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Virgin Media Ltd, R (on the application of) v Zinga [2014] EWCA Crim 52 (24 January 2014)

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Neutral Citation Number: [2014] EWCA Crim 52

Case No: 2012/05959/C2

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL
24/01/2014

Before:

**LORD CHIEF JUSTICE OF ENGLAND AND WALES
Mr JUSTICE FOSKETT
and
Mr JUSTICE HICKINBOTTOM**

Between:

Regina (Virgin Media Ltd)	Respondent
- and -	
Munaf Ahmed Zinga	Appellant

**Andrew Campbell-Tiech QC and Muthupandi Ganesan for the Appellant
David Groome and Ari Alibhai (instructed by Wiggin LLP) for Virgin Media Limited as
private prosecutor**

**Matthew Butt for the Commissioner of Police for the Metropolis
Kennedy Talbot for the Director of Public Prosecutions**

Hearing dates: 15 May 2013 and 15 October 2013

HTML VERSION OF JUDGMENT

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The Lord Chief Justice of England and Wales:

Introduction and factual background

1. Virgin Media Limited (Virgin) provides a telephone, broadband and television service by a cable to customers in the UK under contracts under which the customer subscribes to the services, including premium channels. The service is provided through a set top box which unscrambles premium channels to which the customer has subscribed. The appellant with associates sold set top boxes with appropriate software which enabled those who had not subscribed to premium services to obtain these without payment to Virgin.
2. Virgin began investigations in September 2008. Instead of bringing civil proceedings, it decided on a private prosecution of the appellant and others for the offence of conspiracy to defraud. Virgin enlisted the assistance of the Metropolitan Police for the arrests and obtaining search warrants. On 11 November 2008 Sergeant Smith of the Metropolitan Police applied to the magistrates for warrants; he gave evidence as did an employee of Virgin. No one told the court that it was intended that Virgin would be the prosecutor. The appellant was arrested on 19 November 2008.
3. A few days later, on 25 November 2008, Virgin then entered into an agreement with the Metropolitan Police Authority under which Virgin agreed to make a cash donation to the Metropolitan Police Authority of 25% of any sums recovered under a Compensation Order. We will refer to that agreement in more detail at paragraph 43 below.
4. The prosecution brought by Virgin was heard in the Crown Court at Snaresbrook before HH Judge Bing. On 29 June 2011 the appellant and another person were convicted; the appellant was sentenced to 8 years imprisonment. An order was also made under s.143 of the Powers of Criminal Courts (Sentencing) Act 2000 for the deprivation of various computers and other electronic equipment. The appellant and a co-defendant appealed against conviction on the basis of the involvement of the Metropolitan Police in the circumstances surrounding the application for warrants, despite the fact that the judge had found there was no bad faith on the part of Virgin or the police. The appeal against conviction was dismissed on 7 November 2012: [\[2012\] EWCA Crim 2357](#).
5. Prior to the hearing of the appeal, Virgin began confiscation proceedings under the provisions of the Proceeds of Crime Act 2002 (POCA). An investigation into the finances of the appellant was conducted by a team from the Metropolitan Police led by Detective Sergeant Peter Ward. Virgin claimed that it had been deprived of revenue of £380m. It sought a compensation order under s.130 of the Powers of Criminal Courts (Sentencing) Act 2000 to the full value of the appellant's benefit from the proceeds of crime stated to be £26.6m as set out in the statement made under s.16 of POCA and dated 1 March 2012.
6. The appellant sought to stay the proceedings on the basis that the pursuit of such proceedings for compensation and confiscation by a private prosecutor was not permitted under the terms of POCA and was in any event an abuse of process; he also contended that the claim for a compensation order under s.130 of the Powers of Criminal Courts (Sentencing) Act 2000 could not be advanced on the basis of the authorities (including *Stapylton* [\[2012\] EWCA Crim 728](#) and *Sheehan* [2009] EWCA Crim 1260); s.130 provides in effect only a limited and summary power to order the defendant to repay or compensate for a loss in a straightforward case.

