Neutral Citation Number: [2024] EWCA Civ 255

Case No: CA-2023-001133

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
Mr Justice Michael Green
[2023] EWHC 1492 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2024

Before:

LORD JUSTICE NEWEY
LORD JUSTICE COULSON
and
LORD JUSTICE STUART-SMITH

- -

Between:

SENEL AHMET	**Claimant/ Appellant**
- and -	
(1) DAVID PAUL TATUM **(2) THE CROWN PROSECUTION SERVICE**	**Defendants/ Respondents**

- -
- -

Mark Warwick KC and Eleanor Vickery (instructed by **Rainer Hughes LLP**) for the **Appellant**
Martin Evans KC and Anna Keighley (instructed by **The Crown Prosecution Service**) for the **Second Respondent**
The **First Respondent** appeared in person

Hearing date: 22 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. On 23 May 2023, Michael Green J ("the Judge") struck out a claim brought by the appellant, Ms Senel Ahmet, on the basis that it was an abuse of process. Ms Ahmet now challenges that decision in this Court. The appeal raises an important question as to the circumstances in which the ownership of properties relevant to applications under the Proceeds of Crime Act 2002 ("POCA") must be litigated in the Crown Court rather than in civil proceedings.

Basic facts

2. The appeal relates to the ownership of a property known as Brindles Farmhouse ("Brindles Farmhouse") in Brindles Close, Hutton, Brentwood. The first respondent, Mr David Tatum, is the registered proprietor of the property, but Ms Ahmet contends that she has a beneficial interest in it.

3. Ms Ahmet and Mr Tatum have a long-standing relationship and three children. According to Ms Ahmet, they lived between 2010 and 2014 in a house which they had bought together. They moved to rented accommodation, but in 2017 Brindles Farmhouse was purchased in their joint names. The property was transferred into the sole name of Mr Tatum in 2019, but Ms Ahmet maintains that that was to facilitate the obtaining of a loan and that she continued to be beneficially interested in it.

4. On 15 April 2021, Mr Tatum was arrested and charged with offences relating to class A drugs and money laundering. On 4 August 2021, on the application of the second respondent, the Crown Prosecution Service ("the CPS"), Her Honour Judge Holt, sitting in the Crown Court, made a restraint order under POCA which, among other things, prohibited disposals of Brindles Farmhouse and money held in an account which Mr Tatum and Ms Ahmet had with Barclays Bank. In March 2022, Ms Ahmet applied for the restraint order to be varied to allow her unfettered access to half the balance on the Barclays account, asserting a beneficial interest in both that money and Brindles Farmhouse. In May 2022, it was agreed that £3,800 a month could be paid from the Barclays account to service a mortgage over Brindles Farmhouse and the matter was listed for a contested hearing on 19 August 2022. At that stage, Ms Ahmet limited her application to asking for the release to her from the Barclays account of £23,070. His Honour Judge Johnson, however, refused the application.

5. The present proceedings were issued on 9 November 2022. By them, Ms Ahmet seeks an inquiry into the extent of the beneficial interests of Mr Tatum and herself in Brindles Farmhouse and a declaration as to those interests. The defendants were named as Mr Tatum and the CPS.

6. On 7 December 2022, the CPS applied to have the claim struck out on the basis that it had been brought for an improper or collateral purpose and/or was susceptible to determination under a procedure laid down in POCA for the resolution of such issues. It was that application which came before the Judge, on 23 May 2023. In an extempore judgment ([2023] EWHC 1492 (Ch), [2023] 1 WLR 3076) ("the Judgment"), he concluded that he should accede to it.

7. In the meantime, Mr Tatum had been convicted on two counts. He had entered not guilty pleas on 22 November 2022, but on 3 March 2023 he changed his plea to the two counts to guilty. On 4 April 2023, he was sentenced to 15 years' imprisonment and a timetable for confiscation was set.

8. On 5 February 2024, His Honour Judge Edmunds KC gave directions, including as to the service by Ms Ahmet of a witness statement and the mutual provision of relevant documents, with a view to a hearing at the end of July with a time estimate of two to three days. The directions were, however, expressed to be contingent on the outcome of this appeal.

