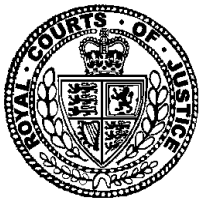

Neutral Citation Number: [2021] EWCA Crim 1198

Case No: 202002645 B2

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM WOOLWICH CROWN COURT**
**H.H.J. Kinch QC, The Honorary Recorder of Greenwich**
**Ind. No. T20187124**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

**Before :**

**LORD JUSTICE DINGEMANS**
**MR JUSTICE SOOLE**
and
**HIS HONOUR JUDGE MICHAEL CHAMBERS QC, RECORDER OF WOLVERHAMPTON**

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**Between :**

| | |
|---|---|
| **Michael Seed** | **Appellant** |
| **- and -** | |
| **Regina** | **Respondent** |

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**Mr Sutton QC** (instructed by **Lewis Nedas Law Ltd**) for the **Appellant**
**Mr Evans QC and Ms Arabella MacDonald** (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing dates : 13 and 29 July 2021

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# Approved Judgment

**Lord Justice Dingemans:**

## Introduction

1. This is an appeal against that part of a confiscation order dated 1 October 2020 made by His Honour Judge Kinch QC, the Recorder of Greenwich, ("the judge") which assessed the "available amount" and recoverable benefit for the appellant, Michael Seed in the sum of £5,997,684.93. Mr Seed was convicted in 2019 of being one of the men involved in 2015 with the burglary of gold, jewellery and other precious items ("the jewellery") from safety deposit boxes in vaults in Hatton Gardens.

2. The appeal raises an issue about whether property stolen from unidentifiable persons which has been seized by the police on the arrest of the burglar, is "an available amount" to the burglar for the purpose of a confiscation order made pursuant to the provisions of the Proceeds of Crime Act 2002 ("POCA"). It is apparent that, for the detailed reasons set out below, the issues raised by the appeal are effectively academic and their determination will not make any practical difference to Mr Seed or to the amount paid in compensation to those who had jewellery stolen from their safety deposit boxes. In circumstances where, for the detailed reasons set out below, we have concluded that the "available amount" has been misstated in one respect, we must attempt to answer the legal points raised by this appeal.

## Background

3. The relevant background to this appeal can be shortly stated. Mr Seed was aged 54 years at the time of the burglary at Hatton Gardens. He had one previous conviction for supplying controlled drugs in 1984 but other than that had lived "below the radar" (as the judge put it when sentencing Mr Seed) not declaring any income or claiming any benefits for many years.

4. Mr Seed was one of the men involved with the theft of the jewellery worth an estimated £13.69 million (some estimates had put the value at £25 million) from safety deposit boxes in vaults at Hatton Gardens Safety Deposit Limited, 88-90 Hatton Gardens which took place between 2 and 5 April 2015. Six men were identified as having entered the premises.

## The arrest of five men and recovery of some jewellery

5. Following a successful surveillance operation by the police, five men were arrested on 19 May 2016 at 24 Sterling Road, London when they met to divide some of the proceeds of the burglary. There was a missing sixth man who was referred to in the evidence as "Basil", and who was one of the men who had entered the safety deposit vaults. The five men were convicted of conspiracy to commit burglary and conspiracy to disguise, convert, transfer or remove criminal property in earlier proceedings referred to as *R v Collins and others*.

6. Jewellery to the value of about £4 million was seized by the police on the arrest of the five men from Sterling Road, from Enfield cemetery where it had been hidden, and from some other locations in London. This jewellery was photographed by the police and shown to owners of the safety deposit boxes. At the time of confiscation proceedings relating to the five men all but £689,233 of the £4 million worth of

jewellery had been returned to the owners. The remaining £689,233 could not be claimed either because there were no distinguishing features in relation to some items (such as gold chains) or because the jewellery had been dismantled for the purposes of selling it on. The police retained the £689,233 worth of jewellery. It was common ground at the appeal that in seizing and retaining the jewellery the police were exercising statutory powers under sections 19 and 22 of the Police and Criminal Evidence Act 1984 ("PACE"). Section 19 gives powers to a police constable to seize property which he has reasonable grounds for believing to have been obtained in consequence of commission of an offence. Section 22 gives powers to retain property which has been seized "so long as is necessary in all the circumstances".

