of the court, and incurred expenditure and liabilities on the faith of a court order which was valid and effective until discharged by the Court of Appeal. He had no responsibility for the fact that the order was wrongly made and it would be intolerable that he should not be entitled to be paid, from one source or another, his proper fees and expenses. Underhill J considered that section 3 of the Human Rights Act 1998 enabled him to interpret POCA as giving the court the right, in circumstances such as those of the present case, to order that the receiver's remuneration and expenses be paid by the CPS. On that basis he ordered the CPS to pay the receiver's remuneration and legal costs (subject to an assessment by the taxing authority of the Crown Court).

Judgment of Mitting and Edwards-Stuart JJ

70. The majority of the Court of Appeal began by noting that it was settled law at Strasbourg that A1P1 comprises three distinct rules (*Sporrong)*. Since the receiver's application to use the assets of the company to meet his remuneration and expenses involved a taking and not merely an interference with the use of the companies' property, the relevant rule was the second rule, contained in the second sentence of A1P1. The majority correctly noted that the general principles of international law were irrelevant for present purposes. The question was whether depriving the companies of their assets for the purpose of paying the receiver would meet the requirements of being "in the public interest and subject to the conditions provided for by law".

71. The majority concluded that the proposed taking of the companies' assets would not comply with the conditions required by law. Their reasoning process was as follows:

1) Before assets could properly be made the subject of a receivership order, there must be reasonable cause to believe that the alleged offender had benefited from his criminal conduct (section 40(2)(b) of POCA) and there must be a good arguable case for treating particular assets as the realisable property of the defendant (*CPS v Compton).*

2) The first condition was not satisfied on either 6 or 23 December 2010 and the second was not satisfied on 23 December 2010.

3) It was true that deprivation of the companies' property to pay the remuneration and expenses of the receiver was authorised by law "in a superficial sense", in that it is a settled principle of receivership law that a receiver is entitled to be paid his remuneration and assets out of the assets he is appointed to receive and manage.

4) However, that proposition was subject to an important caveat: the conditions upon which a restraint order may be made and a receiver appointed must first be satisfied. If they are not, there is no lawful basis for the appointment of a receiver in respect of property belonging to an alleged offender, still less property belonging to a third person.

5) In order to determine the issue of lawfulness for the purpose of the second rule under A1P1, the court must look to the "underlying lawfulness of the receiver's appointment".

6) The bare fact that the receiver had been appointed by order of a court was not sufficient to authorise the deprivation: *Frizen v Russia*.

72. The majority held, in agreement with Laws LJ, that Underhill J had been wrong to hold that POCA could be interpreted in such a way as to give the court power to order the receiver's remuneration and expenses to be paid by the CPS. They recognised the unsatisfactoriness of the outcome, since the receiver had been appointed by the court, on the application of the CPS, had undertaken work and incurred expenses in the legitimate understanding that he would be rewarded and recompensed out of assets identified by the CPS. Their judgment left open the possibility that the receiver might have a common law remedy, but they did not elaborate on this, presumably because the point had not been developed in argument.

Judgment of Laws LJ

73. Laws LJ's analysis began logically with domestic law. The setting aside of the receivership order by the Court of Appeal did not render the order under which the receiver was appointed a nullity ab initio. The Crown Court order had the force of law until it was set aside and the setting aside of the order did not retrospectively deprive the receiver of his right to remuneration under it. As Laws LJ pithily put it, "The Crown Court's order is therefore good until set aside; and this is so whatever the basis on which it is set aside."

74. The terms of the receiver's appointment and his remuneration, costs and expenses were within the court's power to order (under section 49(2)(d) and the criminal procedure rules), and they entitled the receiver to recover his proper remuneration and expenses out of the companies' assets.

75. Laws LJ disagreed with the majority's interpretation of "the conditions provided for by law" under A1P1. The conditions provided for by law were soundly constituted by (i) the material provisions of POCA, (ii) the order made by the Crown Court on 6 December 2010, (iii) the common law rule that the orders of a superior court of record are good until set aside and (iv) the common law rule that a receiver is entitled to be paid his remuneration and expenses out of the assets he is appointed to receive and manage, which gave a long-standing historic context to the order's effect and vindicated the principle of legal certainty.

76. Laws LJ went on to consider the requirement of proportionality. He cited *Raimondo* as an authority showing that statutory regimes of seizure and confiscation by the state may well be justified under A1P1 for the prevention of crime and that the Strasbourg Court will allow a margin of appreciation to the state.

