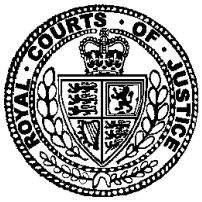

Neutral Citation Number: [2024] EWCA Crim 340

Case No: 202303577 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LIVERPOOL
His Honour Judge Murray
T20217184

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2024

Before :

LORD JUSTICE EDIS
MRS JUSTICE FARBEY
and
THE RECORDER OF SHEFFIELD
His Honour Judge Richardson KC, Sitting as a judge of the Court of Appeal Criminal Division

- -

Between :

THE KING	**Appellant**
- and -	
BRADLEY LUXTON	**Respondent**

- -
- -

David Perry KC and **Alex Langhorn** (who did not appear below) (instructed by **CPS Proceeds of Crime Division**) for the **Appellant**
Nathaniel Rudolf KC (who did not appear below) and **Barnaby Hone** (**assigned by the Registrar**) for the **Respondent**

Hearing dates : 15 March 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 16 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Edis :

1. This is the fifth case in a series of appeals by the prosecution under section 31 of the Proceeds of Crime Act 2002, "the 2002 Act". Where a section number is given in this judgment without specifying the Act from which it comes, it is a section of the 2002 Act. Under s.31(2), if the Crown Court decides not to make a confiscation order the prosecutor may appeal to the Court of Appeal. The Court of Appeal may confirm the decision or if it believes the decision was wrong may itself proceed under section 6 or direct the Crown Court to proceed afresh under section 6, see section 32(2).

2. The first four cases are the subject of our judgment ("the main judgment") handed down immediately before this judgment, neutral citation number [2024] EWCA Crim 344. These two judgments should be read together. We adopt our summary conclusions in paragraphs [4]-[11] of the main judgment, our analysis of the authorities at [12]-[14] and the fuller reasoning on common principles at [24]-[34]. We shall refer to the authorities, where necessary, by reference to the abbreviations in the Table in paragraph [12]. There are additional authorities referred to in this judgment and these are identified here:-

Title	Reference	Level	Abbreviation in this judgment
R v. Grice	66 Cr App R 167	CACD	*"Grice"*
R v. Menocal	[1980] AC 598	HLE	*"Menocal"*
R v. Reilly	[1982] QB 1208	CACD	*"Reilly"*
R v. Miller	(1992) Cr App R 19	CACD	*"Miller"*
R v. Neish	[2010] EWCA Crim 1011; [2010] 1 WLR 2395	CACD	*"Neish"*
R v. Warren	[2017] EWCA Crim 226	CACD	*"Warren"*
R v. White (Horace)	[2021] EWCA Crim 1511; [2022] 4 WLR 10	CACD	*"White (Horace)"*

3. The application for leave to appeal was referred directly to the Full Court by the Registrar with the cases that are the subject of the main judgment. The reason why this case was heard separately and why we are giving a separate judgment is that it raises three further issues beyond those which were settled in the main judgment. It is not without its complexity. These issues are:-

   i) Is a decision to refuse an application under section 385 of the Sentencing Act 2020 (often called "the slip rule", but see below) to rescind a decision not to make a confiscation order and to refuse to set aside a financial order made in place of a confiscation order a "decision to refuse to make a confiscation order", giving rise to a right of appeal under section 31(2) of the 2002 Act?

   ii) If not, what is the effect of the making of a financial order in breach of section 15(2) of the 2002 Act on the jurisdiction of the Crown Court to proceed under section 6?

   iii) In any event, was the decision of His Honour Judge Murray on 27 July 2023 a "decision not to make a confiscation order" giving rise to a right of appeal under section 31(2)? If so, should that appeal be entertained where the prosecution

withdrew the proceedings, having been confronted with the wrongly decided case of *Iqbal*?

The facts of the confiscation proceedings

4. The respondent's involvement in the higher echelons of drug dealing across the UK was discovered as part of Operation Venetic, the police operation into encrypted telecommunications known as 'Encrochat'. Between March and June 2020, the respondent had arranged multiple transactions of kilos of Class A and Class B drugs worth thousands of pounds. He was arranging the delivery of drugs all over the country including locations as far from his home in the Wirral as Cornwall, Bournemouth and Tyneside. The profits were ploughed into building and renovating his home.