7. The Police (Property) Act 1897 was a successor statute to the Metropolitan Police Courts Act 1839. It has been amended by the Police (Property) Act 1997. It provides a power to the police to apply to the Magistrates' Court for an order to return property in the possession of the police to the owner. Section 2, as amended, provides for Regulations to authorise the sale of property in the possession of the police and to apply the money to certain specified purposes. Those purposes do not include paying compensation to persons who might have been the owner of the items of the jewellery, but who cannot be identified as such. The police wanted to sell the jewellery and provide the proceeds of sale to the owners of the safety deposit boxes in proportion to their losses. The prosecution therefore applied, in the confiscation proceedings against the five men, for the court: to make a compensation order against the five men; to treat the £689,233 as an available amount; and to direct, pursuant to section 13(6) of POCA, that the amount payable under the compensation order should be paid out of the confiscation order.

8. Confiscation proceedings were taken against the five men. In the course of those proceedings the judge found that there were hidden assets (being the unrecovered jewellery) of £5,610,521.71 available to the five men. The judge also added the sum of £689,233 as part of the available amount to the five men.

9. It is now apparent (although it did not appear to feature in submissions during the confiscation hearing relating to Mr Seed before the judge) that the five men had expressly consented to the sale of the jewellery worth £689,233.

10. Some of the unclaimed jewellery recovered from Sterling Road and Enfield cemetery was subsequently sold at various auctions by the police and by the time of the confiscation proceedings involving Mr Seed the remaining value of the jewellery recovered from Sterling Road and Enfield cemetery and held by the police had reduced from £689,233 to £318,386.

**The arrest and conviction of Mr Seed and the recovery of further jewellery**

11. Mr Seed was later identified as Basil. He was arrested on 27 March 2018 at a flat in Birkenhead House, London and further jewellery was recovered from his flat. This jewellery was valued, for auction purposes, at £143,129.74. This jewellery was shown to persons who had lost items from their safety deposit boxes in the 2015 burglary and some property was returned and some was not claimed. The remaining part which was not claimed was valued at £66,415.54.

12. Mr Seed was tried in the Crown Court at Woolwich before the judge and a jury. On 15 March 2019 Mr Seed was convicted of two counts being: conspiracy to commit burglary; and conspiracy to disguise, convert, transfer or remove criminal property. He was sentenced to 10 years imprisonment on count one, and 8 years imprisonment concurrent on count two, making an overall term of imprisonment of 10 years. After his conviction and sentence confiscation proceedings were brought against Mr Seed.

**The confiscation proceedings and ruling by the Judge**

13. Mr Seed said at the confiscation proceedings that he had no right to the jewellery which was seized apart from one gold ingot which he said was his. His evidence about this ingot was rejected by the judge in the confiscation proceedings.

14. In the confiscation proceedings it was agreed that Mr Seed, because of his conviction on count 2, had a "criminal lifestyle" for the purposes of POCA. This meant that the assumptions set out in section 10 of POCA were relevant.

15. Section 10(4) provided that "any expenditure incurred by the defendant" after the commission of the crime was met from property obtained by him as a result of his general criminal conduct. The relevant expenditure was £24,540. The judge was satisfied that the property recovered from the appellant's address was stolen property bar a few insignificant items.

16. The prosecution contended that the benefit obtained by Mr Seed was in excess of £25 million, but in the previous confiscation proceedings for the other defendants, they had settled on a figure of £13,645,899. This was the figure which was adopted for the benefit from the burglary. This figure was added to the expenditure of £24,540 to give a total benefit figure of £13,670,429.

17. The judge then turned to consider the available amount. The judge had earlier decided, in confiscation proceedings against the co-defendants, that there were hidden assets amounting to £5,610.521.71. The judge decided that there was no reason to adopt a different figure for Mr Seed and the judge therefore found that there were hidden assets of £5,610,521.71. It is not apparent that any submission was made to the judge below to the effect that the sum of £5,610,521.71 should have been reduced by the amount of jewellery worth £143,129.74 found at Birkenhead House, and there was no such submission before us. We do not know the way in which the sum of £5,610,521.71 was calculated and we are not in a position on this appeal to review that figure which, in any event, was not challenged on this appeal.

18. The judge then turned to consider the jewellery recovered from Mr Seed's flat at Birkenhead House, as well as that recovered from Sterling Road and Enfield cemetery which had not yet been claimed by the owners of the safety deposit boxes or sold by the police. As noted above these items of remaining jewellery were valued at £66,415.54 (Birkenhead House) and £318,386 (Sterling House and Enfield cemetery).