77. There could be no argument as to the POCA regime's legitimate aim, which was to preserve property for the satisfaction of confiscation orders made to strip criminals of the fruits of their crime.

78. The Act constituted the judgment of Parliament as to how "a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's right" should be struck in this area. Parliament's judgment leant heavily towards the general interest, although there are careful, but limited, protections for the individual (notably in sections 61 and 72).

79. Given the respect owed by domestic courts, and the Strasbourg Court, to Parliament's judgment as to how the balance between general interest and private right was to be struck, Laws LJ considered that A1P1 would only very rarely be

violated on proportionality grounds by the effects of a receivership order. This was not in his judgment such a case.

80. On Laws LJ's approach to A1P1, the question of the court's power to order recovery of the receiver's remuneration and expenses against the CPS would not have arisen, but he addressed it in view of the decision of the majority on the A1P1 issue. He noted that no express provision of POCA gave the court any such power. The question was whether section 3 of the Human Rights Act allowed the court to interpret or "read down" the statute so as to find such a power. There was no provision in the Act which might be amenable to that process of interpretation, and the policy of the statute was that the receiver's right to recover his expenses from the receivership properly applied in every instance (unless different arrangements were made by contract). In those circumstances he concluded that there was no power in the court to make an order against the CPS.

A1P1: discussion

81. Since the present case involves deprivation of the companies' assets, and not merely control of their use, the Court of Appeal identified the second of *Sporrong's* three rules as the key provision:

> "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law [and by the general principles of international law]."

As the court recognised, the reference to international law is irrelevant in the case of a taking by a state of the property of its own nationals. The critical questions are those addressed by Laws LJ: (1) whether the proposed taking is in accordance with "conditions provided for by law"; (2) if so, whether the measure relied upon to justify the taking has a legitimate aim; (3) if the first and second conditions are each satisfied, whether the taking strikes a fair balance between the general interest of the community and the requirements of the protection of the companies' right to peaceful enjoyment of their possessions.

82. On the question of lawfulness, Mr Jones submitted that the majority of the Court of Appeal were right in their analysis (summarised in para 71 above). Mr Perry and Mr Parroy submitted that the majority were wrong and that Laws LJ was correct in his analysis (summarised at paras 73 to 75 above).

83. On this issue I agree with Laws LJ for the reasons given by him and I cannot improve on his analysis. Mr Jones sought to uphold the approach of the majority by

reference to the observations of the Strasbourg Court in *James* at para 67 (referred to at para 58 above) to the effect that the expression "the conditions provided for by law" in A1P1 refers not merely to municipal law but also to the quality of the law. The point which the Strasbourg Court was making was that the relevant conditions must comply with the rule of law in terms of clarity, accessibility and lack of arbitrariness. The relevant provisions of POCA together with the common law of receivership (the Criminal Procedure Rules) amply satisfy the requirements of the rule of law. *Frizen v Russia*, on which Mitting and Edwards-Stuart JJ placed some reliance, was not a comparable case because the state in that case was unable to identify any provision of domestic law under which the order had been made.

84. Laws LJ was plainly right that as a matter of domestic law the appointment of the receiver was valid until the Court of Appeal set aside the order appointing him. Under domestic law the Crown Court had power to order that the receiver's remuneration and expenses should be taken from the assets placed in his control. The setting aside of the receiver's appointment did not retrospectively affect his entitlement to be paid out of those assets for his proper remuneration and expenses during the period of the receivership.

85. Next, Mr Jones submitted that the measure relied on to justify payment of the receiver's remuneration and expenses out of the assets of the companies was not in the public interest because it lacked a legitimate aim. Its aim, he submitted, was to enable the state to place the cost of an order which ought never to have been made on to the person against whom it was made, and that this was not a legitimate purpose. However, that is to start at the wrong end. It is to deduce the aim by reference to the result rather than to look at the measure itself in order to see what is its true aim. The safety valve against a measure with a legitimate aim being relied upon to produce an unjustifiable result is the separate requirement of proportionality.

86. The Strasbourg Court has adopted a generous approach to the "public interest" test, allowing a wide measure of appreciation to a national legislature in determining what it considers to be in the public interest (see *James*, referred to at para 56 above). The aim of the legislature in enabling the court to appoint an interim receiver under section 48 was to preserve property pending the conclusion of criminal proceedings and the possible making of a confiscation order. A professional receiver would have to be paid, and the purpose of allowing the court to apply the usual common law principle as to the payment of receivers was to enable the receivership to operate like any other. I agree with Laws LJ it was open to Parliament to form the judgment that this would serve the legitimate public interest in combatting crime by making it unprofitable.