7. Virgin then abandoned its claim for compensation for itself. It pursued solely the proceedings for confiscation which would inure to benefit of the Crown, subject to the "incentive scheme" we describe at paragraph 50 below. On 19 September 2012, the judge ruled that it was lawful for a private prosecutor to begin confiscation proceedings and that the proceedings brought were not an abuse of the process of the court.
8. On 25 September 2012, HH Judge Bing assessed the benefit of the criminal conduct at £11.8 million; he assessed the available amount at £8,771,300 and made a confiscation order against the appellant under s.6 of POCA in that sum, to be paid to the Crown within 6 months with a consecutive sentence of 10 years in default of payment.
9. The first and principal issue raised on this application for leave to appeal was whether a private prosecutor such as Virgin was entitled to bring proceedings for confiscation under POCA, even if it had no financial or other personal interest in the outcome. The appellant contended first that on a proper construction of POCA viewed in the light of the development of the confiscation regimes, the term "prosecutor" referred solely to a prosecutor accountable to the state. Secondly, the confiscation scheme could not be delivered by a private prosecutor. Thirdly, it was not in the public interest that such draconian powers be exercised by anyone other a body accountable to the state. In addition to that principal issue, the second issue raised was the propriety of the agreement with the Metropolitan Police Service. We grant leave.
10. The issues raised are of importance. First, there is an increase in private prosecutions at a time of retrenchment of state activity in many areas where the state had previously provided sufficient funds to enable state bodies to conduct such prosecutions. Second, the impugning of the propriety of the agreement between the Metropolitan Police Authority and Virgin has to be considered in the light of the considerable reduction in funds available to the police. Third, there is an obvious and serious conflict of interest inherent in Virgin's original position as a private prosecutor and a company seeking very substantial compensation for its lost revenue through confiscation proceedings. We therefore asked the Director of Public Prosecutions and the Commissioner of Police for the Metropolis for their assistance.

1. The ability of a private prosecutor to bring confiscation proceedings

11. Before turning to the terms of POCA, it is necessary briefly to refer to the position of private prosecution within the criminal justice system of England and Wales.
 - (a) *The power to bring private prosecutions*
12. The right to bring a private prosecution is long established: its history is summarised in the judgments of Lord Wilson and Lord Mance in *R (Gujra) v Crown Prosecution Service* [\[2012\] UKSC 52](#). Its position has for sometime rested on a statutory basis.
13. In the most recent legislative provision, the Prosecution of Offences Act 1985, the Director of Public Prosecutions is obliged to conduct certain proceedings and may take over private prosecutions, but the right to conduct private prosecutions is preserved in wide terms by s.6 of that Act:

"Prosecutions instituted and conducted otherwise than by the Service

(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.

(2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage."

14. In *Jones v Whalley* [2007] 1 AC 63 Lord Bingham and others expressed the view that the right to bring a private prosecution should no longer be regarded as an important constitutional safeguard, but as he and the others acknowledged it continued to exist and, as Lord Mance observed in that case, private prosecutions were not uncommon. Further views on the place of private prosecutions in the criminal justice system were expressed in *R (Gujra) v Crown Prosecution Service*.
15. As Parliament has authorised the bringing of such prosecutions, we do not consider it desirable to add to the debate. It is evident that private prosecutions by charitable or public interest bodies such as the RSPCA are common. Furthermore public bodies such as the Financial Services Authority also rely for their authority to prosecute on the general power of a private individual to prosecute: see *R v Rollins* [2010] UKSC 39 at paragraphs 7-14. In the consequential sentencing and confiscation proceedings no one has challenged its right to pursue the obtaining of a confiscation order; the point was never raised: *R v Rollins* [2102] 1 Cr App R (S) 64.
16. It is now also evident that commercial organisations regularly undertake private prosecutions. This type of private prosecution is undertaken not only by trade organisations such the Federation Against Copyright Theft (principally the visual media) and the British Music Industry ('BPI') (the music industry) but also ordinary commercial companies. We were told that such prosecutions resulted in consequential confiscation proceedings being undertaken by such private prosecutors. This appeal is concerned with this type of private prosecution brought by a commercial company.

(b) The scope of criminal proceedings within s.6 of the Prosecution of Offences Act 1985

17. Against that background we turn to the statutory regimes. As we have set out, s.6 of the Prosecution of Offences Act 1985 permits the bringing of "criminal proceedings" by a private prosecutor. It cannot be questioned that sentencing is part of the criminal proceedings instituted against a defendant. It is also well established that confiscation proceedings are part of the sentencing procedures: see for example *R v Rezvi* [2002] UKHL 1 at paragraph 13 and *R v Johnson* [1991] 2 QB 249. It therefore must follow that confiscation proceedings are also part of criminal proceedings and within the scope of s.6 of the Prosecution of Offences Act 1985.
18. The question therefore arises whether there is anything in the provisions of POCA which specifically provides for such proceedings only to be instituted by the Crown Prosecution Service or other state prosecutors such as the Director of the Serious Fraud Office.

(b) The meaning of prosecutor in POCA
19. The scheme of POCA provides by s.6 of POCA that, after conviction, the court must proceed to consider the making of a confiscation order if "the prosecutor... asks the court to proceed" or "the court believes it is appropriate for it to do so". If the prosecutor does not ask the court, but the court believes it is appropriate to proceed to consider confiscation, the court can order the prosecutor to provide a statement of information under s.16.
20. S.6 contains no definition of prosecutor, but it is contained within Part 2 of POCA. Also contained in Part 2 is s.41 which confers power on the court to make an order restraining a

person from dealing with assets; that power can be exercised if the five conditions set out in s.40 are satisfied. S.40(9) provides:

If the first condition is satisfied—

(a)

(b) references in this Part to the prosecutor are to the person the court believes is to have conduct of any proceedings for the offence;