19. Before the judge the prosecution contended that all of the remaining jewellery formed part of the overall amount available to Mr Seed to satisfy his confiscation order. It was submitted on behalf of Mr Seed that the value of the jewellery was not available to Mr Seed because the jewellery had been seized by the police and therefore the available amount and recoverable benefit should be reduced.

20. The judge found that Mr Seed had an interest in the jewellery from both Birkenhead House and from Sterling Road and Enfield cemetery, and that they fell to be taken account as part of the realisable amount. The judge held that even though physical control was with the police, the jewellery was not without value simply because the appellant could not access the proceeds. The available amount was therefore £5,997,684.93 (being hidden assets of £5,610,521.71 and £318,386 (Sterling House and Enfield cemetery) and £66,43.34 (Birkenhead House), and it was not a disproportionate order to make.

21. When addressing the argument about the difference made by adding in the £66,415.54 from Birkenhead House and £318,386 from Sterling House and Enfield cemetery as an available amount, the judge said at paragraph 20(a) of his ruling that "I have no hesitation in saying that the difference between these figures would not affect any eventual default term". The judge recorded that he could not see any practical advantage in deciding the point but the defence submitted that a lower confiscation order might assist Mr Seed, and the prosecution submitted that the sum needed to be included so that it could be distributed to those who owned the property. The judge was not convinced by either submission and regretted that he had not case managed the issues more actively. As to the term in default the judge set this at seven years. The judge ordered that the confiscation order was not to be enforced to the extent that a sum had been recovered by way of satisfaction of another confiscation order.

**The practical effect of the compensation and confiscation orders made by the judge**

22. The compensation and confiscation order made by the judge meant that Mr Seed, in common with the other five men, had to return the hidden assets of £5,610,521.71 or serve a period of imprisonment in default. So far as the jewellery was concerned, the police would sell the jewellery recovered from Sterling House and Enfield cemetery with the express consent of the five men. So far as the jewellery recovered from Birkenhead House was concerned the police would apply to the Magistrates' Court for an order under section 67A of POCA. This would enable the jewellery recovered from Birkenhead House which was still unclaimed to be sold. The proceeds of sale would then be applied to the compensation order and reduce the amount outstanding under the confiscation order. In practical terms the police were selling the jewellery on behalf of the five men and Mr Seed and thereby reducing the amounts under the compensation and confiscation orders.

23. It is now clear that it was in Mr Seed's interest to have the value of the unclaimed jewellery recovered from Sterling Road and Enfield cemetery and from Birkenhead House included as part of his available amount. This is because section 79 of the Magistrates' Court Act 1980 provides a mechanism under which part payments of a compensation order will reduce, on a pro rata basis, the amount of the term in default. If the sums of £66,415.54 (Birkenhead House) and £318,386 (Sterling Road and Enfield cemetery) are included and sold pursuant to an order under section 67A of POCA it appears, from a note provided by the parties to the court after the hearing, that some 164 days would be taken off the seven year default term. This is important because if Mr Seed succeeds in showing that all or some of the recovered jewellery does not form part of his available amount, this court will need to be careful to ensure that we exercise our powers so that "taking the case as a whole, the appellant is not more severely dealt

with on appeal that he was dealt with by the court below" which would be contrary to section 11(3) of the Criminal Appeal Act 1968.

**The issues on the appeal**

24. Mr Sutton QC on behalf of Mr Seed submitted that the judge's ruling failed properly to apply the provisions of sections 9, 79, 82 and 84 of POCA. This had led the judge to overstate the available amount by including the value of the unclaimed amounts of jewellery stolen from the safety deposit boxes recovered from Sterling Road and Enfield cemetery, and Birkenhead House. Mr Sutton submitted that the remaining unclaimed jewellery from Sterling Road and Enfield cemetery, and Birkenhead House was not an "available amount" to Mr Seed because it was in the possession of the police at the time of the confiscation proceedings and Mr Seed had never owned the jewellery. It was further submitted that Mr Seed could not sell the jewellery and so it would have no value to him.

25. Mr Sutton also submitted that if these items had been included the period in default should have been lower by some 6.5 per cent, which represented the percentage by which the value of the available amount had been overstated. 6.5 per cent of the term in default was effectively 5 and a half months. At the time of the hearing before us it did not seem that the practical effect of section 79 of the Magistrates' Court Act 1980 had been considered on behalf of Mr Seed. The parties were directed to put in a note, to be agreed if possible, on the effect of section 79. As recorded above, the note showed that under the present order Mr Seed would have about 164 days taken off the default term if the jewellery was sold and payments were made.