87. The critical question is whether in the circumstances of the present case an order that the receiver's costs and expenses should be met out of the companies'

assets is disproportionate, in that it would not achieve a fair balance between the interest of the community and protection of the companies' right to their own property.

88. I start from the position that the taking of property without compensation will normally be a disproportionate interference with a person's A1P1 rights. Although this was said in a case about compulsory purchase, it is a general principle, but it is only a starting point. To give an obvious example, a confiscation order under POCA is a taking of property without compensation, but it is done for the salutary purpose of depriving a criminal of the proceeds of his crime. A restraint order and receivership order may also be proportionate if reasonably ancillary to that process.

89. In *Andrews* the Strasbourg Court judged that it was not disproportionate that the costs of a receivership should be taken from the assets of the defendant notwithstanding his ultimate acquittal. However, in its reasoning the Court highlighted the fact that there was a case against the applicant, which required to be answered, and that necessary steps had to be taken to preserve assets in which he had more than a peripheral interest. Sometimes too it may happen that an innocent third party's affairs are so intermingled with the defendant's as to give reasonable cause to believe the defendant to be the owner of assets which are ultimately found to belong to a third party, but that is not the present case. In this case, the companies were neither defendants nor was there reasonable cause for regarding their assets as the assets of the defendants on the evidence before the court at the time when the receivership order against them was made effective (14 December 2010). Whilst those facts did not make the receivership order legally invalid under domestic law during the period until it was set aside, they are the cornerstone of the companies' argument that it would be disproportionate and unfair to require them to pay the costs of the receivership.

90. Mr Perry and Mr Parroy submitted that although it must now be accepted that the receivership order ought never to have been made, the court should adopt a similar approach to that of the Strasbourg Court in *Benham* (referred to in para 62 above). In that case the applicant was imprisoned under an order which ought not to have been made, but the matter was complex and the magistrates acted in good faith. It was held that there was therefore no breach of article 5. By parity of reasoning it was argued that the court should conclude that to require the companies to bear the costs of the receivership would not infringe A1P1, because (as is true) the order under which the receiver seeks to recover his remuneration and expenses from the companies was made by the Crown Court in good faith and the matter was complicated. Simon Brown LJ drew a similar analogy between article 5 and A1P1 in *Hughes*, referred to at para 46 above, when he said that it was no more unfair, disproportionate or arbitrary that an acquitted defendant should be uncompensated for any adverse effects of a restraint or a receivership order than that he should be uncompensated for loss of liberty whilst on remand.

91. I am not persuaded that the analogy is apt. It is true that a remand in custody and the appointment of a management receiver are both forms of interim restraint and both may cause the individual to suffer financial loss as a side effect, but it is not right simply to lump together different forms of loss and assume that the Convention applies in the same way to them all. If the companies were claiming to recover trading losses resulting from the impact of their business being put into the hands of the receiver, it would be a claim for loss by interference with their property, to which the third rule in *Sporrong* would apply. It could be said that there would be an analogy between a claim for that kind of loss and a claim for loss resulting from the interim detention of the individual. I see the argument that it would be strange that a person who is remanded in custody and whose property is made the subject of a restraint and receivership order should be disentitled to claim for the loss of earnings resulting from his personal detention but might be entitled to claim for loss of trading opportunities resulting from the restraint on his property. I see also the argument that it might have a chilling effect on prosecutors if they faced the prospect of possibly having to make good trading losses during the period of a receivership, which might be considerable but would be hard to estimate and over which the prosecution would have no control.

92. However, the court is not considering a claim of that kind. The companies are resisting an application by the receiver to take his expenses and remuneration out of their companies' assets. It is quite different from a claim for compensation for a period of remand in custody. If one wanted to find an analogy with a defendant remanded in custody, the nearest equivalent would be if the assets of the defendant were sought to be used to defray the costs of detaining him and the legal proceedings. The important point for present purposes is that whereas incidental loss (such as trading loss) which a person may suffer as a by-product of an interim restraint would come under the third rule in *Sporrong*, as loss resulting from the state's interference with the property, the Court of Appeal were right to identify the second rule as the relevant rule in this case because it concerns a proposed taking of the companies' assets.