5. He pleaded guilty to six counts of conspiracy on 23 April 2021. These were 5 counts of conspiracy to supply controlled drugs (being a count for each type of drug supplied) and 1 count of conspiracy to convert criminal property. He was sentenced to a total of 16 years' imprisonment on 6 August 2021. On that day His Honour Judge Aubrey KC decided to postpone determination of the confiscation proceedings and set a timetable. The two year permitted period would have expired on 22 April 2023 had it not been, as the judge later found it was, extended by Mr. Recorder Waldron KC on 4 November 2022.

    i) On 22 November 2021, a 'section 18 Statement of Means' was served by solicitors acting for the respondent.

    ii) On 17 December 2021 and 31 January 2022 the timetable was varied. No date for the final hearing was set, and a Review Hearing was fixed for 2 May 2022 following the anticipated completion of the service of evidence under the statutory scheme.

    iii) On 8 March 2022, a 'section 16 Statement of Information' was served by the prosecution. This was in time. It valued the drugs which the respondent had supplied at £1,293,095. It suggested that this was a criminal lifestyle case, and gave an account of a number of complex property transactions resulting in a benefit figure of £2,136,183.70 and an available amount of £393,570.64. The property transactions involved the respondent's father, Garry Luxton, and he occupied a property with his partner, Samantha Newton. Including Appendices, this document contained over 2,000 pages and represented a great deal of work. The police and prosecution had acted with diligence and reasonable expedition in its preparation. Time for a response was extended by the court until 22 July 2022 by order of 22 April 2022.

    iv) On 4 September 2022, after a series of extensions of time, a preliminary 'section 17 Response' was served on behalf of the respondent. It contended for a somewhat lower benefit figure and a lower available amount figure and included this:-

> "As the crown will be inviting the court to make a determination pursuant to s10A POCA 2002 as to the extent of the defendant's interest in the above referred to properties, it is submitted that Samantha Newton and Garry Luxton

> should be notified of this by the crown and invited to the mention hearing to make representations."

v) On 16 September 2022, a 'section 16 Response in Reply' was served by the prosecution. This was in time according to the revised timetable.

vi) On 1 November 2022, Sonn Macmillan Walker Solicitors indicated to the Court that they were instructed for interested parties under s10A of the 2002 Act, namely Garry Luxton and Samantha Newton.

vii) On 4 November 2022 a hearing took place before Mr. Recorder Waldron KC at which the prosecution, the respondent and the interested parties were represented. After re-setting the timetable to allow the interested parties 8 weeks to serve their evidence and the prosecution a further 8 weeks to reply, Mr. Recorder Waldron said this:-

> "The case will be listed for a mention on 24th March and this matter is set for a hearing with an estimated length of two days on 27th July 2023."

In making this order, Mr. Recorder Waldron was fixing a hearing date outside the permitted period, which had not been extended. He did this because everyone present had made an error in assuming that the two year period ran from 6 August 2021. This was what was said in the prosecution section 16 statement, and it was an error. The interested parties could not check against the DCS, because they had not been granted access at that date. The date of conviction was there in the side bar for those who did have access to check. The judge did not consider whether there were exceptional circumstances for this reason. During the hearing the clerk of the court first suggested fixing the hearing for 17 May 2023, but this was not convenient to a witness. The next date offered by the court was the 27 July 2023, which was agreed. We can find no reference to this hearing in a widely shared comment in the side bar of the Digital Case System (DCS), or in the Memoranda section (which is used by the judges at this court), or anywhere else. A transcript was obtained in August 2023 at the prosecution request and we infer that there is a note on the prosecution file which caused them to make that request. There is a record on the Xhibit system on which the court clerk makes a record of hearings, but the parties do not have access to this. Matters would have proceeded much more smoothly in this case if prosecuting counsel then appearing had accurately informed the judge about the expiry of the permitted period, and if someone had made an accurate note of the order which was made as a widely shared comment on the DCS. Neither of these things were difficult to do. The date of conviction is clearly visible as a widely shared comment on the DCS.