The statutory framework

9. Part 2 of POCA, which comprises sections 6 to 91, contains provisions allowing for the confiscation of assets of persons convicted of criminal offences. Where someone has been convicted of a relevant offence and has benefited from his criminal conduct, section 6(1) provides for a confiscation order to be made requiring him to pay the "recoverable amount". By section 7, the "recoverable amount" is "an amount equal to the defendant's benefit from the conduct concerned" unless, among other things, the "available amount" is less, in which case the "recoverable amount" cannot exceed the "available amount". Section 9(1) explains that the "available amount" is:

> "the aggregate of—
>
> (a) the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and
>
> (b) the total of the values (at that time) of all tainted gifts."

By section 78, a person is to be treated as making a "gift" if he "transfers property to another person for a consideration whose value is significantly less than the value of the property at the time of the transfer", and a gift will be "tainted" if made in circumstances such as are described in section 77.

10. Section 10A of POCA applies where someone other than the defendant may have an interest in property that could be used to satisfy a confiscation order. It allows the Crown Court to determine the extent of the defendant's interest in the property and for anyone else who may have an interest in it to have the chance to make representations. It is in these terms:

> "(1) Where it appears to a court making a confiscation order that—
>
> (a) there is property held by the defendant that is likely to be realised or otherwise used to satisfy the order, and
>
> (b) a person other than the defendant holds, or may hold, an interest in the property,

> the court may, if it thinks it appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant's interest in the property.
>
> (2) The court must not exercise the power conferred by subsection (1) unless it gives to anyone who the court thinks is or may be a person holding an interest in the property a reasonable opportunity to make representations to it.
>
> (3) A determination under this section is conclusive in relation to any question as to the extent of the defendant's interest in the property that arises in connection with—
>
> (a) the realisation or destruction of the property, or the transfer of an interest in the property, with a view to satisfying the confiscation order, or
>
> (b) any action or proceedings taken for the purposes of any such realisation or transfer.
>
> (4) Subsection (3)—
>
> (a) is subject to section 51(8B), and
>
> (b) does not apply in relation to a question that arises in proceedings before the Court of Appeal or the Supreme Court.
>
> (5) In this Part, the 'extent' of the defendant's interest in property means the proportion that the value of the defendant's interest in it bears to the value of the property itself."

11. Section 10A was inserted into POCA by section 1 of the Serious Crime Act 2015 ("SCA 2015"). The explanatory notes to SCA 2015 stated as regards section 1:

> "19. In general, it is most appropriate for third party interests to be dealt with substantively at the enforcement stage of a confiscation order given that the existence of such interests only crystallises against specific property at that stage. However, in some cases waiting until enforcement to determine the extent of a third party's interest in the defendant's property can complicate, lengthen and otherwise frustrate the confiscation process ….
>
> 20. This section inserts a new section 10A into POCA to confer on the Crown Court, when making a confiscation order, a power to make a determination as to the extent of the defendant's interest in particular property (new section 10A(1) and (5)). Given that a consequence of making such a

> determination will be to determine the extent, if any, of any third party interest in the property, new section 10A(2) affords third parties who have, or may have, an interest in the property the right to make representations to the court about the extent of their interest. The right to make representations also extends to the defendant. Subject to two exceptions, any determination as to the extent of the defendant's interest in particular property is binding on any court or other person involved in the enforcement of the confiscation order (new section 10A(3)). The exceptions are where it is open to a court which has appointed an enforcement receiver to hear representations (see section 4) or in proceedings before the Court of Appeal or Supreme Court (new section 10A(4)).
>
> 21. It is envisaged that the Crown Court would only make such determinations in relatively straightforward cases, that is where the court considers that it can, without too much difficulty, determine the defendant's interest in particular property. In deciding whether to make a determination in any particular case, it is expected that judges will exercise this power to determine the defendant's interest in property only in those cases where their experience (including in respect of matters as regards to property law), the nature of the property, and the likely number and/or complexity of any third party interests allows them to do so."