21. If there was any doubt that prosecutor had anything other than its ordinary meaning as applicable to all prosecutors, in our judgment this sub-section makes clear that the term prosecutor is to be read throughout Part 2 in that wide sense – the prosecutor who conducts the proceedings for the offence; that must include all prosecutors including a private prosecutor. We should add also that in s.85(1)(aa), a public prosecutor is referred to in an amendment made by the Criminal Justice Act 2003 and in other Parts of POCA there are references to powers being exercisable by specific persons. These further provisions do not really assist; the words used in s.6, particularly in the light of s.40 (9), are clear. They refer to any person permitted to prosecute.
22. It was, however, contended by Mr Campbell-Tiech QC on behalf of the appellant that s.40 (9) of POCA was to be understood as a carry over from the scheme that had existed under previous enactments which established and governed earlier confiscation regimes; although it had a purpose in the earlier regimes, it had no significance in POCA.
23. We accept that the origins of s.40(9) of POCA are clear.

i) The history of the legislation was set out by Lord Bingham in *R v May* [\[2008\] 1 AC 1028](#) at paragraphs 8 and following. He introduced this by stating:

"The series began with the Drug Trafficking Offences Act 1986, and there followed (among the more important statutes) the Criminal Justice Act 1988, the Criminal Justice (International Co-operation) Act 1990, the Criminal Justice Act 1993, the Drug Trafficking Act 1994, the Proceeds of Crime Act 1995 and the Proceeds of Crime Act 2002. In these statutes the original confiscation regime established by the 1986 Act was modified, extended, elaborated and tightened,..... But despite much refinement and differences between the 1986 and 1994 Acts on the one hand and the 1988, 1993 and 1995 Acts on the other, the essential structure of the 1986 regime has been retained."

ii) The role of the prosecutor in confiscation proceedings was set out in s.3 of the Drug Trafficking (Offences) Act 1986. The term prosecutor was defined in s.7(3)(b) of that Act only for specific purposes. S.72 of the Criminal Justice Act, which made provision for confiscation in non-drugs cases, set out the role of the prosecutor in slightly different terms, but contained in s.76(3) a similar definition of prosecutor for the same specific purposes.

iii) The language of the provision in s.6 of POCA was introduced by the Drug Trafficking Act 1994 (in language closely following the amendment to the Drug Trafficking (Offences) Act 1986 effected by the Criminal Justice Act 1993):

"2(1) Subject to subsection (7) below, where a defendant appears before the Crown Court to be sentenced in respect of one or more drug trafficking offences ..., then—

(a) if the prosecutor asks the court to proceed under this section, or

(b) if the court considers that, even though the prosecutor has not asked it to do so, it is appropriate for it to proceed under this section,

it shall act as follows"

iv) The language of the scheme for non-drugs offences established by the Criminal Justice Act 1988 was similarly amended by s.1 of the Proceeds of Crime Act 1995.

v) From that time onwards, the legislative scheme ensured that the prosecutor played a central role – it either initiated confiscation proceedings or acted on the direction of the court.

24. In the light of that history it was submitted that the definition in s.40 (9) was simply a carry-over from the earlier provisions and had no wider significance. It had been derived from s.7 (3) (b) of the Drug Trafficking Offences Act 1986. At that time there was a purpose in making such provision given the split in jurisdiction between the High Court and the Crown Court. The section in the Drug Trafficking Offences Act 1986 (and the similar provision in s.76 (3)(b) of the Criminal Justice Act 1988) provided that the reference to prosecutor for the purposes of ss.8, 9 and 22 of that Act (which gave the High Court powers) were to the person whom the High Court was satisfied is to have the conduct of the proposed proceedings for restraint and charging order made to enforce any confiscation orders. The provision had simply been incorporated into POCA where it had no real purpose once the Crown Court was given the power to make such orders, save to identify the employer of the accredited financial investigator making an application for a restraint order under s.68 of POCA.

25. Although s.40(9) may well have originated from these provisions and the essential structure of the legislation is, as Lord Bingham explained, largely the same, the language of s.40 (9) is wider and refers to the whole of Part 2; it does not merely refer to certain sections. It refers to powers conferred on the Crown Court in contradistinction to the High Court as the power to make restraint and other orders was transferred to the Crown Court. There is no reason to read the section as not being of general application to Part 2, as its plain language indicates. We therefore are unable to accept this part of the submission. Nor can we accept the contention that the definition in s.40 (9) is relevant only to s.68 of POCA. There is nothing that so restricts it.

26. We would add that, unless language is obscure or unclear, it is generally neither necessary nor desirable to engage in the process of the historical examination of previous legislation to construe sections of a new statute (which POCA is) in contradistinction to a consolidating statute.