viii) On 9 January 2023, the interested parties lodged their witness statements and evidence.

ix) On 24 March 2023 the mention hearing resulted in directions, see below.

x) On 22 April 2023, the period of postponement expired.

xi) On 29 April 2023, solicitors for the respondent wrote in these terms to the CPS:-

> "The above referred to case was last heard before Liverpool Crown Court on 24 March 2023 where the following directions were made:
>
> Skeleton and evidence by 5 May
>
> Prosecution response by 16 June
>
> Final bundle 30 June
>
> We have had difficulties in instructing Counsel in this matter but have now instructed Mr Baki to represent Mr Luxton. He will be preparing the skeleton argument but will need time to get to grips with the case and a legal visit is also booked with Mr Luxton for 12 June in which it is hoped Mr Baki can attend. Given this we write to ask whether you have any objections to the following extension request which will not impact on the contested hearing date:
>
> Skeleton and evidence by 16 June
>
> Prosecution response by 14 July
>
> Final bundle 21 July"

xii) The revised timetable appears to have been adopted. Evidence gathering continued, as shown by the dates of some valuations which were provided to the court. On the day before the hearing of 27 July the solicitors for the interested parties wrote complaining that the hearing could not fairly proceed because of late service of material by the CPS.

The hearing of 27 July 2023

6. On 27 July 2023, the matter was listed before His Honour Judge Murray. By this stage a very considerable quantity of material had been placed before the court, and counsel appeared for the prosecution, for the respondent and for the interested parties. The case was listed for a two day contested hearing. There had been very extensive correspondence between the various parties and the case had been case-managed by the Crown Court which exercised control over the timetable in a complex case. Neither the court nor any party had appreciated that the permitted period expired on 22 April 2023.

7. The prosecution indicated to the court that there had been discussions between all parties (prosecution, defence and interested parties) all morning but they had not yet proved fruitful. An adjournment was granted to the afternoon.

8. Counsel who then appeared for the prosecution describes what then happened in his witness statement, which is consistent with the transcript:-

> "6. When we were called back on, I indicated that we had not been able to reach a settlement on an offer put forward by the defence. I indicated that we were ready to proceed to a final hearing.
>
> 7. HHJ Murray then raised an issue of whether there had been an application to extend the period of postponement. I had been instructed the prosecution had applied for the permitted period which ended in April 2023 to be extended. My instructions were to apply for a further extension in the event of adjournment.
>
> 8. In light of HHJ Murray's observations I checked my hearing record sheet and the DCS sidebar. I could see nothing to indicate the period had been extended. I did not consider whether the Court had extended the period of postponement of its own motion because I saw nothing to suggest it had. Whilst the Court had adjourned the last hearing, there had been no application to extend the period for exceptional circumstances and I was of the view it had not been addressed. This is clearly the point that HHJ had in mind.
>
> 9. HHJ Murray had obviously considered the provision in the statute that any application to extend must be made within the permitted period.
>
> 10. A discussion took place between all three Counsel. Mr Hone provided the case of *Iqbal* (2010). I was of the view the appellate court's very clear decision was fatal to this case. I thought the only option was to withdraw the confiscation proceedings.
>
> 11. We were called back on. HHJ Murray asked what I wanted him to do. I responded that he should dismiss the POCA proceedings. HHJ Murray asked "are you withdrawing" to which I responded "yes". I did not have instructions to withdraw but took the decision in the belief *Iqbal* was fatal to the Crown's application to extend the period of postponement. I could see no other option for the Crown.
>
> 12. It was clear that HHJ Murray had in mind that same view of fatality, hence why he raised it. Even if I had made an application at that stage to extend so that we could proceed to the final hearing at some future date, it would not have succeeded."