12. For the purpose of obtaining information to help it in carrying out its functions under section 10A of POCA, the Crown Court may order either the defendant or anyone else who it is thought might hold an interest in the property in question to give it information. By section 31, a person whom the Court of Appeal "thinks is or may be a person holding an interest in the property" can appeal against a determination under section 10A if he was denied a reasonable opportunity to make representations when the order was made or "if it appears to the Court of Appeal to be arguable that giving effect to the determination would result in a serious risk of injustice to the person".

13. If a confiscation order is not satisfied, the Crown Court can appoint an "enforcement receiver" in respect of "realisable property" with, among others, power to realise it: see sections 50 and 51 of POCA. "Realisable property" comprises "any free property held by the defendant" and "any free property held by the recipient of a tainted gift": see section 83.

14. By section 51(8) of POCA, the Crown Court is not to confer a power of realisation on an enforcement receiver without giving "persons holding interests in the property a reasonable opportunity to make representations to it". By section 51(8B), the representations that can be made:

> "do not include representations that are inconsistent with a determination made under section 10A, unless—
>
> (a) the person was not given a reasonable opportunity to make representations when the determination was

made and has not appealed against the determination, or

(b) it appears to the court that there would be a serious risk of injustice to the person if the court was bound by the determination".

However, a person "affected" by an order under section 50 or section 51 can appeal: see section 65.

15. The Crown Court has power to make "restraint orders" in advance of any confiscation order. Such an order prohibits dealings in "realisable property" and is permissible as soon as a criminal investigation has been started if there are "reasonable grounds to suspect that the alleged offender has benefited from his criminal conduct": see sections 40(1) and (2) and 41(1) of POCA. Any person affected by a restraint order can apply for it to be discharged or varied and can appeal an order made on such an application: see sections 42(3) and 43(2).

16. Sections 58(5) and 59(5) of POCA are in point where there are other proceedings relating to property in respect of which a restraint order or an order appointing an enforcement receiver has been made or applied for. They are in these terms:

i) Section 58(5):

"If a court in which proceedings are pending in respect of any property is satisfied that a restraint order has been applied for or made in respect of the property, the court may either stay the proceedings or allow them to continue on any terms it thinks fit"

ii) Section 59(5):

"If a court in which proceedings are pending in respect of any property is satisfied that an order under section 50 appointing a receiver in respect of the property has been applied for or made, the court may either stay the proceedings or allow them to continue on any terms it thinks fit"

17. Section 69 of POCA applies to, among others, the powers conferred on the Crown Court by sections 50, 51, 58(5) and 59(5). So far as relevant, it provides:

"(2) The powers—

(a) must be exercised with a view to the value for the time being of realisable property being made available (by the property's realisation) for satisfying any confiscation order that has been or may be made against the defendant ….

…

> (3) Subsection (2) has effect subject to the following rules —
>
> (a) the powers must be exercised with a view to allowing a person other than the defendant or a recipient of a tainted gift to retain or recover the value of any interest held by him;
>
> (b) in the case of realisable property held by a recipient of a tainted gift, the powers must be exercised with a view to realising no more than the value for the time being of the gift ….”

18. Part 2 of POCA replaced the confiscation schemes which had previously been found in the Drug Trafficking Act 1994 and Part VI of the Criminal Justice Act 1988. Under the earlier legislation, the Crown Court had jurisdiction to make confiscation orders, but restraint and receivership orders were made by the High Court. POCA transferred jurisdiction to make restraint and receivership orders to the Crown Court.

The Judgment

19. Relying on the provisions in Part 2 of POCA, the CPS submitted to the Judge that “Parliament has provided a complete and exhaustive code for the resolution of disputed property rights which may arise between the CPS and a third party”.