(c) Compensation for an improper investigation

27. Mr Campbell-Tiech QC next relied on what he contended was an inference to be drawn from the terms of s.72 of POCA. Under that section the court may order the payment of such compensation as it believes to be just where (1) a criminal investigation has been started, (2) it has not resulted in a conviction, (3) there has been a serious default and (4)

loss has been caused as a result of certain actions. S.72(9) lists those whose default may result in the payment of compensation including those who could conduct investigations (including accredited financial investigators) and prosecutors such as the CPS and SFO and who are to be responsible for paying the compensation in each such case.

28. It was contended that as there was no reference to a private prosecutor in s.72(9), it was clear Parliament could not have intended that a private prosecutor could bring confiscation proceedings. Parliament had provided that if there was a serious default by an accredited financial investigator, then compensation was payable by his employer; it had made provision for payment of compensation in the event of a serious default by a member of the CPS. If Parliament had intended private prosecutors to be persons who could bring confiscation proceedings under POCA, then it would have made a corresponding provision for the private prosecutor to pay compensation.
29. On the assumption that a private prosecutor can bring confiscation proceedings, it is clear that there is an omission from the statutory scheme for compensation in the event of a default. Although we therefore see force in the contention made on behalf of the appellant, we cannot accept that the failure to provide a remedy before the Crown Court for serious default by a private prosecutor has the consequence that the term "prosecutor" in POCA is to be interpreted as excluding a private prosecutor. Given the plain meaning of the word prosecutor and the definition in s.40(9), this would be an impermissible inference.

(d) The powers to investigate etc

30. Mr Campbell-Tiech QC then contended that a private prosecutor could not properly participate in confiscation proceedings under POCA, as it could not conduct the financial investigation of the defendant and therefore supply the statement of information required by s.16 of the Act. It could not apply for certain orders under POCA such as production orders under s.345, disclosure orders under s.347 and customer information orders under s.370.
31. Such orders could only be sought by an appropriate officer who is defined under s.378(1) as including a member of the staff of the Serious and Organised Crime Agency (now replaced by the National Crime Agency), an accredited financial investigator, a police officer and a customs officer. An accredited financial investigator is for most purposes a person accredited by SOCA (now the National Crime Agency) under s.3 of POCA; the Secretary of State has power under s.453 and subordinate legislation to limit those who can exercise restraint and investigation powers to those employed by the state or those who have had specific training.
32. It is, in our view, clear that POCA makes a distinction between those who can investigate and those who can prosecute. The fact that a prosecutor cannot investigate does not impair the ability to participate fully in confiscation proceedings, provided that an appropriate officer, as defined in POCA, assists that prosecutor by exercising the various investigatory powers. No inference as to the limitation on the meaning of prosecutor can therefore be drawn from this contention.

(e) The draconian nature of the confiscation regime and the need for proportionality

33. There can be no doubt but that the confiscation regime is draconian. In *R v Rezvi* Lord Steyn in giving the principal judgment in relation to the provisions contained in the Drug Trafficking Act 1994 made clear that the draconian scheme of the regime which included the reverse burden of proof was proportionate because it was necessary to confiscate the proceeds of crime; the court played a central role in ensuring that there was no unfairness.

34. One of the issues which the Supreme Court had to consider in *R v Waya* [\[2012\] UKSC 51](#) in relation to the even more draconian POCA regime was the extent to which a confiscation order had to be proportionate in order to comply with article 1 of the First Protocol to the Convention. At paragraphs 10-35, Lord Walker and Sir Anthony Hughes, in giving the main judgment, set out the duty of the court in respect of proportionality. At paragraph 19, they said:

"The Crown's power, under s. 6(3)(a) of POCA, to ask the court to make a confiscation order is one with far-reaching consequences and care should be taken to exercise it on sound principles. S. 6 of HRA imposes on prosecutors the duty not to act in a manner incompatible with Convention rights, so that the Crown has an important preliminary function in ensuring that a disproportionate order is not sought. But the safeguard of the defendant's Convention right under A1P1 not to be the object of a disproportionate order does not, and must not, depend on prosecutorial discretion, nor on the very limited jurisdiction of the High Court to review the exercise of such discretion by way of judicial review. The latter would moreover lead to undesirable satellite litigation. Mr Perry and Lord Pannick were correct to identify the repository of the control in the person of the Crown Court judge, subject to the reviewing jurisdiction of the Court of Appeal, Criminal Division, on appeal by either party."