93. In support of their argument for regarding the taking as a proportionate measure, Mr Perry and Mr Parroy drew attention to the protections for the individual which are built into the relevant part of POCA, including particularly section 49(8), set out in para 34 above. Under that subsection the court must not activate any power given to the receiver to manage the property, or realise assets for the purpose of meeting his remuneration and expenses, until any person holding an interest in the property has had a reasonable opportunity to make representations. That provision is designed to minimise the risk of the court making a wrongful order such as was made in this case, but I do not see that a taking is rendered proportionate by the existence of a protective provision which failed to operate as it should. Indeed the opposite could be argued.

94. This case is distinguishable from *Raimondo*, *Andrews*, *Hughes*, *Capewell* and *Sinclair v Glatt*, because all those cases were decided on the premise that the original receivership order was rightly made. In *Sinclair v Glatt* the applicant was not the defendant, but the relevant property was in the defendant's legal ownership and was therefore held to be properly included in the receivership order. In the present case, however, not only were the companies not defendants, but at the time when the receiver's powers were activated there was no reasonable cause to believe that their assets were assets of the defendants. The question is whether on those facts it strikes a fair balance between the general interest of the community and the protection of the companies' rights to the peaceful enjoyment of their property that the companies' assets should be taken to pay for the costs and remuneration of the receiver. At this point I part company with Laws LJ and agree with Underhill J that this would not be a fair balance. As Lord Reed observed in *AXA General Insurance Ltd v HM Advocate* at para 128, the assessment of proportionality requires careful consideration of the particular facts. In this instance there was no good arguable case for assimilating the companies' assets with those of the defendants, and Underhill J aptly described it as simply a confiscation of a third party's assets to fund the execution of an order that should not have been made in the first place.

95. In *Capewell* Lord Walker at para 25 described the relationship between the general law of receivership and the detailed provisions of the Criminal Justice Act 1988 (for which one must now substitute POCA) as "somewhat opaque". Section 49(2)(d) empowers the court to authorise the receiver to realise so much of the property as is necessary to meet his remuneration and expenses in accordance with the ordinary law of receivership. However, the court as a public authority must not exercise its power in such a way as to breach the companies' rights under A1P1.

96. At the same time a real difficulty arises from my conclusion that the companies' rights would be violated if the receiver's application to use their assets to meet his remuneration and expenses were granted (and similarly if he were permitted to retain money already taken by him, subject to any further evidence and submissions for which Underhill J gave permission in his order referred to in para 4(iii) above). Nobody on the hearing of this appeal has disputed the court's jurisdiction not only to set aside the receivership order (as has happened) but to refuse the receiver's application, if it concludes as I do that it would involve a violation of the companies' A1P1 rights, but Underhill J correctly recognised that simply to refuse the application would replace one injustice with another. As Lord Walker said in *Capewell*, a receiver who accepts appointment by a court is entitled to know that the terms of his appointment will not be changed retrospectively. Moreover it is an ordinary part of receivership law that a receiver has a lien for his proper remuneration and expenses over the receivership property. To take away that right without compensating him would violate the receiver's rights under A1P1. Unless it is within the power of the court to ensure that the receiver receives his recompense for which the lien is a security by some other means, the court will be

left in the invidious position of violating the companies' A1P1 rights if the receiver's application is allowed and violating the receiver's A1P1 rights if it is refused. That leads to the question whether the court has power to order that the receiver's proper remuneration and expenses should be paid by the CPS.

Relationship between the receiver and the CPS

97. I agree with the Court of Appeal that it is not possible to locate within POCA a power to order the CPS to pay the receiver's remuneration and expenses. Underhill J did not identify how this might be done and Mr Perry was not able to do so. Adopting an alternative approach suggested by the court, Mr Perry argued that the receiver was induced to accept his appointment on the promise or expectation of being able to recoup his expenses and remuneration from the property over which he was appointed to act, although the receiver accepted the financial risk that those assets might be of insufficient value.

98. The terms on which the CPS asked the receiver to agree to act were set out in the letter to which I have referred. The relevant provisions are set out in paras 19 and 20. The letter included the statement that the receiver would have a lien over the defendants' assets and that the CPS did not undertake to indemnify him if those assets were insufficient. The appointment by the court was made on the terms of the agreement between the CPS and the receiver, and the receivership assets included the assets of the company which were expressly included in the terms of the court order. The effect of my conclusion on A1P1 is that the lien is unenforceable.