20. The Judge agreed. He said in paragraphs 33 and 34 of the Judgment:

> “33. It does seem to me … that Parliament has provided a complete and exhaustive code for the resolution of disputed property rights in the context of restraint and confiscation orders in criminal proceedings. Third party rights are fully protected by ensuring that, at each stage, the third party is able to argue in support of their alleged beneficial interests in the property concerned.
>
> 34. There is, in my judgment, a clear intention of Parliament that disputed issues of beneficial interests in property subject to restraint and confiscation orders under the Act are to be determined in the Crown Court. It cannot have imagined that a third party should be able to start parallel proceedings in the Chancery Division to determine those exact same rights so as to be binding on the CPS in the Crown Court proceedings. That would undermine the carefully structured process that fully protects a third party’s rights. If Parliament had thought that the Crown Court was not equipped to determine disputed property rights, it would not have set up such a structure. And I might add … there are always issues arising in relation to a matrimonial home, which Crown Court judges dealing with these sorts of cases are well able to decide.”

21. The Judge concluded in paragraphs 57 and 58 of the Judgment:

> "57. … Once a restraint order has been obtained, that brings into play the scheme and process devised by Parliament for dealing with disputed interests in a defendant's property. The only reason for this claim was because of the restraint order. So the issue is whether the claimant is obliged to follow the procedure prescribed by Parliament for the resolution of such matters in the context of the Act. Section 10A does use the word 'may', but the authorities are clear, particularly *Capper* [2010] Lloyd's Rep FC 593 in applying *Autologic* [2006] 1 AC 118, that it is an abuse to seek to try the same issue in a different jurisdiction to that which Parliament has decided should hear those matters.
>
> 58. The claimant will be able to fully argue her case in the Crown Court, and the fact that she has already failed in one application does not mean that she cannot argue for her beneficial interests in the property when the issue is live under the confiscation order application. Similarly, at the time she issued this claim she could have applied to vary the restraint order if she wished to do something with her equity in the property. Furthermore, she can even wait until the enforcement stage when there may be a very real risk of the property being sold, and then seek to prove her beneficial interest. In other words, she is not in any way prejudiced by not being able to pursue this claim in the Chancery Division, and she is able to protect her interests fully in the proceedings under the Act in the Crown Court."

The parties' positions

22. Mr Mark Warwick KC, who appeared for Ms Ahmet with Ms Eleanor Vickery, took issue with the proposition that "Parliament has provided a complete and exhaustive code for the resolution of disputed property rights in the context of restraint and confiscation orders in criminal proceedings". While, he said, Parliament sometimes gives a particular Court or Tribunal exclusive jurisdiction in relation to a type of dispute, that is not so here: POCA has not removed the right to resort to civil Courts for the determination of property rights either generally or even where the issue arises between a person asserting such a right and a prosecutor in the context of confiscation proceedings. In such a case, it will be open to the civil Court to grant a stay or make another order under section 58(5) or section 59(5) of POCA, but the proceedings should not be struck out as an abuse of process.

23. In contrast, Mr Martin Evans KC, who appeared for the CPS with Ms Anna Keighley, supported the Judge's decision. Mr Evans did not suggest that civil proceedings in respect of property which a prosecutor contends is or should be the subject of a restraint or confiscation order are invariably abusive: to the contrary, he said that civil proceedings could be proper in a variety of circumstances. He argued, however, that it is an abuse of process for a person claiming an interest in a property to bring civil proceedings to establish that interest if the real dispute is between that person and the prosecutor. Parliament, Mr Evans submitted, has provided in POCA a complete and exhaustive code for the resolution of disputes as to property rights which may arise

between a prosecutor and a third party in relation to confiscation proceedings. That such issues should be determined by the Crown Court, in accordance with Parliament's evident intention, gives rise to no unfairness, Mr Evans said, as the rights of third parties are fully protected under Part 2 of POCA.