9. The judge's note on the side bar said:-

> "BRADLEY LUXTON
> Listed for POCA final hearing
> Prosecution withdraw proceeds of crime application
> Surcharge and collection order
> No order as to exhibits"

10. It is true that the prosecution did withdraw its application, but the judge knew why they were doing this. Counsel had been instructed that time had been extended until the day of the hearing, but neither he nor the judge could find any evidence of any application ever having been made. Both of them seem to have been aware of the order of 4 November 2022. That may be what counsel is referring to in paragraph 8 of his witness statement, above, as "the last hearing". The transcript reads, in part:-

> JUDGE MURRAY: All right. Has there ever been in this case an application to extend time?
>
> COUNSEL FOR PROSECUTION: Yes, it was extended until today.
>
> JUDGE MURRAY: Says who? Can you show me an application to extend time? (Pause)
>
> COUNSEL FOR PROSECUTION: I cannot readily see one on the system.
>
> JUDGE MURRAY: That is why I am asking you to show it to me.
>
> COUNSEL FOR PROSECUTION: Yes.
>
> JUDGE MURRAY: Do you want to go and take some more instructions about this settlement?
>
> COUNSEL FOR PROSECUTION: On that, yes.
>
> JUDGE MURRAY: I tried to give you a hint before.
>
> COUNSEL FOR PROSECUTION: Yes. No, I took the hint, believe you me, I took the hint, but I have not----
>
> JUDGE MURRAY: I am ready to start this. I will give you some more time if you want to take instructions about settlement.
>
> COUNSEL FOR PROSECUTION: Well, I do need to find out about the extension, whether that has actually been granted. Because if it has not we are outside the period, because the conviction date was April 2021.

11. There was then a short break after which the court convened again and this occurred:-

> PROSECUTION COUNSEL: Your Honour, thank you once again for the time and can I thank your Honour for spotting probably what is the most blindingly obvious starting point for this confiscation application, which is the application within the permitted time. Mr Luxton was convicted in April 2021, therefore----
>
> JUDGE MURRAY: I took the pleas.

> PROSECUTION COUNSEL: ----and your Honour took the pleas, that is right. So the two year confiscation period expired in April 2023. Having checked all the hearing record sheets and the file, there is no evidence that an application to extend the permitted period beyond April exists. So no application has ever been made to the court or one that the defence have ever responded to and the period has lapsed in April. The position is from case law -- and I am grateful to my learned friend -- I have not read the case in full myself but I have seen the commentary of it, the case of *R v. Iqbal*, the Court of Appeal held that an application to extend must be made before the expiry of the permitted period and it seems to us that that brings this to an end because no application has ever been made.
>
> JUDGE MURRAY: So what are you doing?
>
> PROSECUTION COUNSEL: Well, I invite the court to dismiss the application.
>
> JUDGE MURRAY: So the prosecution are withdrawing this application, are they?
>
> PROSECUTION COUNSEL: Yes.
>
> JUDGE MURRAY: Okay, prosecution withdraw Proceeds of Crime Act application.

12. In his later judgment on 15 September dealing with the application under section 385 to vary or rescind his order of 27 July the judge recorded that he had accessed the Xhibit log of the hearing of 4 November 2022 on 27 July 2023. This passage of that judgment said:-

> "……prosecuting counsel told the Recorder that the 2 year period expired in the middle of August 2023. After that information was given – the date of 27th July 2023 was given for the final hearing. It looked to me as if the hearing date of 27th July 2023 was given as a result of the court being told that the 2 year limit ran out in mid-August 2023 – when it in fact ran out on 22nd April 2023. That was of concern to me, as I couldn't see that the issue of postponing beyond the 2 year period and the issue of exceptional circumstances had been addressed."

13. This information was not shared with counsel on 27 July 2023 and so they made no submissions about it. It seems from paragraph 8 of his witness statement that prosecuting counsel entertained some similar thoughts, but he said nothing about that on the transcript.

14. The judge recorded the decision of the prosecution to withdraw proceedings knowing that it was made in the belief that no postponement of the proceedings to 27 July 2023 had taken place, and knowing that the prosecution believed, as a matter of law, that no application could be made for a postponement after the expiry of the permitted period.