99. There is an argument that the statement "you will have a lien over the defendants' assets for payment of your fees" should be interpreted as a promise that the receiver would have a legally enforceable lien over the receivership property, whatever its value might be, but to resort to that solution would involve a strained and artificial construction of the letter. The alternative is that the CPS made no such promise to the receiver, but that this was their mutual expectation and was the premise on which the receiver agreed to act. If the latter is the preferable analysis, does the receiver have a remedy against the CPS under the law of restitution or unjust enrichment?

100. The current preference among scholars of the subject is to call it unjust enrichment rather than restitution. An example is the renaming of Goff and Jones' seminal textbook. The first seven editions were entitled *The Law of Restitution* but the title of the eight edition (2011) has been changed to *The Law of Unjust Enrichment*. What matters is the content, and the words "unjust" and "enrichment" are both in some respects terms of art.

101. Enrichment requires the obtaining of a benefit, which may include the provision of services, as correctly stated by Professor Andrew Burrows in his *Restatement of the English Law of Unjust Enrichment*, 2012, at p 7. The CPS plainly perceived that there would be benefit to the public in the companies' assets being removed from their control and placed in the hands of an independent receiver while its criminal investigation was proceeding.

102. As to the "unjust" element in an unjust enrichment claim, I agree with the following overview in the current edition of *Goff and Jones* at para 1-08:

> "the 'unjust' element in 'unjust enrichment' is simply a 'generalisation of all the factors which the law recognises as calling for restitution' [a citation from the judgment of Campbell J in *Wasada Pty Ltd v State Rail Authority of New South Wales (No 2)* [2003] NSWSC 987 at [16], quoting Mason & Carter, *Restitution Law in Australia* (1995), 59-60]. In other words, unjust enrichment is not an abstract moral principle to which the courts must refer when deciding cases; it is an organising concept that groups decided authorities on the basis that they share a set of common features, namely that in all of them the defendant has been enriched by the receipt of a benefit that is gained at the claimant's expense in circumstances that the law deems to be unjust. The reasons why the courts have held a defendant's enrichment to be unjust vary from one set of cases to another, and in this respect the law of unjust enrichment more closely resembles the law of torts (recognising a variety of reasons why a defendant must compensate a claimant for harm) than it does the law of contract (embodying the single principle that expectations engendered by binding promises must be fulfilled)."

103. An important part of this branch of law is concerned with cases where money is paid or benefits are conferred for a consideration which has failed. Burrows' *Restatement* at p 86, accommodates this within the concept of "unjust" enrichment by stating that a defendant's enrichment is "unjust" if the claimant has enriched the defendant on the basis of a consideration that fails.

104. Confusion is sometimes caused by the fact that the term "consideration", when used in the phrase "failure of consideration" as a reason for a restitutionary claim, does not mean the same thing as it does when considering whether there is sufficient consideration to support the formation of a valid contract. Viscount Simon LC explained this in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 48:

> "In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act . . . but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise."

105. To avoid this confusion, Goff and Jones suggest, at paras 12-10 to 12-15, that the expression "failure of basis" is preferable to "failure of consideration" because it accurately identifies the essence of the claim being pursued. Whichever terminology is used, the legal content is the same. The attraction of "failure of basis" is that it is more apt, but "failure of consideration" is more familiar.

106. Failure of basis, or failure of consideration as it has been generally called, does not necessarily require failure of a promised counter-performance; it may consist of the failure of a state of affairs on which the agreement was premised.

107. A succinct summary of the meaning of failure of consideration was given by Professor Birks in his *An Introduction to the Law of Restitution* (1989), p 223 (cited with approval by the Court of Appeal in *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, [2013] Ch 23, para 24):

> "Failure of the consideration for a payment . . . means that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself."

108. In the present case the receiver has lost his lien. Professor Birks' reference to failure of the consideration for "a payment" would apply equally to failure of the consideration for the provision of services. The present case involves both; the receiver made payments for the protection of the receivership property (in particular by the employment of security guards) and also provided professional services for which he seeks remuneration.

109. The point that a failure of consideration may consist of the failure of a non-promissory event or state of affairs is reiterated in Burrows' *Restatement* at pp 86-87. He states that consideration which fails may have been "an event or a state of affairs that was not promised", and he cites the decision of the High Court of Australia in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 as an example of a failure of a non-promissory condition as to the future. Rothmans were licensed to act as wholesalers of tobacco products under a New South Wales statute. They sold products to retailers for a price including licence

fees, which were in reality a form of indirect taxation, payable by Rothmans to the New South Wales government. The Act imposing that liability on Rothmans was held by the High Court to be unconstitutional. The retailers then sued Rothmans to recover the amounts which they had paid in respect of the tax which had until then been unlawfully imposed on Rothmans.