26. After the hearing Mr Sutton put in an additional note dated 14 July 2021 seeking permission to raise two further points on appeal. The first point was that it was now understood that one of the five men had paid part of the confiscation order from personal assets, and that there was therefore no parity in default terms between Mr Seed and that co-defendant anymore. The second point was that as the earlier available amount to the five men had been higher, they would have more taken off their default terms when the property was sold by the police and credited to the confiscation order than would Mr Seed.

27. In his submissions at the hearing before us Mr Evans QC on behalf of the prosecution submitted that the Theft Act 1968 provides that a thief does assume a right over stolen property pursuant to section 3 because the term "appropriates" includes an assumption of the rights of the owner. The appellant has assumed a possessory "right" over the property he has stolen and therefore had an "interest" in it for the purposes of POCA. It was further submitted that even if the jewellery in the sum of £384,801.54 had been wrongly included the period in default should remain the same. It was pointed out that the default period was half of the maximum term (14 years) that could be imposed, and that co-defendants whose available amount had varied from £6,594,145.25 to £7,635,233.31 but who had also received default terms of 7 years, notwithstanding the difference in value.

28. The issues were further refined in the course of oral submissions before us. There was a short further hearing on 29 July 2021, after a judgment had been sent to the parties in draft and further notes had been produced on behalf of Mr Seed and the prosecution, to consider the effect of the consent of the five men to the sale of the unclaimed jewellery

recovered from Sterling Road and Enfield cemetery on Mr Seed's possession of that jewellery. We are very grateful to Mr Sutton and Mr Evans, and their respective legal teams, for their helpful submissions and written notes.

29. It is apparent that the issues to address on the appeal are: (1) whether the judge was wrong to include in the "available amount" the unclaimed jewellery stolen from Hatton Garden and seized by the police from Sterling Road and Enfield cemetery (£318,386) and from Birkenhead House (£66,415.54); (2) if so, whether the term in default should be reduced; and (3) whether Mr Seed should be entitled to rely on the new points raised in the note dated 14 July 2021 and if so whether the confiscation order should be amended.

**Relevant statutory provisions**

30. Confiscation proceedings under POCA will assess the "benefit" made by the defendant. The amount of the benefit figure may be affected by statutory assumptions if the defendant is deemed to have a criminal lifestyle for the purposes of POCA. Once the benefit has been determined it is then necessary to determine the "available amount" under section 9 of POCA. The "recoverable amount" is the amount of the benefit unless the available amount is less than the benefit.

31. The available amount is defined in section 9 of POCA. This is the total amount of free property less obligations which have priority (such as other orders made on conviction). So far as relevant section 9 provides:

> "Available amount
>
> (1) 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 …"

32. Section 79 of POCA deals with value and so far as relevant provides:

> "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."

33. Section 82 of POCA deals with free property. It defines property as being free "unless it falls within subsection (2) or (3)". Subsection (2) sets out property in respect of which orders have been made under statutory provisions, such as "section 27 of the Misuse of Drugs Act". Subsection (3) sets out property which has been forfeited or detained under statutory provisions, such as cash forfeiture notices under schedule 1 to the Anti-terrorism, Crime and Security Act 2001. It is common ground that none of the statutory provisions in subsections (2) or (3) are applicable in this case.

34. Section 84 of POCA deals with general provisions relating to property and, so far as relevant, provides:

> "(2) The following rules apply in relation to property—
>
> (a) property is held by a person if he holds 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)."

**Some relevant legal principles**

35. The parties relied on a number of previous authorities. In the light of the issues in this case the starting point is *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381; [2001] 1 WLR 1437. The claimant had been arrested with another man for handling a stolen motor car. The claimant was at the time driving a Ford motor car which was seized by the police pursuant to statutory powers in sections 19 and 22 of PACE. The Ford motor car was also found to be stolen because the Vehicle Identification Number had been ground off, but the owner had not been identified. The claimant was not charged with any offences and demanded delivery up of the Ford motor car. The judge, having found that the car was stolen, dismissed the claim. The Court of Appeal upheld the judge's finding that the car was stolen, but ordered its return to the claimant. This was because he had possession of the Ford motor car before it was seized. The police only had power to retain the Ford motor car pursuant to the statutory powers. After those powers were exhausted the claimant had the best title to the Ford motor car and was entitled to its return. The fact that the Ford motor car had been stolen did not mean that the defence of illegality trumped the right of return of the car in that case. Part of the reasoning of the Court of Appeal in *Costello* depended on the fact that the claimant did not need to rely on anything more than his right to possession to assert his claim which meant, under the prevailing approach of the decision of the House of Lords to illegality at common law in *Tinsley v Milligan* [1994] 1 AC 340, that the claim was not defeated by illegality.