He also knew that the decision had been made by counsel on the basis of an authority which he had not read "in full". Alarm bells about the reliability of the decision in *Iqbal* had been sounded in *T* and very loudly indeed in *Guraj*. It is perhaps a little disappointing that no-one brought those decisions to the attention of the court. It was suggested to us that *T* was a decision where the court had cited *Iqbal* without criticising it, but that is unsustainable. Lord Justice Laws said in *T* at [13]:-

> "In our judgment HHJ Ambrose should not have been inhibited, as he was, by Hooper LJ's observation in *Iqbal* so as to conclude that there was no jurisdiction here to entertain the confiscation proceedings."

15. The court there simply asserted that a judge should not have been inhibited by an "observation" which was on the face of it binding on him. That may have left the matter uncertain, but the Crown Court should have had both authorities, if it was to be influenced by either. In any event, *Guraj* is very explicit in expressing doubts about the correctness of *Iqbal*.

16. Finally, the judge did not know whether prosecuting counsel was aware that the 27 July 2023 hearing date had been fixed by a judge at a hearing on 4 November 2022. No mention of that event was made by anyone.

The application under section 385 Sentencing Act 2020

17. The CPS quickly appreciated that an error had been made. On 4 August 2023 an application was made under section 385 of the Sentencing Act 2020 to rescind the surcharge order and the "order that there would be no confiscation order in these proceedings." This was supported by a lengthy skeleton argument by Mr. Perry KC and Mr. Langhorn, which set out the chronology in detail and examined the relevant authorities relating to section 385 and also the line of authority starting with *Soneji* which we identify in our first judgment. The submissions were summarised as follows:-

> "i. The earlier Confiscation Proceedings were withdrawn by Counsel for the Prosecution on the basis of a series of errors of fact and law, namely that:
>
> a. There had not been a valid extension of the period of postponement;
>
> b. The failure to apply for such an extension of the period of postponement was fatal to the application for a Confiscation Order in that it removed the jurisdiction of the Court to make such an Order;
>
> c. There was no means of remedying the position by asking the Court to retrospectively approve the extension of the period of postponement beyond the permitted period; and
>
> d. The Court would in any event be bound to refuse the application because of failings (if they were material failings) by the Prosecution to serve a bundle on the Interested Third

> Parties (who had in fact only served a detailed skeleton argument raising matters of fact and law on 17 May 2023). (The correct position is that the Court was not required to look simply at the compliance of the Prosecution with the Orders made following the hearing on 24 March 2023, but the conduct of all parties throughout the proceedings, per *Regina v. Halim* [2017] EWCA Crim 33 {5B-41, at 1099}. This was particularly important given the delays occasioned by both the conduct of the Defendant (his failure to comply with earlier Orders) and the Interested Third Parties, who had been ordered to serve their skeleton argument and supporting material by 5 May 2023. In all the circumstances, if there was any prejudice caused by delay (which there was not) the cure would have been an Order for the costs of the hearing on 27 July 2023 rather than refusing any extension of the permitted period and period of postponement).
>
> ii. The Court erred in not considering whether it should, of its own motion, impose a Confiscation Order given the duty to do so contained within section 6(3) POCA 2002;
>
> iii. It is open to the Court under section 385 SA 2020 to vary the sentence imposed by making an Order which was not made (or applied for) when sentence was imposed, per *Regina v. Menocal [1980] A.C. 598, Regina v. Reilly* [1982] Q.B. 1208 and *Regina v. Miller* (1991) 92 Cr. App. R. 191;
>
> iv. It would be in the interests of Justice to rescind the earlier orders and to proceed under section 6 POCA 2002 and impose a Confiscation Order; and
>
> v. The Defendant would, otherwise, obtain a windfall benefit as a result of the Prosecution and the Court's error as to the extent of its jurisdiction to make a Confiscation Order."

18. This document was further refined, and shortened, in a skeleton argument dated 16 August 2023. Citations from *Soneji, Johal, Guraj* and *Ahmed* were set out. It is not necessary to deal with those, in view of our conclusions in the main judgment. The hearing on 4 November 2022 was accorded somewhat greater prominence in this document, probably because the transcript of it had been obtained, along with a citation from *Neish* at [11]:-

> "Whether it was described as an adjournment or a relisting, in our judgment a decision to put the hearing back to a later date constituted a postponement."

