

HOUSE OF LORDS

R

Vs.

Islam

(Lord Hope of Craighead, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance,
Lord Neuberger of Abbotsbury)

10.06.2009

JUDGMENT

LORD HOPE OF CRAIGHEAD

My Lords,

1. This case raises a short but important point about the meaning of the expression “market value” in section 79 of the Proceeds of Crime Act 2002 (“POCA 2002”). The relevant subsections provide as follows:

“(1) This section applies for the purpose of deciding the value at any time of property then held by a person.

(2) Its value is the market value of the property at that time.”

The question on which the House granted leave to appeal has focussed the issue in this way:

“For the purpose of calculating a defendant’s benefit, as distinct from the available amount, in confiscation proceedings under the Proceeds of Crime Act 2002, must goods of an illegal nature obtained by him be treated as having no value?”

2. My noble and learned friend Lord Mance has described the facts of this case and the statutory background. I gratefully adopt his account of them, and I agree with the reasons that he gives for allowing the appeal and answering this question in the negative. I have not found the issue an easy one to resolve however, and as we are not all of the same view I should like to set out briefly in my own words the reasons that have led me to this conclusion.

3. Although the current provisions have become more complicated, the concepts on which the confiscation provisions in POCA 2002 are based have been part of the law for several decades. They can be traced back to the Drug Trafficking Offences Act 1986, which introduced a scheme for the making of confiscation orders against persons convicted of drug trafficking offences. A new general power to confiscate the proceeds of indictable offences other than those referred to as drug trafficking offences was introduced by Part VI of the Criminal Justice Act 1988. This was followed by a revised scheme for those convicted of drug trafficking offences in the Drug Trafficking Act 1994. Part VI of the 1988 Act and the scheme in the 1994 Act have in their turn been replaced by POCA 2002. This is a lengthy enactment which extends to 462 sections and twelve Schedules. Its

length is attributable, at least in part, to the fact that it combines in a single statute provisions extending to all three jurisdictions of the United Kingdom and makes provision also for civil recovery orders against persons who are thought to hold recoverable property.

4. The scheme which the 1986 Act provided for the calculation of a confiscation order was set out quite simply in sections 1 to 4, read together with section 5 which defined the principal terms used. The court was required first to determine whether the person in question had benefited from drug trafficking: section 1(2). If it determined that he had so benefited, the next step was to determine the amount to be recovered in his case: section 1(4). The amount to be recovered was the amount which the court assessed to be the value of his proceeds of drug trafficking: section 4(1). If the court was satisfied that the amount that might be realised at the time the confiscation order was made was less than the amount it assessed to be the value of the proceeds of his drug trafficking, the amount to be recovered was to be the amount that could be realised: section 4(3). Among the expressions that required definition were the amount that might be realised and the word "value". Section 5(3) described the amount that might be realised as the total of the values at that time of all of his realisable property. Section 5(4) set out what was meant by the word "value". It provided that the value of property in relation to any person holding the property, except where another person also held an interest in it, was to be its market value. No distinction was made as between the different parts of the calculation that this definition was to be applied to. Value was to be taken to be market value for all purposes.

5. The same basic scheme is to be found in the relevant provisions of POCA 2002. On the one hand the court must assess the amount of the defendant's benefit from the conduct concerned: section 6(4), read with section 8. For this purpose it must take account of his conduct up to the time it makes its decision and take account of property obtained up to that time. Prima facie the amount of his benefit, so assessed, is the recoverable amount: section 7(1). But if the available amount is less than the amount of his benefit, the recoverable amount is restricted to the amount that is available: section 7(2), read with section 9. The available amount, for the purposes of deciding the recoverable amount, is the total of the values of all the free property held by the defendant when the confiscation order is made: section 9(1). The basic rule about value is set out in section 79, as quoted above: see para 1. It is supplemented by section 80, which deals with the value of property obtained from conduct. There are two methods of calculating this figure: section 80(2). One is to determine the value of the property at the time the defendant obtained it, and then to adjust that figure to take account of changes in the value of money. The other applies where he still holds the property or holds other property which directly or indirectly represents it in his hands. It is to take the value of that property at the time the confiscation order is made. Here again no distinction is made as between the different parts of the calculation to which the word "value" is to be applied. For all purposes it is to be taken to be the market value of the property.

6. The statute has refrained from defining precisely what is meant by the expression "market value". It can be assumed that greater precision on this matter was not thought to be necessary. A market, after all, is a place where goods are bought and sold. The market value of goods is the price that they will fetch in that market. It is the price which a willing seller will accept for them from a willing buyer. This is how transactions between traders in the market are carried on. Of course, the kind of market in which the property in question is commonly sold must first be identified. Some goods can only be bought and sold in markets that are hard to find or are highly specialised. The nature of the goods is likely to provide the best guide as to where or what this market is. This is a matter which will require to be determined by the court, if there is a dispute. So too is the figure that is to be taken to be the price that the property would fetch in that market. This is a question of fact

which is left by the statute for determination by the court as the need arises.

7. The statute does not say however that the market in which the price of the property must be determined must always be a legitimate one. At first sight this is not surprising, as confining the concept of market value in this way would be apt to distort the calculation in favour of a defendant who deals in illegal drugs at the stage of calculating the value of the benefit that he has derived from drug trafficking. In the ordinary case, of course, the market to which one naturally goes to determine the market value of a given item of property is the place where such items can be bought and sold legitimately. If there is a legitimate market, that is the market to which one should go to make the calculation. This is the position when attention is being directed, even in drug trafficking cases, to the stage of the formula which directs attention to the amount that is available. At this stage the court is contemplating property that can be realised legitimately when the confiscation order is made. This is not because the statute says that the market in which the value is struck must at all stages in the application of the formula be a legitimate one. It is because this is the kind of market in which the property that is being examined at this stage must be assumed to be being bought and sold.

8. But what is to be done at the benefit stage of the formula if the property that was obtained, because of its nature, condition or quantity, had no value in any legitimate market at all? If it was indeed valueless in any market that can be imagined, then so be it. Its market value must be taken to be nil. But is one driven to the same conclusion in a case such as the present, where the heroin had an undoubted value in the market in which drugs of that kind are commonly bought and sold, simply because the market in which these transactions take place is not a legitimate one? If so, the result will be to restrict the amount of the benefit in a way that ignores the known facts. One would have to discount the value that the defendant could have obtained for the drugs in a market where he would certainly have found a willing buyer for them had his activities not been interrupted. I do not think that there is anything in the wording of the statute that drives one to that conclusion.

9. The position becomes more complicated when one examines the authorities. But I think that it is possible to find a way through them that supports the Crown's argument.

10. I take as my starting point *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247. In that case a question arose as to whether the stamps the Post Office lost, which if they had been stolen would have been sold in the thieves' market, had a "market value" within the meaning of section 9(2)(b) of the Crown Proceedings Act 1947 and, if so, what the value was. Lord Denning MR said at p 264C-E that the market value meant the price at which the goods could be expected to be bought and sold as between a willing seller and willing buyer, even though there might be only one seller or one buyer, and even though one or both might be hypothetical rather than real. Applying that test he said that the value of the stamps was their face value:

"There was only one seller of these stamps (at any rate in the legitimate market) and that was the plaintiff company. They sold them at their face value. But there were thousands of buyers. And they all paid the face value. The market value was clearly the face value."