36. Reference was made to *R v Rose* [2008] EWCA Crim 239; [2008] 1 WLR 2113. This case concerned whether a stolen child's motorcycle formed part of the benefit which was obtained by the defendant. It was held to be part of the benefit because the appellant had obtained a possessory right to it. This case did not deal with the issue of available amount. It might be noted that this case was decided before the decision of the Supreme Court in *R v Waya* [2012] UKSC 51; [2013] 1 AC 294 had made it clear that any confiscation order had to be proportionate.

37. The parties also relied on *R v Islam* [2009] UKHL 30; [2009] 1 AC 1076, where the House of Lords held that for the purposes of sections 79(2) and 80(2) of POCA illegal goods obtained by a defendant were not to be treated as having no value when calculating a defendant's "benefit" for the purposes of confiscation proceedings. Therefore the value of illegal drugs was a benefit, even though it had no value after seizure. All the judges, however, agreed that for the purposes of assessing the "available amount" the drugs did not have a value, see paragraphs 18 and 37 of the

judgment. This is because it was common ground that "the market that has to be contemplated for the assessment of the available amount must be taken to be one which the defendant can resort to realise his assets without acting illegally", see Lord Hope at paragraph 18. Mr Sutton relied in particular on this statement and similar dicta from Lord Mance at paragraph 34 to the effect that it would be impossible to regard the heroin as having any market value because "it would not (because it could not) ever be bought or sold on any market".

38. *R v Islam* was considered and applied by *R v Kakkad* [2015] EWCA Crim 385; [2015] 1 WLR 4162, where the benefit was reduced from £2.2 million to £1.1 million to reflect the evidence about the value of the drugs held by the defendant. It was not a case about available amount.

39. Reference was also made to *R v Brooks* [2016] EWCA Crim 44; [2016] 4 WLR 79. That was an undisclosed assets case where it was held the judge had erred in including the value of drugs as an available benefit, because they could not be lawfully sold. The available benefit was reduced from £3.6 million to £500,000, and the period of default imprisonment reduced from 7 years to 5 years.

40. It should be noted that it was not argued before us by either party that the decision in *Costello* had been affected by the provisions of section 329 of POCA, which post-dated the decision in *Costello.* Section 329 of POCA makes it an offence for anyone knowingly to acquire or possess criminal property. It was also not argued before us that the approach to illegality taken in *Costello* had been affected by the recent decision of the Supreme Court on illegality in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467. *Patel v Mirza* modified the approach taken by the common law to illegality. As the resolution of this point will not make any practical difference to either party and because we have not heard argument on these points, we will not determine them. They might be relevant to address in any future case concerning the possessory rights to property acquired by a thief.

**Seized jewellery and the available amount (issue one)**

41. In our judgement when Mr Seed removed the jewellery from the safety deposit boxes he was, with the other five men, taking possession of the jewellery. Mr Seed, as a person in possession of goods, even if those goods have been stolen, had a possessory title to those goods. Mr Seed's possessory title was good against the world save for the owners of the jewellery. The rights of the owner could be enforced by the owner or sometimes relied on by third parties pursuant to the provisions of the Torts Interference with Goods Act 1977, see *Costello* and generally Clerk & Lindsell on Torts, Twenty-Third Edition, at 16-47.

42. The police have various statutory powers in relation to stolen goods. So far as is relevant in this case, the police powers to seize and retain the jewellery under PACE is, as was made clear in paragraph 11 of *Costello*, a temporary right to retain property for the specified statutory purposes. The effect of the seizure under PACE was to suspend Mr Seed's possessory right to the jewellery removed from him by the police but, as *Costello* makes clear, it did not give the police a better title to the jewellery than Mr Seed. The police were therefore entitled to, and did, show the stolen jewellery to owners of the safety deposit box who had the better rights as owners of the jewellery if they could identify it as theirs.