19. The following passage from Lord Steyn in *Soneji* at [27] was also not set out:-

> "First, lower courts have accepted that, in parallel to the statutory confiscation postponement proceedings, there exists a common law jurisdiction to adjourn confiscation proceedings. In my view

> section 72A(3) [the predecessor to the "exceptional circumstances" provision in section 14 of the 2002 Act] rules out such co-existing powers. I would rule that there is no such common law jurisdiction."

Section 385 Ruling

20. We pay tribute to the care and skill with which the judge addressed the position at the hearing under section 385 of the Sentencing Act 2020. He did not, of course, have the benefit of the main judgment we hand down today.

21. The Judge recorded that he was not deciding whether to make a Confiscation Order under the 2002 Act, nor whether there were grounds to extend the period of postponement of the confiscation proceedings beyond the 2 year limit under section 14. The judge then explained that he had had little time to prepare for the hearing on 27 July, but had considered the Xhibit log for 4 November 2022 and the decision in *Johal* while doing so. He expresses surprise that prosecuting counsel said in his witness statement that he had been instructed to apply for a further postponement if the case were not dealt with on that day. In fact, according to the transcript, prosecuting counsel had told the judge that there had been an extension of the permitted period to the hearing on 27 and 28 July, see paragraph 7 of the witness statement at [8] above, and the passage from the transcript at [10].

22. The judge recorded that he had not chosen not to make a Confiscation Order, because the prosecution had withdrawn that application, so the only order he could now be asked to vary was the Surcharge Order. The Surcharge Order was not wrong in principle so he refused to vary that order.

23. The Judge gave further reasoning for his decision, in case "others take a different view" of the reasoning whereby he reached his decision. The prosecution appeared to argue that the prosecution cannot withdraw confiscation proceedings and a Judge was under a duty to continue the confiscation proceedings, based on section 6 of the 2002 Act. The judge did not accept this interpretation of the section. He found that the court was only under a duty to proceed under section 6 of the 2002 Act if the prosecution was asking the Court to make such a determination. If, in every such case, the court was under a duty to decide whether the defendant had a criminal lifestyle and whether he had benefitted, in what sum and to decide the recoverable amount, just in order to check whether the prosecution had made the correct decision, that would take up a vast amount of resources and surely could not have been what the Act intended.

24. Having considered *Miller* and *Warren*, the Judge was not persuaded that he had made an error, of law or fact, on 27 July 2023 and therefore, section 385 of the Sentencing Act 2020 did not apply. The prosecution had the power to withdraw confiscation proceedings and did so in this case; the court did not make a decision not to make a confiscation order. There was no clear and obvious error to remedy under the slip rule.

25. The judge held that it could not be said that all parties knew that the final hearing was being postponed to beyond the 2 year limit or that all parties were implicitly agreeing that there were exceptional circumstances that necessitated postponement beyond the 2 year limit. The prosecution misled the court as to the relevant dates in November 2022. No care had been taken at all to comply with the 2 year period, no application was made

to ask the court to consider exceptional circumstances and this appeared to be the result of a systemic failure, rather than one-off mistake. *Johal* allowed a Judge to consider whether exceptional circumstances existed retrospectively, but here, as a result of the actions of the Crown Prosecution Service, there were no exceptional circumstances. Moreover, he held that the Recorder, if correctly informed on 4 November 2022 that the permitted period expired on 22 April 2023 would not have considered that there were exceptional circumstances. He would instead have fixed the final hearing for a date before 22 April 2023. The fact that the parties were not in fact ready by then was immaterial because people often take longer to do things if the timetable of the case allows. The judge did not therefore decide whether there were, as of 4 November 2022, exceptional circumstances to justify a postponement to 27 July.

26. The judge did not deal head on with the proposition that the proceedings had in fact been postponed to 27 July 2023, because he held that the judge who did that had been misled by the prosecution about the end date of the permitted period and thought that he was choosing a date within it. Neither did he deal with section 14(8) of the 2002 Act and the decision in *Soneji* that matters of this kind do not, in any event, go to the jurisdiction of the court.