Discussion

Exclusivity and abuse of process: some principles

24. Some statutes providing for disputes to be determined in a particular way serve to preclude their resolution in any other manner. In *British Telecommunications plc v Revenue and Customs Commissioners (No 2)* [2023] EWCA Civ 1412, [2024] STC 23, the Court of Appeal concluded that a scheme for claiming bad debt relief established under the Finance Act 1978 had such an effect. Falk LJ, with whom Nugee and Warby LJJ agreed, explained in paragraph 35 that the relevant enquiry was into "whether Parliament intended the statutory provision in question to provide the exclusive or sole remedy, rather than asking whether an alternative remedy (or at least a particular alternative remedy) was intended to be ousted" and that, "[p]ut very shortly, the question can be formulated as whether Parliament intended the statutory remedy to be exclusive, or whether it intended that remedy to coexist with any other remedy". "The question", Falk LJ said in paragraph 35(a), "is one of statutory construction: what did Parliament intend?"

25. There are other contexts in which tax issues cannot be pursued otherwise than using the appeal process for which Parliament has provided. Thus, in *Knibbs v Revenue and Customs Commissioners* [2019] EWCA Civ 1719, [2020] 1 WLR 731, at paragraph 17, the Court of Appeal said:

> "It is well established that if Parliament has laid down a statutory appeal process against a decision of HMRC, a person aggrieved by the decision and wishing to challenge it must use the statutory process. It is an abuse of the court's process to seek to do so through proceedings in the High Court or the County Court."

Earlier, in *Autologic Holdings plc v Inland Revenue Commissioners* [2005] UKHL 54, [2006] 1 AC 118 ("*Autologic*"), Lord Nicholls had said this about the "exclusive nature of the appeal commissioners' jurisdiction to decide certain types of disputes arising in the administration of this country's tax system":

> "12. Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory

> code. Thus in such a case the High Court proceedings will be struck out as an abuse of the court's process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal. The dissatisfied taxpayer should have recourse to the appeal procedure provided by Parliament. He should follow the statutory route.
>
> 13. I question whether in this straightforward type of case the court has any real discretion to exercise. Rather, the conclusion that the proceedings are an abuse follows automatically once the court is satisfied the taxpayer's court claim is an indirect way of seeking to achieve the same result as it would be open to the taxpayer to achieve directly by appealing to the appeal commissioners. The taxpayer must use the remedies provided by the tax legislation …."

26. The mere fact, however, that, as a matter of statutory construction, it cannot be seen that Parliament intended a statutory regime to be exclusive does not necessarily mean that it is always proper to resort to common law remedies instead. As Lord Diplock observed in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, at 536, "[t]he circumstances in which abuse of process can arise are very varied". "Abuse of process", Lord Diplock noted, "concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people".

27. Company law provides an illustration. Chapter 1 of Part 11 of the Companies Act 2006 ("CA 2006") sets out a procedure to be followed where a shareholder wishes to bring a "derivative claim", i.e. one "(a) in respect of a cause of action vested in the company, and (b) seeking relief on behalf of the company": see section 260. The provisions do not produce a statutory bar on shareholders including claims for relief in favour of their companies in "unfair prejudice" petitions under section 994 of CA 2006, and it can be perfectly proper to do so. However, it could potentially be an abuse of process to seek relief in favour of a company by way of an unfair prejudice petition if that were the only relief sought or if, although the petition also contained a claim for relief which was available exclusively in unfair prejudice proceedings (such as an order for the purchase of shares), it could be discerned that the petitioner was not genuinely interested in obtaining such relief and was, instead, trying to bypass the filter for which Part 11 of CA 2006 provides: see *Ntzegkoutanis v Kimionis* [2023] EWCA Civ 1480, at paragraph 55.

28. Claims involving public law points can generate comparable issues. It was once considered that "it would … as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 [of the Rules of the Supreme Court] for the protection of such authorities": see *O'Reilly v Mackman* [1983] 2 AC 237, at 285, per Lord

Diplock. The approach nowadays is more fact-sensitive. In *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, Lord Woolf MR said at paragraph 39 that "[t]he emphasis can … be said to have changed since *O'Reilly v Mackman*", going on:

> "What is likely to be important when proceedings are not brought by a student against a new university under Order 53, will not be whether the right procedure has been adopted but whether the protection provided by Order 53 has been flouted in circumstances which are inconsistent with the proceedings being able to be conducted justly in accordance with the general principles contained in Part 1 [of the Civil Procedure Rules]."