35. It was contended on behalf of Virgin that when a private prosecutor brought such proceedings, it was acting in the name of the Crown. We were referred to *Scopelight v Chief Constable of Northumbria* [2010] 1 Cr App 19 (a decision of the Court of Appeal Civil Division on s.22 of the Police and Criminal Evidence Act 1984), *R v Pawsey* [1989] Crim LR (a decision of Judge Gower at the Central Criminal Court on the disclosure of witness statements) and *Ewing v Davies* [\[2007\] 1 WLR 3223](#) (a decision of Mitting J on the right to bring a private prosecution). The court should look at the nature of the function being undertaken by a private prosecutor such as Virgin and therefore treat it as a public authority for the purposes of s.6 of the Human Rights Act: *Aston Cantlow v Wallbank* [\[2004\] 1 AC 546](#); *L v Birmingham City Council* [\[2008\] 1 AC 95](#). A private prosecutor was therefore bound by the Convention only to make an application for confiscation which was not disproportionate.
36. None of the cases cited clearly establish the proposition for which Virgin contended. The issue raised is an important one, but only arises as a subsidiary point. Although we see great force in the contention, we do not think it is necessary to decide whether this argument is correct; it would also be necessary to consider the decisions in *R v Stow* [\[2005\] EWCA Crim 1157](#) and *R (Hasse) v District Judge Nuttall* [\[2008\] 1 WLR 1401](#) at paragraphs 33-35 and [\[2009\] QB 550](#) at paragraph 24. It is now established, whatever the status of a private prosecutor such as Virgin, it is the court's duty, as was made clear in both *Rezvi* and *Waya*, to ensure that the confiscation order is not disproportionate. As the duty is ultimately that of the court, it cannot make a difference to the proper interpretation of the term "prosecutor" as used in POCA, though as we set out in paragraphs 59 and following below, a court may have to take steps to enable it to discharge the duty in some cases.

(f) Conclusion on construction

37. We have therefore reached the conclusion that a private prosecutor is entitled to initiate confiscation proceedings under s.6 of POCA.

38. The view we have reached is consistent with the view taken by the Divisional Court in *Margaret Lamont-Perkins v RSPCA* [2012] EWHC 1002 (Admin) of the position of a private prosecutor in relation to other significant statutory powers vested in a prosecutor. In that case the appellant argued that the power under s.31 of the Animal Welfare Act 2006 to certify conclusively for the purposes of limitation when matters came to the prosecutor's knowledge was a power that was restricted to state prosecutors and not to private prosecutors. The court concluded, after a review of the provisions of that Act, the power was a power available to all prosecutors.

(g) Parliamentary material

39. If, however, there was perceived to be any ambiguity about the status of the term "the prosecutor" and whether it includes a private prosecutor, we consider that any doubt could have been resolved by reference to the exchange during the debate on 22 April 2002 in the House of Lords on the Proceeds of Crime Bill between Viscount Bledisloe and the then Attorney General, the relevant part of which was in these terms:

"Viscount Bledisloe:

The noble and learned Lord spoke about the prosecutor as though it would always be the Crown Prosecution Service which would ask for an order. It may be unlikely in relation to the offences to which we are referring but there is always the possibility of a private prosecution and a private prosecutor may be singularly unreasonable in what he may ask for in relation to a victim. I do not ask for an answer now, but will the noble and learned Lord consider before the next stage whether it might be appropriate to give the court a residual discretion, limited to exceptional circumstances, to decide not to proceed even if the prosecutor or the director has asked it to do so?

Lord Goldsmith:

... the Director of Public Prosecutions has the ability to take over proceedings started by a private prosecutor. So where a private prosecutor is thought to be abusing whatever power he may have, whether bringing a prosecution or taking a particular step in the process, there is always the remedy that the director (and therefore the Crown Prosecution Service) can step in and exercise his judgment in relation to the case..."

40. No amendment of the sort contemplated by Viscount Bledisloe was made to the Bill and the Act was passed in the form then being considered. That would indicate that Parliament was well aware that the proposed legislation permitted the involvement of a private prosecutor in connection with bringing confiscation proceedings and consciously did not seek to interfere with that possibility.

2. The propriety of the agreement with the Metropolitan Police Authority

(a) The facts

41. We have set out at paragraph 2 the involvement of the Metropolitan Police at the request of Virgin in the arrest of the appellant on 19 November 2008 and the search warrants. In the appeal against conviction, Rafferty LJ in giving the judgment of the court observed at paragraphs 32 and 33:

"We do not understand why it was felt acceptable, during an ex parte application with its duty of full disclosure, to keep from the Bench that a private prosecution was expected. We would wish to emphasise that the obligation on an applicant for a warrant is the same as that imposed on any person making a "without notice" application to a court, namely one of "full and frank disclosure". That is what Hughes LJ was saying in *R v Stanford*. The obligation is not necessarily fulfilled merely by an information demonstrating that the bare statutory minima for the grant of the warrant are met. The disclosure must be as "full and frank" as the circumstances of each case requires.

The Bench, once informed, might have probed the reason for the CPS not bringing the case. It might have taken an interest in why the [Metropolitan Police Service] thought it appropriate to lend assistance to a large commercial entity in this fashion at this stage. There was, after all, oral evidence before it from a senior representative of [Virgin], the company which would bring the prosecution, and yet he stopped short of explaining an uncomplicated and we suggest an uncontroversial fact. We struggle to see what was the advantage – to anyone – of silence. If nothing else it would seem a natural progression from explanation of [Virgin]'s legitimate sense of grievance to explanation that [Virgin] would have conduct of the case. What harm would it have done? None, so far as we can tell. It would not have been surprising had the warrants in any event been granted after full and frank disclosure, especially as we agree with the Respondent that mala fides is not made out."