11. In *R (Revenue and Customs Comrs) v Machell* [2005] EWHC 2593 (Admin); [2006] 1 WLR 609, para 29 Stanley Burnton J said that in this passage Lord Denning had excluded illegitimate transactions from the determination of market value. He drew that same conclusion from the observations in the *Post Office* case of Pearson LJ at p 269A, where he too referred to legitimate

transactions and of Russell LJ at p 272B-C, where he said that he would exclude the thieves' market. But I think that it would be wrong to conclude from those observations that the court was laying down a rule that wherever one finds the phrase "market value" in a statute it must be taken to confine the inquiry to transactions that are legitimate.

12. The following passage from Pearson LJ's judgment at pp 268-269 helps to set the observations in the *Post Office* case into their proper context:

"For the purposes of the present case, I think it [the expression 'market value'] could be sufficiently defined as the uniform or average price or consideration for which the article in question is ordinarily bought and sold or acquired and disposed of in legitimate transactions. In some other case it might be necessary to resort to surreptitious transactions in search of 'market value': *Mouat v Betts Motors Ltd* [1959] AC 71, 82. There is no such necessity in this case, as there is a normal cycle of transactions, in which the ownership of the stamps is transferred and the price or consideration involved is always equal to the face value."

This passage shows that the judges referred to legitimate transactions in that case because the conclusion that they drew from the facts was that this was the appropriate market to which to go to determine the market value of the articles in question, not because they thought that they were driven to it by the terms of the statute. In *Mouat v Betts Motors Ltd* [1959] AC 71, 82 Lord Denning, delivering the judgment of the Board, referred to *British Motor Trade Association v Gilbert* [1951] 2 All ER 641 as an example of a case where it was appropriate to go to what he described as a surreptitious market that was fed by persons who had broken their covenants.

13. Further support for the view that there is no universal rule that a reference to market value must be taken to exclude illegitimate transactions, as Stanley Burnton J in *R (Revenue and Customs Comrs) v Machell* [2006] 1 WLR 609, para 28, suggested, is to be found in the observations of Lord Widgery CJ in *Byrne v Low* [1972] 1 WLR 1282. That was a case about the amount of the monetary penalty for a contravention of the prohibition on the importation of indecent goods. Section 305(2) of the Customs and Excise Act 1952 provided that this was to be calculated by reference to the price which the goods might reasonably be expected to have fetched if they had been sold in the open market. Lord Widgery CJ said at p 1285:

"It is contended before us today, and I think clearly the contention is correct, that in deciding what is the open market value of goods of this kind, one is not restricted by the distinction between the so-called black market and white market. What is being sought is the price which a willing seller would accept from a willing buyer for these goods as landed at the port or airport at which they were originally landed. If we can ascertain what is the price which would be paid by a willing buyer to a willing seller at the port of landing, then that is the open market value of the goods for present purposes, and the penalty accordingly can be up to a maximum of three times that value."

The court accepted the evidence of an invoice that showed the price that the actual seller required from the actual buyer for the goods as landed, there being no open market in this country in the sense of a market free and above board, not conducted in an underground fashion, in which the goods of that kind could be sold.

14. In *R v Dore* [1997] 2 Cr App R(S) 152 the issue was the amount of a confiscation order made under section 2 of the Drug Trafficking Act 1994. The judge had included, when he was assessing the proceeds of the defendant's drug trafficking, the purchase price of the drugs which were in his

possession when he was arrested and which had been forfeited. Lord Bingham CJ at p 158 said, approving of the decision in *R v Thacker* (1994) 16 Cr App R (S) 461, that as the drugs had been forfeited they were no longer the property of the former owner. So he was in no position to realise that property as an asset. He then added these comments:

“But even if the drugs had still been held by the defendant within the meaning of section 62(5)(a) of the 1994 Act - and this could well be the position where it was the police and not the Customs and Excise who seized the drugs - so that the property would on its face be realisable property within the meaning of section 6(2)(a) of the 1994 Act, the drugs would still be without value as realisable property. That is because, by virtue of section 7(1) of the 1994 Act to which we have already made reference, the value of the property is to be taken as its market value and the market value must be the market value if the property is sold lawfully. In the case of drugs, it is obvious that the drugs cannot be sold lawfully and therefore they have no market value.”

15. Those observations were relied on by Stanley Burnton J, delivering the judgment of the Court of Appeal in *R v Hussain* [2006] EWCA Crim 621, paras 13 and 14, as authority for the proposition that drugs which it is illegal to buy and sell in this country had no “market value” for the purposes of the 1994 Act, and that as this expression was re-enacted in POCA 2002 Parliament must be taken to have appreciated that the Court of Appeal had already decided that “market value” meant value in a lawful market, in a market in which the goods could be bought and sold lawfully. It followed that the “benefit” which the defendant had obtained in that case was nil because that which could not lawfully be bought and sold had no market value: para 17. The Court of Appeal regarded itself as bound by that decision in the present case: [2008] EWCA Crim 1740. But I agree with Toulson LJ that in *Hussain* the Court of Appeal read too much into what Lord Bingham CJ said in *Dore*. This is because the issue which he was considering was whether the drugs were to be treated as having a realisable value, not the amount of the defendant’s benefit. As Toulson LJ said in para 23:

“When looking at the benefit historically gained by a criminal from drug dealing, as distinct from looking at what is his realisable property, it is not self-evident that the court should exclude the actual market value of goods in which it was unlawful for the defendant to deal.”

16. In my opinion the earlier cases to which I have referred support this approach. I would reject the proposition that, in re-enacting the expression “market value” in section 79(2) of POCA 2002, Parliament was accepting that the inquiry was to be restricted to a market in which the goods could be bought and sold lawfully. Not only, as I have said, does this read too much into Lord Bingham CJ’s remarks in *Dore*. It overlooks the trend of the earlier cases which, albeit not in the same legislative context, indicate that the essence of market value is simply that it is the price that would be paid for the goods as between a willing buyer and a willing seller. The nature of the goods, and the context in which the assessment is to be made, will determine the nature of the market to which one should go to determine their market value. If the only market in which such a transaction can take place is an illegitimate one it should, unless the context shows otherwise, nevertheless be one to which regard can be had to determine the price that the goods would fetch.