43. As to the unidentified and unclaimed jewellery, under the common law, Mr Seed (and the five other men) were entitled to call for the return of the jewellery once the police no longer required it for statutory purposes under sections 19 and 22 of PACE. As noted above this would be subject to the provisions of section 329 of POCA about which we were not addressed. In our judgement this meant that Mr Seed and the five men had an interest, within the meaning of section 84(2)(h) of POCA in the jewellery. This is because they had a right to possession, suspended pending the police's exercise of statutory powers. This might also be described as a contingent right to possession of the jewellery on the exhaustion of the police's statutory powers. This approach is consistent with the approach in *Webb v Chief Constable of Merseyside Police* [2000] QB 427 at 448 which itself followed *Field v Sullivan* [1923] VLR 70, and was considered in *Costello* at paragraphs 24. This expressly contemplated the temporary suspension of rights to property. This was the position for the five men when the confiscation order was made against them for the jewellery recovered from Sterling Road and Enfield cemetery. The passages in *Webb* and *Costello* also confirmed that the right to possession could be divested by a Magistrates' Court order authorising the sale of property.

44. As to the value of that right, the confiscation order against the five men was made on the basis that the jewellery would be sold by the police with the consent of the five men. This meant that there was no issue of the five men acting illegally by handling and purporting to sell the stolen goods, therefore engaging section 329 of POCA. It also meant that the point in *R v Islam* about there being no available amount because it was illegal to sell the class A drugs did not arise. This is because the sale of the unclaimed jewellery recovered from Sterling Road and Enfield cemetery by the police was with the consent of the five men who had a right to possession of that jewellery which, in circumstances where the owners could not be identified, was the best right available. The proceeds of sale were then applied to reduce the amounts owing under the confiscation order.

45. Once, however, the five men, who had been in possession with Mr Seed of the jewellery recovered from Sterling Road and Enfield cemetery, had expressly consented to the sale by the police of the property, in our judgment. Mr Seed lost his right to possession of the unclaimed jewellery recovered from Sterling Road and Enfield cemetery. This is because, assuming that the concept of de facto joint possession is valid (which has been doubted, see F. Pollock and R.S Wright *Possession in the Common Law* (Oxford 1888) at page 21 "physical possession is exclusive, or it is nothing", and D. Fox *Enforcing a Possessory Title to a Stolen Car* [2002] CLJ 27) once the five men in joint possession of the unclaimed jewellery recovered from Sterling Road and Enfield cemetery had consented to its sale by the police, whatever joint rights to possession Mr Seed had had over that jewellery had disappeared. This is so even if it was planned by the five men and Mr Seed (as it appears to have been from paragraph 12 of the note dated 27 July 2021 prepared by Mr Evans and Ms MacDonald) that Mr Seed would receive more of the jewellery later recovered from Sterling Road and Enfield cemetery. The effect of the consent of those in joint possession would have been to divest Mr Seed of possession, in the same way that co-owners in possession of property may act to destroy another co-owner's interest in goods, see generally *Halsbury's Laws of England, Volume 80* at paragraph 840.

46. The inclusion of the £318,386 as an available amount for Mr Seed in the confiscation order was therefore wrong, because it was not available to Mr Seed after the five men had consented to the sale of that jewellery recovered from Sterling Road and Enfield cemetery by the police. We note that this argument was not addressed to the judge below, and so it is not surprising that he did not deal with it.

47. The position in relation to the £66,415.54 worth of unrestored jewellery taken from Birkenhead House is, in our judgment, different. Mr Seed had taken possession of this jewellery after it had been removed from the safety deposit boxes in Hatton Gardens. The police lawfully interfered with this right to possession by seizing the jewellery and returning some of it to the owners, who had a better right to it than Mr Seed. The police were entitled to retain possession pursuant to section 22 of PACE but once the statutory purposes were exhausted, Mr Seed would have the right to possession of the property. The effect of the seizure under PACE was to suspend Mr Seed's possessory right to the jewellery removed from him by the police but, as *Costello* makes clear, it did not give the police a better title to the jewellery than Mr Seed.