110. The retailers argued unsuccessfully that there was an implied agreement under which they could claim repayment of any unpaid tax. This argument was described in the leading judgment of Gleeson CJ, Gaudron and Hayne JJ, as "artificial and unconvincing" (para 20). However, the retailers succeeded in restitution.

111. Gleeson CJ, Gaudron and Hayne JJ, stated at para 16 that "Failure of consideration is not limited to non-performance of a contractual obligation, although it may include that". They also rejected Rothmans' argument that the restitution claims failed because there had not been a total failure of consideration, by interpreting the consideration for the total payments made by the retailers as containing severable parts.

112. Gummow J (concurring), in a passage at para 72 with which I agree, advocated

> "caution in judicial acceptance of any all-embracing theory of restitutionary rights and remedies founded upon a notion of 'unjust enrichment'. To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writing of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around."

113. After reviewing the authorities Gummow J held, at paras 101 to 102, that failure of consideration in this area of law may include the collapse of a bargain, which need not be contractual in nature. He held at para 104 that there had been no failure in the performance by Rothmans of any promise made by them, but that there had been a "failure of consideration" in the "failure to sustain itself of the state of affairs contemplated as a basis for the payments the appellants seek to recover".

114. Similarly, in the present case the receiver agreed to accept the burden of management of the companies on the basis that he would be entitled to take his remuneration and expenses from the companies' assets, and that state of affairs

which was fundamental to the agreement has failed to sustain itself. It might nevertheless be argued that there has not been a total failure of consideration, because the restraint and receivership order included assets of the defendants other than the assets of the companies. There is a lively academic debate whether it is an accurate statement of law today that failure of consideration cannot found a claim in restitution or unjust enrichment unless the failure is total, but that point has not been fully argued and it is unnecessary to decide it in this case. Modern authorities show that the courts are prepared, where it reflects commercial reality, to treat consideration as severable. *Rothmans* itself is an example. Another example cited by Burrows is the decision of the Court of Appeal in *D O Ferguson & Associates v M Sohl* (1992) 62 BLR 1995. That case involved a building contract which was repudiated by the builders at a time when the works had been partly completed. The contract price was approximately £32,000. At the time when the builders abandoned the site they had been paid over £26,000 and the value of work done by them was about £22,000. It was held that the owner was entitled to claim in restitution for the sum of £4,673, representing the amount by which the sums paid to the builders exceeded the value of the work done. The builders objected that there had not been a total failure of consideration under the contract, since most of the building work had been done, but the court held that there had been a total failure of consideration for the amount by which the builders had been overpaid.

115. In the present case there was a total failure of consideration in relation to the receiver's rights over the companies' assets, which was fundamental to the basis on which the receiver was requested by the CPS and agreed to act. I use the expression "fundamental to the basis" because it should not be thought that mere failure of an expectation which motivated a party to enter into a contract may give rise to a restitutionary claim. Most contracts are entered into with intentions or expectations which may not be fulfilled, and the allocation of the risk of their non-fulfilment is a function of the contract. But in the present case the expectation that the receiver would have a legal right to recover his remuneration and expenses was not just a motivating factor. Nobody envisaged that the receiver should provide his services in managing the companies as a volunteer; those services were to be in return for his right to recover his remuneration and expenses from the assets of the companies, such as they might be. The agreement between the CPS and the receiver so provided, and that provision was incorporated into the order of the court.

116. I would hold that the CPS fulfilled its contractual obligations to the receiver by ensuring that the order appointing him conformed with the terms of the underlying agreement between them, but that the receiver is entitled to recover his proper remuneration and expenses from the CPS because the work done and expenses incurred by the receiver were at the request of the CPS and there has been a failure of the basis on which the receiver was asked and agreed to do so.

Disposal

117. I would uphold the Court of Appeal's decision dismissing the CPS's appeal from the refusal by Underhill J to make an order permitting the taking of the companies' assets to meet his remuneration and expenses, essentially for the reasons given by Underhill J. I would allow the receiver's appeal against the Court of Appeal's decision in relation to the CPS and reinstate the order of Underhill J referred to at para 4 above (but for different reasoning).