17. I appreciate, with great respect, the force of the point that my noble and learned friend Lord Walker makes that the same meaning should be given to the expression “market value” at all stages of the calculation, in the absence of any indication to the contrary. But I think that the answer to it lies in the fact that the contexts in which the expression is used at the benefit and the realisation stages are different. On the one hand the court is looking for the value that the goods had in the hands of the defendant at the time when he obtained the benefit. It does not seem out of place in that

context to look at the market to which he would have been expected to go to sell the drugs, even although this was an illicit one, especially as this was the only market in which he could have derived any significant benefit from them. On the other hand when the court is assessing realisable value it is looking for the amount that the defendant can be expected to pay under the confiscation order. The assumption is that he will have to realise his property if it is not already available to him in the form of cash. The only market that can properly be considered for this purpose is one in which it will be lawful for him to engage in. The court cannot expect him to resort to transactions that are illegal to find the money that he will need to satisfy the terms of the confiscation order. I should add, in response to points made by my noble and learned friend Lord Neuberger of Abbotsbury, that I am not to be taken as suggesting that recourse should be had to black market values to inflate the price at the realisation stage if there is a lawful market in which goods of the kind in question are normally bought and sold. Nor am I suggesting that the difference as to the effect of the expression “market value” arises simply because the dates are different. The difference in effect is due to the fact that the contexts are different. I do not for my part, with respect, think that this approach gives rise to any logical difficulty.

18. For these reasons I would hold that *R v Hussain* was wrongly decided and that it should be overruled. The market that has to be contemplated for the assessment of the available amount under section 9 of POCA 2002 must be taken to be one to which the defendant can resort to realise his assets without acting illegally. But no such restriction applies at the stage of calculating the amount of his benefit under section 8. At that stage the nature of the goods and the market in which they are ordinarily bought and sold will determine the market to which it is proper to go to discover the amount that a willing buyer would pay to a willing seller for them.

LORD WALKER OF GESTINGTHORPE

My Lords,

19. I have the misfortune to differ from your Lordships as to the disposal of this appeal. It would be inappropriate to set out my reasons at length. In any case the point is a short point of construction: the meaning of the words “market value” in section 79(2) of the Proceeds of Crime Act 2002 (“PCA 2002”).

20. Section 79(2) applies (see subsection (1)) “for the purpose of deciding the value at any time of property then *held* by a person” (emphasis applied). That echoes the language of section 9 (available amount), subsection (1)(a) of which refers to “all the free property then held by the defendant” (subject to a possible deduction for prior statutory obligations). It also echoes, less directly, the language of section 8 (defendant’s benefit): section 8(2) refers to “property obtained” up to the time of the Court’s decision, and section 80 explains that by reference to (among other things) the situation where “the person holds the property obtained” (section 80(3)(a)). Moreover section 80(4) leaves no doubt but that section 79 applies for all the purposes of section 80 (and so for the purposes of section 8). There is a similar pattern in section 81 (value of tainted gifts): tainted gifts come in under section 9(1)(b).

21. In short, Parliament has made quite clear that the market value test is to apply for all the purposes of the calculations required by the two key provisions, that is quantum of benefit from crime under section 8 and quantum of available assets under section 9. Yet the Crown seeks to give a different meaning to section 79 for the purposes of section 8 from that which it has for the purposes of section 9. In relation to section 9 it is conceded that smuggled heroin cannot have a

market value, for the reasons given by Ebsworth J in *R v Thacker* (1995) 16 Cr App R (S) 461, 463, and by Lord Bingham of Cornhill CJ in *R v Dore* [1997] 2 Cr App R(S) 152, 158. But the Crown resists the same reasoning being applied to the expression when section 8 is in point.

22. When Parliament was considering the Bill which became the PCA 2002 this point had already been recognised in *Thacker*, in *Dore*, and in *R v Berry* [2000] 1 Cr App R(S) 352, 356. I would not rely (as the Court of Appeal did in *R v Hussain* [2006] EWCA Crim 362, para 14) on the presumption that Parliament, in considering the Bill, treated the law as settled by the decisions mentioned above. But there are to my mind some points which Parliament cannot possibly have overlooked, that is (i) that one of the most serious and prevalent offences aimed at by the PCA 2002 is trafficking in heroin and other class A drugs; (ii) that because there is no lawful market for such drugs in the United Kingdom (discounting, as I would, the limited supplies lawfully imported for medical use) the expression “market value” was not apt as a method of valuation; and (iii) an appropriate form of words could easily have been found if different methods of valuation had been intended under section 8 (on the one hand) and under section 9 (on the other hand).

23. It is as true today as it was in 1869 that “it is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament”: *Cleasby B in Courtauld v Leigh* (1869) LR 4 Exch 126, 130. Here it is a question of construing the very same words as applied to consecutive sections of the PCA 2002. I would dismiss this appeal.

BARONESS HALE OF RICHMOND

My Lords,

24. I agree that, for the reasons given by my noble and learned friends Lord Hope of Craighead and Lord Mance, that *R v Hussain* [2006] EWCA Crim 621 should be overruled, that this appeal should be allowed and the order of HHJ Collender QC restored.

25. This is not a case where we are putting a different construction upon the same words when used in different sections of the same statute. It is a case where we are applying the words of the same section to different factual situations. We are concerned only with section 79 of the Proceeds of Crime Act 2002. Section 79(1) provides that “This section applies for the purpose of deciding the value at any time of property then held by a person”. Section 79(2) provides that “Its value is the market value of the property at that time”. We are, I think, all agreed that references to a market can on occasions include a black market. In applying section 79(2), it seems to me entirely appropriate to ask “upon what market do we expect the value of this property to be raised?” When we are looking at the benefit which the malefactor has gained from his conduct, we look at the market in which he expected to dispose of the property in question. That is what it was worth to him. When we are looking at what is available for confiscation by the state, we look at the market in which he can properly be expected to realise the value of the property he holds. The state cannot expect him to sell it on the black market. It may be the same property but it may well have a different value depending upon the circumstances in which that value comes to be realised. This is a commonplace of everyday life. Property may change dramatically in value depending upon whether it is sold new, or in the second hand market, or in the antique market. I see no reason why Parliament should not have contemplated such a commonplace in enacting section 79(2).

26. Lord Mance has, in my view, correctly identified the question thus: “to which market is attention to be directed?” This may or may not include a black market as the circumstances require.

Once that has been decided, the issue is whether the property has any value in that market and, if so, what.

LORD MANCE

My Lords,

27. The respondent pleaded guilty on 1 February 2006 to two counts of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of goods contrary to section 170(2) of the Customs and Excise Management Act 1979. The counts concerned the importation of 3.53 kg of heroin through Southampton on or about 14 February 2005 and of 0.438 kg of heroin through Felixstowe on or about 1 March 2005. Both consignments were following their importation seized by HM Revenue and Customs (“HMRC”), the latter after a controlled delivery to a location selected by the respondent. The courts below have held that the respondent obtained the heroin at the moment of its importation as a result of or in connection with his illegal conduct within the meaning of section 76(4) and (7) and section 80(1) of the Proceeds of Crime Act 2002. That conclusion is no longer challenged. The issue now before the House is whether the heroin had, when the respondent so obtained it, any market value within the meaning of section 80(2) read with section 79(2) of the same Act.