In *Armstrongs Aggregates Ltd v Natural England* [2022] EWHC 2009 (Admin), [2023] Env LR 9, at paragraph 8, Fordham J spoke of "procedural exclusivity" now meaning that "public law issues raised as a claim outside judicial review may constitute an abuse of process, if the claim serves to circumvent or flout protections by reference to which permission for judicial review would be refused".

Criminal and civil Courts in the context of POCA

29. There is no doubt that it can be appropriate for disputes over property ownership that are relevant to POCA proceedings to be determined in the Crown Court. Section 10A of POCA allows for just that. In *Re Stanford International Bank Ltd* [2010] EWCA Civ 137, [2010] Ch 33, Hughes LJ said in paragraph 208 that "Judges in the Crown Court should not of course shrink from deciding issues of civil law where they properly can, even if they are less familiar to them than is the daily round of the criminal jurisdiction". Hughes LJ went on to say that "there will be a few cases where the complexities are such that a Crown Court judge should not fear to explore the possibility of onward allocation to another judge" and to refer to the possibility of finding a judge of "suitably mixed expertise" to deal with the case: see paragraphs 208 and 209. In paragraph 211, Hughes LJ said:

> "The judge eventually hearing the restraint order proceedings should ordinarily have some experience of criminal cases, the nature of the confiscation regime, and the manner in which prosecutions and the defence thereto proceed. But there is no reason why a judge of the High Court should not sit in the Crown Court to deal with a complex restraint order case. He or she may be from the Queen's Bench, Chancery or Family Division, or Commercial Court, according to need and availability. Some cases may be suitable for hearing by a specialist mercantile or chancery senior circuit judge. The presiding judge will be in a position to consult the appropriate head of division (in London) or liaison judge (on circuit) in order to explore availability. It will need to be remembered that the availability of the relatively few judges of suitable mixed expertise will be quite limited and calls upon it need to be judged carefully. The decisions involved are matters of pure

> case management and are most unlikely to generate appealable rulings."

In paragraph 205, after noting that jurisdiction to make restraint orders had been committed to the Crown Court and that sections 58(5) and 59(5) of POCA "plainly contemplate that other litigation relating to property which is subject to a restraint order may, as a result of the order, need to be stayed or permitted to proceed only on terms", Hughes LJ said, "Accordingly the initiative is firmly in the hands of the Crown Court".

30. It is easy enough to think of reasons why it might be preferable for property issues to be resolved in the Crown Court. Applications for confiscation orders, restraint orders and orders appointing receivers are all assigned to the Crown Court. If in the context of such proceedings a question arises as to ownership of an asset, there is an obvious convenience in having it decided in that same context rather than in separate civil proceedings. The case for the Crown Court dealing with property disputes will be the stronger if it is suggested that there has been a "tainted gift". Only the Crown Court could rule on such a point, and there may well be advantages in addressing issues as to ownership and "tainted gifts" together, the more so since the same evidence could be relevant to both.

31. Further, POCA safeguards the interests of third parties in a number of ways. The Court must not exercise the power conferred by section 10A(1) without giving anyone who it thinks may have an interest in the property a reasonable opportunity to make representations, and such a person can appeal if denied such an opportunity or it is arguable that giving effect to the determination would result in a serious risk of injustice. Again, a power of realisation is not to be conferred on an enforcement receiver without affording anyone with an interest in the relevant property a reasonable opportunity to make representations, and there is a right of appeal. On top of that, someone affected by a restraint order can apply for its discharge or variation, and has a right of appeal.