Lessons for the future

118. In the judgment of the Court of Appeal referred to at para 24 above, Hooper LJ deplored the fact that the original application was made at short notice to a judge who was in the middle of conducting a heavy trial and with only a limited time available for considering it. It should be axiomatic that, as he said, 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. The problem was compounded in this case by the lack of proper opportunity which the judge had to consider the evidence lodged by the companies before he made the critical decision to implement the receiver's powers.

119. When the CPS is proposing to seek a restraint order, and particularly a restraint order coupled with a receivership order, it should give as much advance notice to the listing office as it reasonably can, together with a properly considered estimate of the time likely to be required for pre-reading and for the hearing of the application. If other trials are not to be interrupted, the listing office will need proper time to make the necessary arrangements under the supervision of the resident judge, who may well need to consult the presiding judge and should certainly do so in complex cases, which may merit being heard by a High Court judge.

120. The fact that such applications are made ex parte, and the potential seriousness of the consequences for defendants (at this stage presumed to be innocent) and for potential third parties, mean that there is a special burden both on the prosecution and on the court. Hughes LJ spelt this out plainly and emphatically in *In re Stanford International Bank Ltd* [2010] EWCA Civ 137, [2011] 1 Ch 33, para 191, in a passage (cited in *An Informer v A Chief Constable* [2012] EWCA Civ 197, [2013] QB 579, para 71) which I would again repeat and endorse:

> "it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to

> consider what any other interested party would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. That duty applies to an applicant for a restraint order under POCA in exactly the same way as to any other applicant for an order without notice. Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable. The prosecutor may believe that the defendant is a criminal, and he may turn out to be right, but that has yet to be proved. An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect the prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge."

I would qualify that only by saying that it is not acceptable that such an application should be forced into a busy list, with very limited time for the judge to deal with it, except in the comparatively rare case of a true emergency application where there is literally no opportunity for the prosecution to give the court sufficient notice for any other arrangement to be made. In that case, the judge will need to consider what is the minimum required in order to preserve the situation until such time as the court has had an adequate opportunity to consider the evidence.

121. A material failure to observe the duty of candour as explained above may well be regarded as serious default within the meaning of section 72 of the Act because of its potential to cause serious harm.

122. Before making an application order for a restraint order, with or without a receivership order, the prosecutor must consider carefully the statutory conditions for making such order. There must be reasonable cause to believe that the prospective defendant has benefited from criminal conduct (section 40(2)(b)) and there must be a good arguable case that the assets which it is sought to restrain must be realisable property held by him. Both conditions require careful thought about who is alleged to have been party to the criminal conduct under investigation. Careful thought must also be given to the potential adverse effect on others who are not alleged to be party to the criminal conduct and possible means of avoiding or limiting it.

123. A judge to whom such an application is made must look at it carefully and with a critical eye. The power to impose restraint and receivership orders is an important weapon in the battle against crime but if used when the evidence on objective analysis is tenuous or speculative, it is capable of causing harm rather than preventing it. Where third parties are likely to be affected, even if the statutory conditions for making the order are satisfied, the court must still consider carefully the potential adverse consequences to them before deciding whether on balance the order should be made and, if so, on what conditions. A judge who is in doubt may always ask for further information and require it to be properly vouched.

124. It is important to remember that under section 49(9) a receivership order may be made subject to such conditions and exceptions as the court specifies. The conditions attached to receivership orders appear to have become largely standard, but the making of a receivership order should never be a rubber stamping exercise. The court has a responsibility to consider what conditions it should contain. In *In re Piggott* [2010] EWCA Civ 285, para 54, Rix LJ referred to a suggestion made by Wilson LJ in the course of argument that in an appropriate case a management receivership order might be made subject to a special term that, if it should be shown in due course that the property subject to the order was not "realisable property" of the defendant but wholly in the legal and beneficial ownership of a third party, then the costs of the management receivership should be borne, not by the property, but, in the absence of any other source, by the prosecutor. I attach as an appendix to this judgment a possible form of "Piggott condition", for which I am grateful to Lord Wilson. In my view there may indeed be cases in which such a condition would be appropriate, particularly cases in which the court can see the possibility that payment of the receiver's expenses and remuneration out of the relevant assets might infringe a person's A1P1 rights.

APPENDIX

THE PIGOTT CONDITION

Order made under s 49(2)(d) of POCA and Crim.PR 60.6(5)

(1) Subject to the condition set out in (2) below, the receiver shall, in relation to any property to which the above receivership order is expressed to apply, have powers to realise so much of it as is necessary to meet his or her remuneration and expenses and to recover them out of the proceeds of its realisation.