28. HHJ Collender QC held on 5 January 2007 that it had a wholesale value of £71,424, and, by reference to that and other items, assessed the respondent’s total benefit at £404,604.69. He held that the respondent had failed to show that the amount available for confiscation was less than the benefit, and made a confiscation order accordingly in the full £404,604.69. He further ordered the forfeiture and destruction of the heroin under section 27 of the Misuse of Drugs Act 1971.

29. On 31 July 2008 the Court of Appeal rightly held that it was bound by (despite doubts it clearly held about the correctness of) its previous decision in *R v. Hussain* [2006] EWCA Crim 621; and on that basis concluded that the heroin did not, for the purposes of sections 76(4) and (7), 79(2) and 80(2) of the Act, have any market value when obtained, since there was no lawful market for its purchase or sale. The Court noted (at para 32) that the judge had not been invited to take “the indirect route of inferring that the [defendant] must have spent £x in purchasing the drugs and that the £x spent on drugs came from criminal conduct”, and that, although that route would have been open under sections 6(4) and 10 (since his guilty pleas established the necessary criminal lifestyle), there was no evidence sufficient to justify any finding as to the purchase cost. The amount of the confiscation order was thus reduced by £71,424. The Court certified a point of law of general importance, namely: “For the purpose of calculating a defendants’ benefit, as distinct from the available amount, in confiscation proceedings under the Proceeds of Crime Act 2002, must goods of an illegal nature obtained by him be treated as having no value?” Leave to appeal was granted by the House.

30. The scheme of the 2002 Act requires the sentencing court, in the event of a relevant conviction, to determine the amount of any confiscation order before making any order for, inter alia, forfeiture under section 27 of the Misuse of Drugs Act 1971 (see section 13 and *R v. Dore* [1997] 2 Crim App R(S) 152, 160, decided under the predecessor provision in the Drug Trafficking Act 1994). The court must start by determining whether the defendant does or does not have a criminal lifestyle (section 6(4)). In the present case, the respondent did have, since his convictions were of a class specified in Schedule 2. Under section 6(5), the court had then to decide the recoverable amount, and make a confiscation order requiring him to pay that amount. Under section 7(1): “The

recoverable amount for the purposes of section 6 is an amount equal to the defendant's benefit from the conduct concerned"; but section 7(2) qualifies this by providing that

"if the defendant shows that the available amount is less than that benefit the recoverable amount is (a) the available amount, or (b) a nominal amount, if the available amount is nil".

Section 9(1) explains that:

"For the purposes of deciding the recoverable amount, 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".

Under section 82 "Property is free unless an order is in force in respect of it under" one of a number of statutory provisions, including section 27 of the Misuse of Drugs Act 1971. "Tainted gifts" are those made after dates defined by section 77, going back as long as six years prior to the commencement of proceedings in the case of a defendant with a criminal lifestyle.

31. The concept of benefit is first addressed in section 8:

"(1) If the court is proceeding under section 6 this section applies for the purpose of—

(a) deciding whether the defendant has benefited from conduct, and

(b) deciding his benefit from the conduct.

(2) The court must—

(a) take account of conduct occurring up to the time it makes its decision;

(b) take account of property obtained up to that time."

Section 76 (Conduct and benefit) provides:

"(4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.

.....

(7) If a person benefits from conduct his benefit is the value of the property obtained."

Sections 79 and 80 then provide:

"79 Value: the basic rule

(1) This section applies for the purpose of deciding the value at any time of property then held by a person.

(2) Its value is the market value of the property at that time.

(5) This section has effect subject to sections 80 and 81.

80 Value of property obtained from conduct

(1) This section applies for the purpose of deciding the value of property obtained by a person as a result of or in connection with his criminal conduct; and the material time is the time the court makes its decision.

(2) The value of the property at the material time is the greater of the following—

(a) the value of the property (at the time the person obtained it) adjusted to take account of later changes in the value of money;

(b) the value (at the material time) of the property found under subsection (3).

(3) The property found under this subsection is as follows—

(a) if the person holds the property obtained, the property found under this subsection is that property;

(b) if he holds no part of the property obtained, the property found under this subsection is any property which directly or indirectly represents it in his hands;

(c) if he holds part of the property obtained, the property found under this subsection is that part and any property which directly or indirectly represents the other part in his hands.

(4) The references in subsection (2)(a) and (b) to the value are to the value found in accordance with section 79.”

Section 84 addresses the concepts of “property” and “held”:

“84 Property: general provisions

(1) Property is all property wherever situated and includes—

(a) money;

(b) all forms of real or personal property;

(c) things in action and other intangible or incorporeal property.

(2) The following rules apply in relation to property—

(a) property is held by a person if he holds an interest in it;

(b) property is obtained by a person if he obtains an interest in it;

.....

(h) references to an interest, in relation to property other than land, include references to a right (including a right to possession).”

32. In other contexts, a drug-importer such as the respondent would find strange a suggestion that

heroin which he obtained by its illegal importation into the United Kingdom had no market value. There are two inter-connected strands to the submission that this is the correct analysis under the 2002 Act. The first is that the word “lawful” must be understood as read into section 79(2) before the phrase “market value”. The second is that the basic rule of market valuation contained in section 79 is also applicable to the valuation of property held by a defendant when deciding the amount available for confiscation (see sections 7(2) and 9(1)) and that the impossibility or inappropriateness of attributing to heroin a black market value at that time demonstrates that no such value can have been contemplated at the earlier stage of valuation of benefit.

33. If the first argument postulates an absolute rule that the law, or Parliament, never concerns itself with black market values, I would reject it. No doubt there are circumstances when they will decline to do so. But that does not mean that it may not be appropriate in other circumstances to accept the reality that benefit may be obtained in the form of black market value. Lord Dunedin’s observation in *Charrington & Co. Ltd. v Wooder* [1914] AC 71, 82 and 84 to the effect that the term “market” did not have a “fixed legal significance” seems to me relevant here as in the contractual context in which it was uttered.

34. As to the second argument, heroin may have a black market value when it is imported and obtained, which it will no longer possess when the confiscation order is made. At the latter point, the heroin will commonly have been forfeited by HMRC or be in the hands of other authorities, about to be forfeited and incapable of being realised on any market. The statutory scheme distinguishes between valuations in different contexts and for different purposes. When assessing benefit, the heroin is to be valued by reference to the market value “at the time the person obtained it” (section 80(2)(a) read with section 79(2)), although in an alternative (not relevant on the facts of this case) by reference to the market value (if greater) of any such heroin obtained and still held or traceable into other property at the date of the court’s decision. When assessing the available amount, the market value is taken “at the time the confiscation order is made” of any “free property then held by the defendant” (section 9(1) read with section 79(1) and (2)). Where HMRC have seized goods, forfeiture is automatic, and in that case the goods will no longer be property held by the defendant at the time of the confiscation order within section 84(2): see *R v Dore* [1997] 2 Cr App R(S) 152, 158, under section 62(5)(a) of the 1994 Act. But, in other cases, the confiscation order will precede any order for forfeiture under section 27 of the Misuse of Drugs Act 1971 (see above). The heroin may then continue in law to be “free property then held by the defendant” at the time of the confiscation order within the meaning of section 84(2), although physically in the possession of the authorities and destined in due course to be the subject of a forfeiture order. In such circumstances, it would however be impossible to regard it as having any market value for the purposes of assessing the available amount; it would not (because it could not) ever be bought or sold on any market.