32. On the other hand, as Mr Evans recognised, there can be circumstances in which civil and confiscation proceedings can coexist. In *Re Stanford International Bank Ltd*, Hughes LJ spoke of "the manner in which an application for a restraint order under POCA 2002 may interlock with complex issues which arise in other litigation" and the desirability of "manag[ing] restraint order applications and associated litigation, so far as can be accomplished, in a co-ordinated manner": see paragraphs 204 and 206. In *Aquila Advisory Ltd v Faichney* [2021] UKSC 49, [2021] 1 WLR 5666, a "secret profit of £4.55m" was both the subject of a civil claim and central to confiscation proceedings: see paragraphs 1-3. In *R v Forte* [2020] EWCA Crim 1455, [2021] 4 WLR 26, where a confiscation order had been made by reference to a property called "Hillside Lodge" and money in a Lloyd's bank account, Edis J, giving the judgment of the Court of Appeal, noted at paragraph 10 that "[c]ivil proceedings to determine the extent of [the defendant's former wife's] beneficial interest in Hillside Lodge, or her mother's interest in funds held in a bank account in her name, might arise in many ways". Further, sections 58(5) and 59(5) of POCA expressly empower the Court to "stay … or allow … to continue on any terms it thinks fit" pending proceedings relating to a property in respect of which a restraint order or one under section 50 of POCA has been made or applied for, and the explanatory notes to SCA 2015 referred to Crown Court judges exercising the power to determine the

extent of a defendant's interest in a property under section 10A "only in those cases where their experience (including in respect of matters as regards to property law), the nature of the property, and the likely number and/or complexity of any third party interests allows them to do so".

33. Even where the real dispute as to the ownership of a property is with the prosecutor, it is possible to envisage circumstances in which there would be a persuasive case for allowing a third party to bring civil proceedings. Suppose that, as can happen, a restraint order is made in respect of a property when a criminal investigation is in its early stages; that there is no likelihood of any ensuing criminal proceedings, let alone confiscation issues, being determined for a number of years; and that a third party has an urgent need to establish ownership of the property or an interest in it. The Crown Court might perhaps be able to render a civil claim unnecessary by arranging matters in such a way as itself to resolve the issue at an early stage. Alternatively, depending on the facts, it might not be reasonable to expect the prosecutor to be ready to address the issue yet. Even so, there could in such a case be a good reason for the third party to wish to resort to civil proceedings. Further, the ability of a civil Court to make a costs order in favour of the third party might be a relevant consideration. There is scope for argument as to the availability of such an order where the Crown Court makes a determination under section 10A of POCA: see in this connection section 19 of the Prosecution of Offences Act 1985 and regulation 3(1) of the Costs in Criminal Cases (General) Regulations 1986 (as amended).

34. In *Capper v Chaney* [2010] EWHC 1704 (Ch), (2010) 174 JP 377, on the other hand, Lewison J struck out civil proceedings in which the claimant had sought a declaration that he was the beneficial owner of cash which the police had seized under powers conferred by POCA. Lewison J said in paragraphs 19-21 of his judgment:

> "19. In the present case, Parliament has assigned the resolution of disputes about cash alleged to represent the proceeds of crime to the magistrates' court (and on appeal the Crown Court). Mr Capper's claim in the High Court to ownership of the cash is an indirect way of seeking to achieve the same result as would be open to him by presenting his case to the magistrates' court when the [Metropolitan Police] Commissioner's claim to forfeit the cash is determined. On that basis, as Lord Nicholls said [in *Autologic*], it is an abuse of process ….
>
> 20. Even if there is a residual discretion in the High Court, the way in which that discretion should be exercised was encapsulated in the judgment of Robert Walker J in *Glaxo Group Ltd v. IRC* [1995] STC 1075, which Lord Nicholls expressly approved:
>
> > 'It is not easy to discern any clear dividing-line between High Court proceedings which are, and those which are not, objectionable as attempts to circumvent the exclusive jurisdiction principle. Possibly the correct view is that there is an absolute exclusion of the High Court's jurisdiction only when the proceedings seek relief which is more or less co-

> extensive with adjudicating on an existing open assessment - but that the more closely the High Court proceedings approximate to that in their substantial effect, the more ready the High Court will be, as a matter of discretion, to decline jurisdiction.'
>
> 21. Before the magistrates' court the essential factual issue is whether Mr Capper or Mr Chaney is the owner of the cash. The issue raised in the High Court is precisely the same. Thus even if the magistrates' court does not have exclusive jurisdiction, the High Court ought, as a matter of discretion to decline jurisdiction. I respectfully disagree with the Master that the issue is not the same. But even if the Master was, in very formal terms, right he did not go on to consider how closely the issue in the High Court proceedings approximated to the issue before the magistrates in its substantial effect. Had he done so he must have concluded that there was a very close approximation."