42. As we have set out at paragraph 5, the court has power under s.130 of the Powers of Criminal Courts (Sentencing) Act to make a compensation order. In *R v Jawad* [2013] EWCA Crim 644, Hughes LJ, in giving the judgment of the court explained the interrelationship between an order for compensation, the making of restoration and confiscation in the light of the decision in *Waya*. If both a compensation and a confiscation order are made, and the court believes that the defendant cannot satisfy both, then the court must under s.13 (5) and (6) direct that the available means must first satisfy the compensation order. In other cases, as Hughes LJ explained at paragraph 23, a defendant ought to be able to make repayment to the person who has suffered financial loss and that taken into account in the confiscation order, as to make a confiscation order without taking such a repayment into account would be the making of a confiscation order that was disproportionate.
43. As in effect the confiscation proceedings could not proceed without an appropriate officer as defined by POCA (see paragraph 31 above), Virgin entered into the agreement with the Metropolitan Police Authority dated 25 November 2008 to which we briefly referred at paragraph 3 above. Under that agreement the Commercial Partnership Manager of the Metropolitan Police Authority agreed that it would work in partnership with Virgin and provide a police service for which it would make a charge which Virgin would pay. In addition the Metropolitan Police Authority would accept from Virgin
- "the unconditional offer of cash donations of 25% of any money returned to Virgin under a Compensation Order following successful asset recovery work..."
44. The "donation" was to be accepted under s.93 (1) of the Police Act 1996. That section enables a police authority to accept gifts of money in connection with the discharge of its functions. We were told that the agreement was structured in this way to give effect to the

views of this court in *R v Hounsham* [2005] EWCA Crim 1366 in which the police had solicited from insurance companies money for part of the police operation that had resulted in the arrest and subsequent trial for the defendants who were alleged to have been staging car collisions. The police obtained £4,500. Gage LJ in giving the judgment of the court said at paragraphs 31 and 32:

"The prosecution now accept that the police were acting *ultra vires* their powers when they accepted financial contributions towards the expense of the investigation from three insurance companies. In our judgment, soliciting by the police of funds from potential victims of fraud, or any other crime, quite apart from being *ultra vires* police powers, is a practice which is fraught with danger. It may compromise the essential independence and objectivity of the police when carrying out a criminal investigation. It might lead to police officers being selective as to which crimes to investigate and which not to investigate. It might lead to victims persuading a police investigating team to act partially. It might also lead to investigating officers carrying out a more thorough preparation of the evidence in a case of a "paying" victim; or a less careful preparation of the evidence in the case of a non-contributing victim. In short, it is a practice which, in our judgment, would soon lead to a loss of confidence in a police force's ability to investigate crime objectively and impartially.

It has been unnecessary, in this case, to consider whether the police authority could sanction such activities pursuant to its powers under section 93 of the 1996 Act (the power to accept gifts and loans). Even assuming it does have such powers, we find it difficult to conceive of a situation where it would be sensible to exercise those powers in connection with criminal investigations."

45. Despite these strictures the court did not find there was an abuse of process in that case as there had been no prejudice and the police had acted in good faith; in a subsequent decision, *R v Smallman* [2010] EWCA Crim 548, the court assumed without deciding that the concession on which the decision in *Hounsham* had been reached was correct, but again found not abuse of process.
46. Pursuant to that agreement the Metropolitan Police Authority assigned Detective Sergeant Peter Ward to act as the appropriate officer, as we have set out at paragraph 5 above. It is clear from the statement of information made by Detective Sergeant Ward under s.16 of POCA that he exercised the compulsory powers that could be exercised by an accredited officer. He submitted in the s.16 statement that the appellant had a criminal life style. He noted that Virgin sought a compensation order on the basis of lost revenue of £380 million. In accordance with the court's powers under s.13 to which we have referred at paragraph 41, the court would then be able to divert the confiscated funds into compensation for Virgin instead of the funds going to the state as confiscation.
47. In the event, as we have set out, Virgin abandoned its claim for a compensation order. We were told that the reason why it did so was because it accepted the contention advanced on behalf of the appellant that, on the current state of the authorities (to which we have referred at paragraph 5), compensation could only be ordered where the sum claimed could either readily be quantified or agreed. It was clear that the appellant would not agree and the quantification was complex for the reasons advanced by the appellant.

(b) The submissions of the appellant

48. The appellant submitted that the agreement was improper as in effect Virgin and the Metropolitan Police were agreeing that compensation would be paid to Virgin.

(c) The justification advanced by Virgin and the Commissioner

49. It was contended by the Commissioner that, as it was lawful for a private prosecutor to conduct confiscation proceedings and as a private prosecutor could not conduct the requisite investigation without the assistance of an authorised officer as defined by POCA, it was permissible for the police to assist a private prosecutor. It was not in the public interest that a person convicted of a crime should escape from an effective investigation into the proceeds of his crime; therefore it was appropriate for an authorised officer to assist.