35. The assessment under section 80(2)(a) of the benefit consisting of the market value of property obtained looks simply to the objective value of the property if put up for sale on the market. Here, that means (under section 80(2)(a)) at the time when the defendant obtained it, i.e. at the moment of importation. In another case, it might (under section 80(2)(b) and (3)) mean at the date of the confiscation order. In either case, whether the importation is ever going to reach its intended market or the importation going to yield any profit at all would be irrelevant. “Such a scheme has the merit of simplicity. If in some circumstances it can operate in a penal or even a draconian manner, then that may not be out of place in a scheme for stripping criminals of the benefits of their crimes”: see *R v Cadman Smith* [2001] UKHL 68; [2002] 2 Cr App R(S) 37, para. 23 per Lord Rodger of Earlsferry. (That case was decided under section 74(3)(a) of the Criminal Justice Act 1988, which

was, as Lord Rodger said, to like effect to section 6(1)(a) of the Drug Trafficking Act 1994, these two sections being superseded by and for present purposes to like effect to the first twelve words of section 80(2)(a) of the 2002 Act.). There is nothing incongruous or inappropriate in this context about looking to the black market for each consignment of drugs; this was not just the only market but the market in which the respondent had intended to dispose of each consignment (even if only after splitting each consignment into smaller units).

36. I cannot however agree with my noble and learned friend Lord Neuberger's suggestion (paragraph 61) that it must logically follow that, if drugs obtained had by the date of the confiscation order been converted into and were thus under section 80(3)(b) or (c) represented by other lawful property, then such property would fall to be valued at that date by reference to any black market value. A lawfully owned gun would, by definition (and in contrast with unlawfully owned drugs), be property which the defendant did not contemplate selling (indeed, in view of the legislation regulating gun-ownership would be most unlikely to be able without detection to sell) on any black market. To look at a black market for guns being unlawfully disposed of (and normally also unlawfully possessed) would be to look at a market for disposal of essentially different items in a quite different context compared with any relevant to the defendant, once he had converted his drugs into lawfully owned property.

37. The assessment of market value for the purpose of determining "the available amount" at the time when the confiscation order is made raises different considerations. Leaving aside the special position arising from tainted gifts, the purpose of restricting the recoverable amount to the lesser of "the defendant's benefit from the conduct concerned" and "the available amount" under sections 7(1) and (2) and 9(1) is to ensure that confiscation orders are not made against defendants in an amount beyond that which they can, from one source or another, meet at the time the confiscation order is made. The court is in this context therefore concerned with the value of property which the defendant can actually be required or expected to realise on the market. It would defeat this purpose if a black market value were put on drugs which would never conceivably be sold on that market to meet the confiscation order.

38. If one supposes circumstances in which drugs obtained by a defendant were, at the time of the confiscation order still held by the defendant and potentially realisable on a black market here or abroad (e.g. where he had hidden or (re-)exported them), a further consideration militating against treating their value as 'available' for the purposes of a confiscation order would be likely to come into play. As a matter of general policy, the court will not enforce or condone the doing of an illegal act here or abroad. The "integrity of the justice process" must be preserved, as McLachlin J said in *Hall v. Hebert* (1993) 101 DLR (4th) 129, 160-8. On the same principle contracts for the performance of illegal acts abroad are unenforceable. A confiscation order requires the defendant to realise his available assets, on pain of serving the additional period of imprisonment specified by the court when making the order. If the court took account of black market value in fixing the value of the defendant's available property, it could itself be regarded as requiring or encouraging, or imprisoning for failure to effect, an unlawful realisation of the drugs by the defendant. The court is not however implicated in any similar way if, when assessing the defendant's benefit from illegally obtained drugs, it recognises the fact that such drugs had a real and intended black market value.

39. In principle, there was, therefore, no inconsistency in this case between treating the heroin as having a black market value when imported and obtained by the respondent in early 2005, but no such value at the time of the confiscation order nearly two years later. This is not to give two different meanings to the statutory concept of market value, which is capable of embracing every

type of market. It is to recognise that the relevant question (“to which market attention is to be directed and/or whether property has any and if so what value upon it?”) always depends upon the context in and purpose for which the question is being answered.

40. I turn to the authorities leading to the opposite conclusion by which the Court of Appeal was bound. They start with *R v. Thacker* (1995) 16 Cr App R(S) 461 and *R v Dore* [1997] 2 Cr App R(S) 152. In the former, the Court held no more than that drugs forfeited by HM Customs ceased to be property held by the defendant, so that there was “no basis upon which it could be held that he was in any position to realise that property as an asset”, and the realisable amount fell to be reduced accordingly under sections 4(3) and 5(1) of the Drug Trafficking Offences Act 1986 (pre-cursors to sections 7(2) and 9(1) of the 2002 Act). The latter case was not in fact concerned with any attempt to treat the drugs seized as realisable property under the 1994 Act, but Lord Bingham CJ said obiter at p.158 that, “even if the drugs [in *R v. Thacker*] had still been held by the defendant - and this could well be the position where it was the police and not the Customs and Excise who seized the drugs”, they “would still be without value as realisable property”: That, he went on, was

“because, by virtue of section 7(1) of the 1994 Act, the value of the property is to be taken as its market value and the market value must be the market value if the property is sold lawfully. In the case of drugs, it is obvious that the drugs cannot be sold lawfully and therefore they have no market value.”

41. Perhaps because of the high authority of Lord Bingham - as Toulson LJ observed in the present case: [2008] EWCA 1740, para. 22 - the passage quoted appears to have been treated in some later cases as if his words were statutory and to have been applied in a very different context from that which he was considering. However, in *R v. Berry* [2000] 1 Cr App R(S) 352, Tuckey LJ rightly observed that the fact that drugs must for the purpose of assessing realisable value be valued at nil because they have no market value does not necessarily mean “that the same would apply when considering the antecedent question of valuing the defendant’s benefit” under the 1994 Act. Nevertheless, in *R v Ajibade* [2006] EWCA Crim 368; [2006] 2 Cr App R(S) 70, the Crown conceded and the Court of Appeal accepted that the principle indicated by Lord Bingham applied to a calculation of benefit under the 2002 Act.