Grounds Of Appeal

27. The prosecution applies pursuant to section 31(2) of the 2002 Act for leave to appeal against the decision made on 15 September 2023 to refuse the application, dated 4 August 2023, made under section 385 of the Sentencing Act 2020 to rescind the order made imposing the Statutory Surcharge; and vary sentence so as to make a confiscation order in the proceedings, on these grounds:-

i) It is submitted that the refusal of the application amounts to a decision not to make a confiscation order, thus conferring jurisdiction on the Court of Appeal;

ii) The judge erred in refusing the application by:

a) reading into the guidance given by the Court of Appeal in *R v Warren* [2017] EWCA Crim 226 in relation to applications under section 385 of the Sentencing Act a caveat that it applied only where the Court had made a material error of law and/or fact; and,

b) adopting too narrow an approach to the question of whether there were exceptional circumstances in this case such as would permit the extension of the period of postponement beyond the permitted period.

iii) There were exceptional circumstances in this case which permitted the extension of the period of postponement beyond the permitted period;

iv) Instead, a technical error has been permitted to frustrate the statutory intent of Parliament that offenders be deprived of the proceeds of crime in circumstances where there was no prejudice to the defendant. Permission to appeal should be granted, the appeal allowed and the case remitted under section 32(2)(b) to the Crown Court with a direction that it proceed afresh under section 6 of the 2002 Act.

Respondent's Grounds Of Opposition

28. The respondent contends that:

    i) The decision of the judge was not a decision not to make a Confiscation Order. Therefore, the prosecution have no right of appeal under s31(2) of the 2002 Act. The refusal to rescind the Surcharge Order under the 'slip rule' is not appealable under section 31 of the 2002 Act;

    ii) The Judge took the right approach to the test under the 'slip rule';

    iii) The Judge adopted the correct approach to deciding whether there were exceptional circumstances. As set out in his judgment, he considered the relevant authorities. Had the court known of the correct expiry date for the postponement period, an appropriate final hearing date within that period would have been found. The delay was due to the prosecution, with no explanation. The decision was a matter of judicial discretion considering the position as a whole. Nothing exceptional was shown and the Judge made the correct decision not extend the period in the circumstances.

29. We heard very able submissions from Mr. Perry KC for the prosecution and Mr. Rudolf KC and Mr. Hone, following, on behalf of the respondent.

Discussion and decision

30. In our judgment it is necessary first to examine the judge's principal reasoning for his decision on 15 September not to rescind his decision of 27 July not to make a confiscation order. This was that he had not in fact made such a decision. As he put it, he "had no decision to make". He held that the only decision which had been made was that of the prosecution in withdrawing the proceedings. The only decision which the judge had made was the imposition of the statutory surcharge which was obligatory in the circumstances. He could not therefore vary or rescind anything and the application failed. The rest of his reasoning was intended to deal with various submissions the prosecution had made and explained why, if they had required a decision, he would have rejected them.

31. This was a very narrow approach to the power he had under section 385 of the Sentencing Act 2020. A miscarriage of justice had occurred on 27 July 2023. No confiscation order was made in a case which was listed for hearing and in which it was agreed that a confiscation order in six figures was appropriate. The dispute was about whether that should have been in the region of £100,000 or £300,000. This was a dispute about the available amount, it being agreed that the benefit figure was very much larger than that. The judge's conclusion on section 385 was that the court had no power to correct this miscarriage of justice because the author of it was prosecuting counsel on that day, abetted by the failure of the CPS to evidence the postponement which had been granted on 4 November 2022.

32. Whereas an appeal only lies to this court under section 31 of the 2002 Act from a decision not to make a confiscation order, section 385 of the Sentencing Act is not in such limited terms. It reads as follows:-

> **385 Alteration of Crown Court sentence**
>
> (1) Subsection (2) applies where the Crown Court has imposed a sentence when dealing with an offender.
>
> (2) The Crown Court may vary or rescind the sentence at any time within the period of 56 days beginning with the day on which the sentence was imposed. This subsection is subject to subsections (3) and (4).
>
> (3) Subsection (2) does not apply where an appeal, or an application for leave to appeal, against that sentence has been determined.
>
> (4) The power in subsection (2) may be exercised only by—
>
> (a) the court constituted as it was when the sentence was imposed, or
>
> (b) where that court comprised one or more justices of the peace, a court so constituted except for the omission of any one or more of those justices.
>
> (5) Where a sentence is varied under this section, the sentence, as so varied, is to take effect from the beginning of the day on which it was originally imposed, unless the court directs otherwise. This is subject to subsection (6).
>
> …….