50. It was also contended that it was appropriate for the police to receive recompense for such work:

i) In 2004, the Home Office introduced a scheme known as ARIS, the purpose of which, as the Parliamentary Under Secretary of State explained:

"is to encourage an increase in the volume and value of asset recovery activity, in particular by supporting innovation in tackling criminality and by enabling partners to fund an expansion of financial investigation."

ii) In *R v Innospec* ([\[2010\] Crim LR 665](#), [\[2010\] EW Misc 7 \(EWCC\)](#), [\[2010\] Lloyd's Rep FC 462](#)) the scheme as it operated in relation to proceedings where the prosecutor was the Serious Fraud Office was described in the following terms:

"Under what is somewhat surprisingly called an "incentive scheme", the proceeds obtained from a confiscation order are, once collected by the Ministry of Justice, distributed to the Home Office in accordance with an agreed protocol with HM Treasury. That confiscation income is then distributed by the Home Office who retain 50% passing 18.75% to the prosecuting authority and 18.75% to the investigating authority and 12.5% to Her Majesty's Court Service. As the Serious Fraud Office is both the investigating and prosecuting authority, 37.5% of the confiscation amount in this case would go to the SFO, it would form part of the income of the Office. In those circumstances, although in general this would not affect the duty of a prosecutor to initiate confiscation proceedings, there would be a clear conflict of interest, if a prosecutor were to give notice requiring a court to proceed to confiscation rather than a fine, as fines are paid to and retained by HM Treasury. No independent prosecutor, exercising the quasi-judicial function in determining whether to issue a notice, could properly issue one in such circumstances. The position of the court administration is quite different; for example, no benefit to the court administration is in fact provided by this scheme, as the income of Her Majesty's Court Service is guaranteed by the Ministry of Justice, irrespective of the amounts paid to it under the so called "incentive scheme".

iii) The agreement was made as Virgin wanted to put the Metropolitan Police in a position similar to that in which they would have been placed if a confiscation order alone had been made. Under a confiscation order the police would receive the share under the Home

Office's incentive scheme. The agreement of 28 November 2008 would have had the same effect if a compensation order had been made. It was therefore justifiable.

iv) The agreement avoided the dangers pointed out by Gage LJ in *Hounsham* as it neither compromised the independence of the police nor led to the police conducting a more thorough investigation than it would in any other case where it did not receive a similar donation. It was not sought by the police. The investigation was not funded by Virgin. If Virgin had not offered the donation, the investigation would have been made in exactly the same way. There would be no loss of confidence in the police in consequence.

51. We were told by Mr Butt on behalf of the Commissioner that it had since been agreed between the Commissioner and the Mayor of London's Office for Policing and Crime (which has taken the place of the Metropolitan Police Authority) that in any case where the payment to the police was more than £50,000 or where the payment might be controversial, the approval of the Deputy Mayor of London for Policing and Crime was required. All such payments would therefore be reviewed by the Directorate of Legal Services at the Metropolitan Police and by the Deputy Mayor and their propriety examined.

(d) Our conclusion on police funding

52. Given the fact that the only benefit of the confiscation proceedings inured to the benefit of the state as no compensation or other recompense was sought by Virgin, there is no basis on which it can be contended that the agreement with the Metropolitan Police Authority gave rise to any abuse of process.
53. However we would observe that the agreement of 28 November 2011 did in fact run some of the risks identified by Gage LJ in *Hounsham*. It did in fact provide an incentive for the police to devote resources to assisting Virgin in their claim for compensation and gave rise to a perception that their independence was being compromised.
54. It would not, however, be appropriate us to comment further on the circumstances in which the police should assist in confiscation proceedings brought by private prosecutors (particularly where the private prosecutors are commercial companies or trade organisations with substantial resources) or in the obtaining of compensation by such private prosecutors and the terms on which the police do so. The Association of Chief Police Officers has issued guidance on the generation of income for the police service under s.25 and s.93 of the Police Act 1996. The issues raised by the present appeal will require careful consideration by the Association of Chief Police Officers (or its successor national body), the Association of Police and Crime Commissioners and the Home Office in the light of the observations made by Gage LJ in *Hounsham* and the very changed financial circumstances in which police forces now operate. Although it is not for this court to give advice on what is acceptable and what is not, it is essential that very urgent consideration is given by the three bodies to which we have referred to the issuing of clear guidance on what the police may or may not do when approached by commercial enterprises to lend assistance in the proceedings for confiscation and claims for compensation.