42. Finally, in *R v. Hussain* [2006] EWCA Crim 621, the Court of Appeal re-examined this question in detail, and reached a like conclusion. The judgment given by Stanley Burnton J has five strands. The first is that “The natural meaning of ‘market value’ is value in a lawful market. The ordinary meaning of ‘market value’, in relation to something which it is illegal to buy and to sell is that it has no market value” (para.12). In support of this, Stanley Burnton J also cited *Building and Civil Engineering Holidays Scheme Management Ltd. v Post Office* [1966] 1 QB 247 and *R(HN Revenue and Customs) v. Machell* [2005] EWHC (Admin) 2593. The second strand (para.13) consists of Lord Bingham’s dicta in *R v. Dore*. The third (para.14) is that, in the light of Lord Bingham’s dicta, Parliament, when re-enacting the words “market value” in the 2002 Act “must be taken to have appreciated that this Court had already decided that ‘market value’ meant value in a lawful market, in a market in which goods could be bought and sold lawfully. In our judgment, Parliament must be taken to have advisedly and deliberately used an expression which had already received an interpretation by this Court in this context”. The fourth (para. 15) is the decision in *R v. Ajibade* applying the dicta in *R v Dore* to the calculation of benefit while the fifth (para.16) was that the result was not “in any way offensive to common sense”, since, “the drugs having been seized, the defendant has received and enjoys no benefit by reason of the drugs themselves”; and, had he sold the drugs, their proceeds, assuming them to be cash or other lawful property, would have been

“a benefit” which would have been the subject of confiscation proceedings; and, if it could have been shown that the drugs had been purchased with the proceeds of drug trafficking, that would have been a benefit for the purposes of the Act.

43. The considerations identified in *R v. Hussain* do not persuade me that the result reached in that case is either required by the statutory language or right. As to the first strand, it may be natural or usual to relate market value to value in a lawful market, for the very reason that ordinarily there is such a market. It does not mean that the concept is either necessarily or always related, and still less confined, to such a market. That is particularly so, in the context of an Act referring to the market value of property obtained as a result of or in connection with a defendant’s criminal lifestyle or criminal conduct. Secondly, Lord Bingham’s dicta in *R v. Dore* were both obiter and concerned with valuation for the purpose of assessing what was realisable or, in the language of the 2002 Act, available at the time and for the purposes of a confiscation order. Third, it is by the same token unjustified to attribute to Parliament, by reference to Lord Bingham’s words, either an appreciation “that this Court had already decided that ‘market value’ means value in a lawful market” or any decision “advisedly and deliberately” to use that expression in that knowledge. Further, on this line of reasoning, Parliament should also be taken to aware of Tuckey LJ’s clear warning in *R v. Berry* in 1999 that a black market value might be relevant to the assessment of benefit. Fourth, *R v. Ajibade* was a decision reached only in 2006 on a concession and without full examination of the issue.

44. Fifth, the statement that “the drugs having been seized, the defendant has received and enjoys no benefit by reason of the drugs themselves” refers, at best, to matters relevant to the exercise of assessing what available property the defendant held at the time of the confiscation order and, at worst, introduces irrelevant considerations into the earlier exercise of assessment of the benefit obtained by his criminality. A defendant may obtain property and, for the statutory purposes, benefit, even though his criminal activities are under close surveillance as a result of which the property he obtains is destined to be and is seized by the authorities. This is illustrated by the House’s decision in *R v. Cadman Smith* [2001] UKHL 68; [2002] 2 Cr App R(S) 37, where cigarettes (as such, lawful to buy and sell) were illegally imported without payment of customs duty, and the defendant was held to have benefited in the amount of the duty so evaded, although he was, at all times unbeknown to him, under Customs surveillance and the cigarettes were duly seized and forfeited before he could realise any of them. The result was to leave him liable both to pay the duty *and* to a confiscation order in potentially the same amount (although limited in the event by reference to the value of his realisable property).

45. Finally, while it is the case that (a) if the drugs had been sold, any cash or other lawful proceeds would have constituted a relevant benefit and also that (b) a confiscation order may be made in respect of the cost price of drugs which can be shown (whether as a result of the statutory assumptions or otherwise) to have been paid for out of the proceeds of criminality, these are considerations which to my mind tend, if anything, to highlight, rather than explain, the oddity of excluding from the assessment of benefit the actual and intended black market value of drugs as and when obtained. Indeed, the latter consideration only operates on the basis of the reality that drugs have a black market value.

46. The cases of *Building and Civil Engineering Holidays Scheme Management Ltd. v Post Office* and *R(HN Revenue and Customs) v. Machell*, to which the Court referred in *R v Hussain*, concern very different areas of the law. In both the issue was on what basis compensation should be awarded - in the former case for breach of covenant, in the latter case under the provisions of the Customs and Excise Management Act 1979 providing for the payment to innocent parties of the market value

of goods belonging to them but destroyed by HMRC. It is understandable that courts should hesitate about recognising an unlawful market in such a context. Nevertheless, Pearson LJ (at p 269) recognised in the former case that “In some other case it might be necessary to resort to surreptitious transactions in search of ‘market value’”, citing *Mouat v. Betts Motors Ltd.* [1959] AC 71, 82. In that case, a car dealer had covenanted not to resell within two years, without offering the car back to the supplier at the original price (£1,207) less depreciation (£50). The dealer in breach of covenant sold the car for £1,700 on the much higher surreptitious market fed by persons who had broken their covenants. Although the supplier could not itself have re-sold the car for more than £1,207, it was entitled to damages measured by reference to the surreptitious market value of £1,700 (i.e. to £543). The effect was to strip from the dealer the benefit it had obtained by its breach of covenant.

47. There are other contexts in which courts have also had no difficulty in recognising the relevance of black market value. Such values have in the past regularly been put on drugs by police and other experts in the course of criminal trials, although weight at 100% purity is now generally to be preferred (*R v. Morris* [2001] 1 Cr App R 25). Further, section 44 of the Customs and Excise Act 1952, considered in *Byrne v Low* [1972] 3 All ER 526, made a defendant convicted of fraudulent evasion of duty “liable to a penalty of three times the value of the goods”, such value being defined by section 305(2) as “the price which those goods might reasonably be expected to have fetched, after payment of any duty or tax chargeable thereon, if they had been sold in the open market at or about the date of commission of the offence for which the penalty is imposed”. The goods were “indecent books and publications prohibited from being brought into this country at all and for which there could be no open market in England in the sense of a free market, open and above board, and not conducted in an underground fashion” (p 528). Nevertheless, the Divisional Court held (at p 529) that

“in deciding what is the open market value of goods of this kind, one is not restricted by the distinction between the so-called black market and white market. What is being sought is the price which a willing seller would accept from a willing buyer for these goods as landed at the port or airport at which they were originally landed”.

Byrne v Low was not cited in *R v Hussain*, but is closer to the present case than the two authorities on “market value” which were there cited.

48. The Court of Appeal’s recent decision in *R v Rose* [2008] EWCA Crim 239 further underlines the oddity of ignoring the black market value of drugs when assessing the benefit obtained by their importation. The Court, while loyally accepting its previous decisions in *R v Hussain* and *R v Islam*, distinguished goods stolen and obtained by a thief or handler from goods like drugs which it is intrinsically illegal to buy or sell. It held that the thief or handler was to be regarded as obtaining a benefit in the amount of their market value by obtaining possession of them, even though they were liable to be and were restored to their legitimate owner (and any attempt to sell them would no doubt have involved further wrong-doing). A distinction of this nature, between the benefit from obtaining stolen goods and from obtaining drugs - one moreover putting drug offenders on a more favourable basis as regards confiscation than thieves or handlers - is not convincing.