Later in his judgment, in paragraph 26, Lewison J said:

> "In other words, Mr Capper's real objective in bringing these proceedings is to pre-empt a decision by the magistrates on a question that Parliament has entrusted to them. In my judgment, the use of the procedural machinery of court A to achieve a result in court B where court B is a domestic court of competent jurisdiction is properly characterised as a collateral objective. The remedy which he seeks from the High Court is of no practical use to him except to pave the way for a favourable decision from the magistrates' court. To bring an action for a collateral purpose is itself an abuse of process."

35. *Capper v Chaney* is, however, distinguishable from the present case. Whereas this case concerns Part 2 of POCA, *Capper v Chaney* involved Part 5. Moreover, Part 5 differs in important ways from Part 2. In particular, (a) Part 5 contains no equivalent to sections 58(5) and 59(5) (under which the Court "may either stay the proceedings or allow them to continue on any terms it thinks fit") and (b) Part 5 includes a provision stipulating that, where an application for the forfeiture of any cash is made under section 298, "the cash is to be detained (and may not be released under any power conferred by this Chapter) until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded" (see section 298(4)), and nothing similar is to be found in Part 2.

36. I should also mention *Re Norris* [2001] UKHL 34, [2001] 1 WLR 1388, in which the wife of a defendant made an application in the High Court for an order appointing a receiver pursuant to the Drug Trafficking Offences Act 1986 to be varied on the basis that she had an interest in a property which had been included in a schedule of assets to be realised. Some of what was said in that case depended, however, on the fact that jurisdiction to make restraint orders and to appoint receivers had not yet been transferred to the Crown Court. I do not think that the decision is of any real help in the context of the present appeal.

37. Drawing some threads together, my own view is that there is no rule barring a third party from seeking to have the ownership of property relevant to confiscation proceedings determined by a civil Court, even where the issue is between the third party and the prosecutor. POCA nowhere states or necessarily implies that it is laying down an exhaustive code for the resolution of such disputes. To the contrary, it empowers a civil Court to stay or to "allow … to continue on any terms it thinks fit" a claim relating to a property in respect of which a restraint order or an order appointing an enforcement receiver has been applied for or made. As a matter of statutory construction, therefore, it is not apparent that Parliament intended POCA to provide the only ways in which any property questions relevant to confiscation proceedings can be decided. Further, while I would not exclude the possibility of a civil claim asserting an interest in what is alleged to be (or potentially to be) "realisable property" within the meaning of POCA representing an abuse of process in particular circumstances, I do not think such claims are generally to be regarded as abusive. Even where a civil Court considers it desirable that a property issue raised by proceedings before it should be decided by the Crown Court, it should typically, as it seems to me, stay them under section 58(5) or section 59(5) rather than striking them out. Having regard to the potential advantages of having ownership matters relevant to confiscation proceedings determined in the Crown Court, the better course will, as it appears to me, commonly be to grant such a stay. In principle, however, a civil Court should consider what is appropriate on the specific facts.

The present case

38. The Judge approached matters on the footing that "Parliament has provided a complete and exhaustive code for the resolution of disputed property rights in the context of restraint and confiscation orders in criminal proceedings". In my view, he was, with respect, mistaken as to this, and, it not being suggested by way of respondent's notice that his decision should be sustained on any other basis, it falls to be set aside.

Conclusion

39. I would allow the appeal and dismiss the application to strike out the claim. That is by no means to say that the ownership of Brindles Farmhouse should necessarily be decided in the High Court. It may potentially be appropriate for that Court to stay the present proceedings.

Lord Justice Coulson:

40. I agree.

Lord Justice Stuart-Smith:

41. I also agree.