Order made under s 49(9) of POCA

(2) The condition referred to in (1) above is that, in the event that it is hereafter determined, whether on appeal or by way of application for variation or discharge of this order, that any property to which the above receivership order is expressed to apply is not arguably held by the defendant and so should not have been made subject to the above receivership order, the powers in (1) above shall not extend to such property and, to the extent that in consequence the said powers do not enable the receiver to recover his remuneration and expenses in full or in part, the applicant for this order do pay him in respect of them.

LORD HUGHES

125. I agree that the receiver's appeal against the decision of the Court of Appeal should be dismissed, and that he should not, in this case, be entitled to recover his expenses from the third party assets belonging to the companies. I also agree that the receiver's appeal should succeed against the CPS. I gratefully adopt the reasons given in Lord Toulson's comprehensive judgment and add only a very few words on the topic of the application of A1P1 to the particular case of receivership orders made under section 48 of POCA as ancillary to a restraint order under section 41.

126. As Lord Toulson explains, an order for the receiver to recover his expenses in the usual way from the assets which he is directed to administer cannot be disproportionate for the reasons held by the majority of the Court of Appeal. The mere fact that an order is set aside on appeal does not mean that it violates the principle of legality; if it did, there would be a breach of one or other of the qualified articles of the ECHR wherever they were engaged and there was a successful appeal.

127. Nor, generally, will there be any question of a restraint or receivership order being disproportionate when made against the assets of a defendant (in which term POCA includes for this purpose an alleged offender under a criminal investigation: see section 40(9)), providing that there is reasonable cause to believe that he has benefited from criminal conduct.

128. When it comes to assets which turn out to belong to a third party, the question whether an order for the receiver to recover his expenses from them is or is not disproportionate will depend on the circumstances. A restraint order under section 41, and thus a receivership order under section 48, must be made against "realisable property". Such property is defined in section 83; it consists of free property held by the defendant, or by the recipient of a tainted gift. At the interim stage of an application for either form of order, the true ownership of assets may not be known, especially (but not only) where a defendant has taken steps to obscure the true position. So the test is that a good arguable case exists for believing that the defendant has an interest in them: *Crown Prosecution Service v Compton* [2002] EWCA Civ 1720.

129. On the findings of the Court of Appeal in February 2011, which were not in question before this court, the present is a strong case of disproportion. There was simply never any proper basis advanced for the contention that the assets of these trading companies were the property of the controlling directors, who were the alleged offenders. The inclusion of the company assets in the restraint and receivership orders was based on nothing more than a bald request to "lift the corporate veil". But no proper basis for doing so was advanced. It was not being

contended that the companies were suspected of being parties to the crimes under investigation, in which event they would themselves have been alleged offenders and their assets might have been apt for restraint if there were grounds for believing that they had benefited from criminal conduct. The companies were, on the prosecution's own case, businesses with substantial legitimate trading, so there could be no suggestion that they were sham entities concealing true ownership of their apparent assets by the suspected directors. It does not seem to have been suggested that the companies were used to evade the legal responsibility of the directors for any crimes suspected. Nor, on the findings of the Court of Appeal, was there any arguable case that they were being used by the directors to channel the benefits of crime to themselves.

130. Other cases of assets which turn out to belong to third parties must be decided on their own facts. If the original order was made when there was indeed a good arguable case for believing that the defendant under investigation had an interest in them, then the fact that it later turns out that he had none will not normally mean that the usual route for a receiver to recover his expenses is disproportionate to the legitimate aim of confiscation legislation to preserve assets which may be needed to satisfy a confiscation order if conviction ensues. If an order was thus made, it does not seem likely that its subsequent setting aside on grounds such as that ownership turns out to be other than it appeared, or that the expense of receivership is not, on closer inspection, justified, would lead to a finding of disproportion. Underhill J's remarks about the closeness of the connection between the defendant and the third party are, on proper analysis, not independent tests of when an order can be made, but reflect a factor which may well be highly relevant to whether there is a good arguable case for believing that the assets are ones in which the defendant has an interest.

131. I respectfully endorse Lord Toulson's remarks at para 122. Restraint (and occasionally receivership) orders may be very valuable in promoting the aims of POCA, which may otherwise all too easily be evaded by alleged offenders once they know that they are under investigation. But such orders are also capable of causing considerable loss to the holders of assets. Applicant prosecutors, and judges asked to make such orders, need to think constructively and critically about what is being alleged and who is said to be a party to it, and also about the balance between the benefits and the costs of the orders sought.