49. For all these reasons, I consider that it is consistent with both the language and the spirit of the statutory scheme to take account of the black market value of drugs when valuing the benefit obtained by the defendant from their illegal importation, although such drugs have a nil market value after seizure for the purposes of assessing the amount available for confiscation. The contrary decision in *R v Hussain*, which the Court of Appeal loyally applied in the present case, was wrong

and should be over-ruled, the present appeal should be allowed and the judge's confiscation order restored.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

50. The facts giving rise to this appeal and the relevant provisions of Part 2 of the Proceeds of Crime Act 2002 are fully set out by my noble and learned friend Lord Mance in his opinion, which I have had the benefit of seeing in draft.

51. The appeal is concerned with the quantification of the sum to be fixed by the court under a confiscation order made against a defendant under section 6(5). Such an order can only be made if the defendant has been convicted of, and has benefited from, one or more specified offences, which include drug trafficking, money laundering, and arms trafficking - sections 6(4)(a), 6(5), and 75(1) and (2) and Schedule 2. If the defendant does not pay the sum fixed, then, by virtue of section 35, he is liable to be imprisoned on the same basis as if he had not paid a fine.

52. When fixing the sum to be confiscated, the court has to carry out a two-stage process. The first is to assess the "recoverable amount", which is, in summary terms, the "value" of "property" obtained by the defendant as a result of his criminal conduct - sections 6(5), 7(1) and 76(4). The second step is to assess the "available amount", which is, again in summary terms, the current "value" of the defendant's "free property"- section 9(1). The sum to be paid under the confiscation order is to be "the recoverable amount", subject to a ceiling, namely the "available amount" - sections 6(5) and 7(2). Thus, while the 2002 Act primarily envisages that a defendant should be required to disgorge all the profits he has made from his criminal activity, it recognises that he cannot be required to pay up more than he can realise in cash.

53. In assessing the "recoverable amount", the court must first assess the defendant's "benefit from his conduct", which is the "value of property obtained by a [him] as a result of or in connection with his criminal conduct" - sections 8(1), 76(4), (7) and 80(1). "Property" is given a very wide meaning by section 84. Section 80(2)(a) provides that the value of property is to be its "value (at the time the [defendant] obtained it)", subject to adjustment for changes in the value of money. However, an alternative valuation may apply if, on the date the court makes the order, the defendant still "holds the property obtained" or other property representing that property. In such a case section 80(2)(b) provides that, if the "value" of such property at that date is greater than the sum arrived at under section 80(2)(a), then it is that value which is to be taken.

54. The "available amount" is defined in section 9(1)(a) as "the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant [subject to certain adjustments]". By virtue of section 84, "property" is "free" provided that it is not subject to a forfeiture order under section 27 of the Misuse of Drugs Act 1971, or to a similar order under other specified legislation.

55. Section 79(1) provides that the section "applies for the purpose of deciding the value at any time of property then held ...". Section 79(2) states that "[i]ts value is the market value of the property at that time". The definition of "market value" in section 79(2) plainly applies to the assessment of both the "recoverable amount" under section 7(1) -pursuant to sections 8(1), 76 and 80 - and the "available amount" in section 9(1).

56. The question which has to be resolved on this appeal is how the heroin imported into this country by the respondent (which gave rise to his conviction) is to be valued for the purposes of assessing the “recoverable amount” under section 7(1), pursuant to sections 8(1), 76(4) and 80(2)(a). Heroin is clearly “property” within section 84, and it is now common ground that the respondent “obtained” the heroin in question at the time it came into this country. Accordingly, the question of principle is whether it had a “market value” under section 79(2), for the purposes of section 80(2)(a), as at that date.

57. The respondent’s argument (which the Court of Appeal rightly, if somewhat reluctantly, considered that it was bound to accept, in the light of the decision in *R v Hussain* [2006] EWCA Crim 621) is that the heroin had no such “market value” at the time he obtained it. This was on the basis that the heroin could not have been sold legally in this country, and there was therefore no lawful market in which it could be said to have a value.

58. In so far as this argument is based on the proposition that, where a statute provides for a “market value” valuation, it must exclude any illegal, or black market, transaction, I would reject it. Whether the black market can be taken into account when assessing the “market value” of a particular piece of property must depend on the context in which the expression is used. The very fact that one refers to “the black market” supports the proposition that, as a matter of language, it is plainly not impermissible to take into account unlawful transactions when assessing a market value. Thus, if the 2002 Act provided for different regimes in drug-related cases depending on the “market value” of the illegal drugs, that would plainly be directing one to the black market value.

59. There have indeed been cases where a statutory reference to market value has been held to extend to dishonest or illegal transactions or markets. A reported decision to that effect is where a fine for importing prohibited goods was to be linked to “the price” which the goods would fetch “if sold in the open market” - *Byrne v Low* [1972] 3 All ER 526. On the other hand, in cases where a statute provides compensation for wrongly destroyed or lost property on a “market value” basis, it would, at least normally, be right to ignore any possibility of an unlawful market or unlawful transaction. A reported decision adopting such an approach is *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247.

60. When considering the meaning of “market value” in relation to the “recoverable amount” under section 7(1), pursuant to sections 8(1), 76(4) and 80(2), it seems to me that there is considerable attraction in the contention that it should extend to the black market, in the light of the purpose of Part 2 of the 2002 Act. That purpose is to make confiscation orders against people who have profited from criminal activity committed for financial gain, and section 80 is concerned with assessing the value of the property obtained from such activity. Many people convicted of such activity will have obtained assets which cannot lawfully be sold but are readily saleable on the black market, such as drugs, firearms, or stolen goods. It would seem a little surprising if the very assets which will often have been the subject of the conviction giving rise to the application of the 2002 Act, could be excluded from the calculation of the value of the property obtained from criminal activity. Further, the more unlawful drugs a convicted drug-dealer has in his possession, the less would be the value of his other assets: so the bigger the drugs haul, the smaller the potential sum identified in the confiscation order. It is not as if there is anything particularly inappropriate about valuing drugs on a black market basis for the purpose of assessing the recoverable amount: if a criminal has sold such drugs, it will have been on the black market, and the proceeds would be taken into account when assessing the “recoverable amount”.

61. On the other hand, such an approach does lead to a somewhat surprising result when one considers its effect more widely. If the “recoverable amount” can be assessed by valuing the drugs a convicted drug dealer has obtained or still possesses on a black market basis, a similar approach would logically have to be adopted in relation to all assets obtained by such a defendant when assessing the “recoverable amount”. If he collected guns or motor cars perfectly lawfully, albeit with the proceeds of his criminal activity, it would seem to follow that they could be, indeed would be, valued taking into account black market values. If he owned a house, and the evidence showed that such houses were often sold partly for cash, which was not declared, in order to evade stamp duty or for some other unlawful reason, thereby inflating the price above its lawful market value, the inflated value would have to be taken into account. Indeed, a passport may have substantial value on the black market. It appears to me somewhat implausible that the value of such items was intended by Parliament to be assessed on a black market basis.