3. The safeguards required by the court in confiscation proceedings

(a) The growth in private prosecutions

55. As we have set out at paragraph 10, the bringing of private prosecutions as an alternative to civil proceedings has become more common; some lawyers and some security management companies now advertise their capabilities at mounting private prosecutions and the advantages of private prosecution over civil proceedings. For example, in April 2013, the

Fraud Advisory Panel, a charity supported by lawyers, accountants and others, published "a factsheet" on "private prosecutions for fraud offences" with the assistance of a law firm that advertises on the internet its expertise in bringing private prosecutions. The factsheet included the following passage:

"A successful private prosecution can result in a criminal conviction and custodial sentence for the offender, and compensation being awarded to the victim. It can also send a powerful deterrent message to those considering engaging in criminal activity against the victim"

56. Some of the other advantages claimed are the speedier process of the criminal courts, the right to apply for a compensation order and the opportunity to seek the costs of a successful prosecution under s.17 of the Prosecution of Offences Act 1995. It is to be noted that under paragraph 2.6.1. of the Practice Direction (Costs in Criminal Proceedings) issued in October 2013, the guidance given is that such an order "should be made save where there is good reason for not doing so, for example, where proceedings have been instituted or continued without good cause." We were provided with an analysis of the differences between civil and criminal proceedings by Mr Groome for which we are grateful.

(b) The cost to the state

57. At a time when the retrenchment of the state is evident in many areas, including the funding of the Crown Prosecution Service and the Serious Fraud Office, it seems inevitable that the number of private prosecutions will increase, particularly in areas relating to the criminal misuse of intellectual property. In the overwhelming majority of such cases, a prosecution will serve the public interest in addressing such criminal conduct.
58. However, it must be noted that the expense to the public purse may be greater given the way in which s.17 of the Prosecution of Offences Act 1985 operates and the fact that the use of criminal proceedings circumvents the fees charged in the civil courts for claims for the recovery of damages by way of compensation. Consideration of the inter-relationship of a reduction in the provision of funds to public prosecutors, the prospect of an increase in the sums paid to successful private prosecutors under s.17 and the avoidance of fees in the civil courts is entirely a matter for the Executive branch of the state and in particular the Ministry of Justice.

(c) Conflicts of interest

59. Again in the overwhelming majority of such cases, the pursuit by a private prosecutor of confiscation proceedings will also serve the public interest to the same extent.
60. However, there may well be cases where concern arises as to the interrelationship between the prosecution in the public interest and claims for recompense by the private prosecutor for its own benefit. Although claims for a compensation order are not likely to be common in view of the limited nature of the order, it is always open to the private prosecutor to seek recompense in the confiscation proceedings in the way set out in *Jawad* ...see paragraph 41 above).
61. In such cases the court can in part rely on the professional duties of the advocates and solicitors under their professional codes and on the duties owed to the Court. These are examined in detail by Sir Richard Buxton in *The Private Prosecutor as a Minister for Justice* [2009] Crim LR 427. Advocates and solicitors who have conduct of private prosecutions must observe the highest standards of integrity, of regard for the public interest and duty to act as a Minister for Justice (as described by Farquharson J) in preference to the

interests of the client who has instructed them to bring the prosecution. As Judge David QC, a most eminent criminal judge, rightly stated in *R v George Maxwell(Developments) Ltd* [1980] 2 All ER 99, (1980) 71 Cr. App. R. 83, in respect of a private prosecution:

"Traditionally Crown counsel owes a duty to the public and to the Court to ensure that the proceeding is fair and in the overall public interest. The duty transcends the duty owed to the person or body that has instituted the proceedings and which prosecutes the indictment."

There is no place in such a prosecution for what some have claimed as "end to end" case management on behalf of the client who has initiated a private prosecution.

62. But the discharge of these duties will not always be sufficient, even if they are carried out; as the appeal against conviction in the present case demonstrated, that is not always the case. Ultimately, as the decision in *Waya* makes clear (as set out at paragraph 34 above), it is for the court to ensure that an order is not disproportionate and the proceedings are not abused. In a case such as *Jawad* where the prosecutor is the Crown, there can be no conflict of interest in seeking recompense for the victim in the course of the confiscation proceedings. That may not be the case where the private prosecutor seeks compensation by way of order or some other form of recompense from the defendant in the course of confiscation proceedings in the manner suggested by *Jawad*. The prospect that the confiscation order with its penal sanctions can be reduced by paying compensation could be seen as a powerful incentive for a defendant to agree to such a proposal advanced by a private prosecutor.
63. In private prosecutions where compensation or recompense is made by the defendant, given the duty which was held in *Waya* to rest upon the court, a court must carefully consider whether it requires assistance, as it has no machinery of its own to carry out any inquiries. In such a case where the court, after due consideration, asks for such assistance from the CPS, we trust that the Director will use the powers given to intervene in the proceedings either by taking over the proceedings or assisting the court. The Director has indicated through counsel to us that she will carefully consider any request from a sentencing court. She will also reconsider guidance on this subject. If difficulties do arise in any particular case, then this court will always be able to review the issue on any appeal and use its power, if necessary, under s.3 (2) (f).

Conclusion

64. In the result and for the reasons we have set out, we dismiss the appeal.

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