48. The practical effect of this means that, under the common law, Mr Seed was entitled to call for the return of the jewellery once the police no longer required it for statutory purposes under sections 19 and 22 of PACE. In our judgement this meant that Mr Seed had an interest in the jewellery, within the meaning of section 84(2)(h) of POCA. Section 84(2)(h) of POCA is very broadly drafted and expressed. The interest was the right to possession, suspended pending the police's exercise of statutory powers. As noted above this might also be described as a contingent right to possession of the jewellery on the exhaustion of the police's statutory powers.

49. This right to possession of the jewellery, suspended pending the exercise by the police of their statutory powers was, in the very particular circumstances of this case, a valuable right for Mr Seed at the time of the confiscation hearing. We note that there was no submission before the judge below or to us that if Mr Seed did have a right to the jewellery, its value was other than the market value of the jewellery. This is not surprising because the scheme of the confiscation order in this case was that the police would, after the making of the confiscation order, obtain an order under section 67A of POCA for the sale of the £66,415.54 worth of jewellery from Birkenhead House, and credit the proceeds of sale to reduce the confiscation order. This meant that the sale was effectively on behalf of Mr Seed. Such a sale would be lawful because it would be made pursuant to a Court order, therefore avoiding the *R v Islam* point.

50. All of this means that the available amount to Mr Seed was overstated in the confiscation order by £318,386, but that there was no such overstatement in relation to the £66,415.54.

**The reduction of the default term to ensure that Mr Seed is not more severely dealt with (issue two)**

51. The effect of reducing Mr Seed's available amount is that he will not get the benefit of the reduction of the days pursuant to section 79 of the Magistrates Court Act 1980 when the remaining £318,386 worth of jewellery from Sterling Road and Enfield cemetery is sold. This means that if the term in default is not reduced Mr Seed will have succeeded on the appeal in reducing the available amount under the confiscation order, but will have ended up by being more severely dealt with in practice. Such a result is not

permissible under section 11(3) of the Criminal Appeal Act 1968. We will therefore have to reduce the days in default for Mr Seed to mirror the days which would have been taken off Mr Seed's term in default when the jewellery was sold by the police.

52. On the basis of the figures provided by the parties after the hearing it seems that 136 days will need to be taken off the term in default. This is because this is the number of days that would have been taken off Mr Seed's default term of seven years when the £318,386 worth of jewellery from Sterling Road and Enfield cemetery had been sold.

53. All of this explains the comment at the beginning of this judgment that the issues raised by this appeal are effectively academic. This is because Mr Seed's position and the position of those whose jewellery was stolen from safety deposit boxes will remain the same.

**No leave to argue further points raised after the hearing (issue three)**

54. As noted above, after the hearing Mr Sutton put in an additional note dated 14 July 2021 seeking permission to raise two further points. The first point was that it was now understood that one of the five men had paid part of the confiscation order from personal assets, and that there was therefore no parity in default terms between Mr Seed and that co-defendant anymore. The second point was that as the earlier available amount to the five men had been higher, they would have more taken off their default terms when the property was sold by the police and credited to the confiscation order than would Mr Seed.

55. We refuse permission to allow these new points to be argued. So far as the first and second points are concerned exact parity between Mr Seed and the five men is impossible to achieve. This is because Mr Seed managed to escape detention for a substantial period of time and had the advantage of his continued freedom with access to the stolen jewellery which the other five men did not have. Further the confiscation order made provision for payments to be credited where it was appropriate. So far as the first point is concerned we do not have exact details of the payments that have been made by one of the five men. So far as the second point is concerned there will be some minor differences between the position of Mr Seed and the five men, but that was because Mr Seed avoided arrest for longer. If he had wanted exact parity he could have surrendered to the police on an earlier occasion. Further this point had been available to be taken before the judge and in the grounds of appeal. It is not apparent that thought had been given to the workings of the confiscation order in practice at the time when the appeal was issued. At the end of day if Mr Seed wishes to obtain a substantial reduction of his term in default he can make a payment from the hidden assets which the judge has found to exist, which finding Mr Seed has not challenged on this appeal.

**Conclusion**

56. For the detailed reasons set out above the appeal is allowed to the extent that the confiscation order is amended so that the "available amount" for Mr Seed is reduced by removing the £318,386 worth of jewellery from Sterling Road and Enfield cemetery. As Mr Seed's term in default would have been reduced by 136 days when that jewellery was sold by the police under the confiscation order, we adjust Mr Seed's term in default to remove 136 days to avoid him being in a worse position than he was as a result of

his partial success on the appeal. We refuse Mr Seed permission to raise the new points identified in the note dated 14 July 2021.