62. I am unpersuaded that this point could be answered by fastening on the word “obtained” in section 80(2)(a) and deducing that it is only those items which the defendant has obtained or intends to dispose of on the black market which can be valued on a black market basis. Although such a contention may produce an attractive result, it appears to me to involve placing an unjustifiably strained meaning on “obtained” in section 80(2)(a), and in section 80(3)(a), where the word is used, as in section 80(1), simply to limit and identify the property to be valued, and not to give any guidance as to how it is to be valued. Equally, the notion that only items which can solely be obtained or disposed of on the black market can be ascribed a black market value may produce an attractive result, but, at least in my opinion, it does not meet the point that only one meaning can logically be given to the expression “market value” in section 79(2).

63. So, if one limits oneself to the “recoverable amount”, it appears to me that the question whether “market value” in section 79(2) extends to black market value is quite finely balanced. However, while this case is only concerned with the assessment of the “recoverable amount” in section 7(1), pursuant to sections 8(1), 76(4) and 80(2), the definition of “market value” applies equally to the assessment of the “available amount” in section 9(1)(a), as already mentioned. So it is necessary to consider the effect of section 79(2), with its market value provision, on the assessment of the “available amount”.

64. In many cases, indeed, I suspect, the majority of cases, even if illegal drugs could be ascribed a black market value in principle, they would have no value ascribed to them at the section 9 “available amount” stage. This is because the drugs will either have been forfeited by HM Revenue and Customs or be liable to immediate forfeiture. Section 80(2)(a) requires “property” to be valued “at the time the [defendant] obtained [them]”, whereas, under section 9(1)(a), it is “free property” which is to be valued “at the time the confiscation order is made”.

65. While illegal drugs are “property” (which is widely defined in section 84) which may have a “market value”, albeit on the black market, under section 80(2)(a), the position will often, indeed I think normally, be different under section 9(1)(a). If the drugs have been forfeited under section 27 of the Misuse of Drugs Act 1971 (or other legislation) by the time the court is considering a confiscation order, they would not be “free property”, and therefore would not fall to be taken into account, or valued, at all when assessing the “available amount”.

66. If they were not yet forfeited but were liable to forfeiture (as may be more usual - see section 13 of the 2002 Act), the drugs would be “free property”, but they would have no “market value”, because they would be held by, or to the order of, HMRC, and they would be certain to be forfeited.

In those circumstances, even if such drugs could be said to be capable of having a “market value”, that value would be nil. In the absence of a specific or implied direction to the contrary, the market value of property which is subject to inevitable statutory compulsory acquisition must be based on the amount of compensation, if any, to be paid for that acquisition. Just as the value of drugs may be enhanced by the fact that they are liable to be forfeited if discovered by the authorities, so may their value become nil once they effectively under the control of the authorities.

67. Having said that, it is easy to envisage cases where a defendant’s “free property” may include drugs in this country (or indeed abroad) which are illegal, and cannot lawfully be sold, but which are not certain to be forfeited. The court may conclude that the defendant holds illegal drugs in this country which cannot be found, as he will not say where they are. Or the court may conclude that the defendant holds illegal drugs outside the jurisdiction, in another country where their sale would be illegal.

68. At any rate at first sight, there may seem to be no good reason why one should not ascribe a market value based on the black market to such drugs under section 9(1)(a), in the same way as under section 80(2)(a). The same principles appear to apply: there is no inherent basis for excluding an illegal transaction as a matter of language; the purpose of the 2002 Act suggests that such property should be valued in this way; a defendant who had disposable drugs would otherwise receive be subject to a smaller confiscation order than one who had not; if the drugs had been sold, the proceeds could be taken into account when assessing the “available amount”.

69. However, the Crown concedes that it cannot be right to ascribe a value for the purposes of section 9(1)(a) to illegal drugs held in this country (or indeed abroad), even if they are not liable to immediate forfeiture. As Lord Mance says in para 37, the purpose of sections 7(1) and 9(1) is to ensure that the confiscation order made by the court under section 6 does not exceed the value of the defendant’s assets. And if a defendant does not meet the confiscation order in full, he will suffer a term of imprisonment in lieu. Accordingly, a confiscation order will, in practice, normally require a defendant to sell all items of “free property” at their “market value”, so as to comply with the order and avoid imprisonment in lieu. If the court were to ascribe a “market value” to illegal drugs held in this country, it would effectively be requiring, or at least condoning, the criminal sale of those drugs, or it would be assessing a figure which the defendant could not meet, and would therefore face further imprisonment under section 35. Accordingly, the Crown concedes that the “market value” to be ascribed to such illegal drugs for the purpose of section 9(1)(a) must be nil.

70. This concession was not challenged at the hearing, it is at least strongly arguable, and indeed as at present advised it seems to me to be probably correct. Accordingly, I am content to proceed on the basis that the concession is rightly made.

71. On that basis, I think that it must follow, essentially for the reasons given far more pithily by my noble and learned friend, Lord Walker of Gestingthorpe in his opinion, which I have seen in draft, that one cannot take into account the black market when determining the value of drugs, or indeed any other property, for the purpose of assessing the “recoverable amount” for the purposes of section 7(1) pursuant to the provisions of section 80(2)(a). The direction to value by reference to “market value” in section 79 applies equally to valuations under sections 9(1)(a), 80(2)(a) and 80(2)(b). It is conceded that the expression cannot extend to the black market when it applies to section 9(1)(a). In those circumstances, unless it was plain beyond peradventure that the same expression had to have a different meaning when applied to section 80(2) (because, for instance, the section simply could not otherwise work), it seems to me to be impermissible to give it a different

meaning when it is so applied. Indeed, as I have mentioned, it would be by no means clear to me that the black market should be taken into account when valuing property under section 80(2), even ignoring section 9(1).

72. I am not persuaded by the argument that a different meaning can be given to “market value” because of the different valuation dates in section 9(1)(a) and section 80(2)(a). First, the difference in the dates of valuation cannot logically justify a different meaning or effect being given to the expression “market value” in section 79(2). Secondly, the argument is undermined by section 80(2)(b), which contains an alternative valuation exercise to section 80(2)(a), and requires the “market value” to be determined as at the same date as section 9(1)(a).

73. Nor do I consider that the principle that the court will not condone a legal act assists the conclusion that a different meaning can be given to the expression in sections 80(2)(a) and 9(1)(a). Part 2 of the 2002 Act works satisfactorily if the statutory expression “market value” excludes black market transactions wherever it applies, at least partly because, in some cases, it would otherwise lead to the court condoning an illegal act. It therefore seems to me to be rather a strange process of construction to conclude that the expression includes black market transactions wherever it applies, save that, where it would lead to the court condoning an illegal act, the expression does not include such transactions.

74. Accordingly, for my part, I would dismiss the Crown’s appeal.

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