33. It is common ground that the conduct of confiscation proceedings is part of the sentencing process for this purpose.

34. It is to be noted that the 2020 Act does not require some error of law or fact as a condition precedent of the exercise of the power. Specifically, it does not provide that if an error has occurred, there is no power to correct it because the error was that of the prosecutor. It is possible that the phrase "slip rule" suggests a more restrictive approach than the Act requires. The power was first introduced by statute on the creation of the Crown Court by section 11(2) of the Courts Act 1971. The common law power which had previously existed to vary or rescind sentences passed in the Assizes and Quarter Sessions is described in *Menocal*. Lord Edmund-Davies rejected a restrictive interpretation of the new power advanced by Waller LJ in *Grice* see page 611G-E and 612H-613A, saying:-

> "My Lords, giving section 11(2) the wide interpretation which I consider should be accorded to it (and with respect, not restricted to mere 'slips of the tongue or slips of memory'), the action of the trial judge in this case would, as I think, have been entirely proper had it been done timeously. But it was not…"

35. The later decisions on this power are very often concerned with pointing out what the power should not be used for, rather than providing a gloss on the statute to define

comprehensively the circumstances in which it may be used. Nothing we say here casts any doubt on any of those decisions, but they should all be read with that observation in mind.

36. That the power exists in relation to financial orders ancillary to sentence, and that the time limit is strict, was established in *Menocal, Miller* and *Reilly*. Those jurisdictional requirements were satisfied in this case.

37. That the power includes a power to increase as well as to reduce sentence was recognised in *Menocal* (see 612E-G per Lord Edmund-Davies) and *Warren*. In *Warren* the court examined earlier authority and elicited 6 propositions at paragraph [22]. None of those propositions state that the power cannot be used to correct an error made by the prosecution which caused the court to act otherwise than as it should. Proposition 2 starts:-

> "A judge should not use the slip rule simply because there is a change of mind about the nature or length of sentence but the slip rule is available where the judge is persuaded that he had made a material error in the sentencing process whether of fact or law…."

38. In our judgment this restriction is a matter of practice not jurisdiction. In restricting the availability of the power to cases where there has been an error, it appears to be in conflict with the wider interpretation favoured by Lord Edmund-Davies in *Menocal*, which does not appear to have been cited. It reflects good sentencing practice. There must be some finality to decision making and a judge should avoid revisiting reasonable decisions. Judges are busy people and do not have time to do every case twice. It is unkind to victims, defendants and others involved in the proceedings and disruptive to the conduct of other cases to convene post-sentencing hearings where they are unnecessary. Where, however, a judge considers that a sentence was, on reflection, wrong (not necessarily in the sense of the tests which the Court of Appeal would apply on an appeal or a reference of an unduly lenient sentence) there is no statutory limit on the freedom to change it. Particular care should be exercised before deciding that a sentence should have been more severe than it was and, in general, a judge would only do so where there was some objective basis for reaching that conclusion. That is a conclusion based on fairness and humanity, rather than on some limit to the power to be found in statute.

39. The judge also cited *White (Horace)* at paragraph [51] in which the Court of Appeal made some observations about the proper use of section 385 in a case where the CPS had attempted to persuade the sentencing judge to use it to impose a more severe sentence on an offender. The CPS had written a letter to the court complaining that the sentencing judge had failed to follow the proper procedure and to apply a number of authorities. The judge decided not to increase the sentence, and the scope of the section 385 power was not therefore in issue before the Court of Appeal. The observations of the court about it were entirely appropriate and designed to ensure that "such an attempt to exert pressure on a sentencing judge should not be allowed to occur again." We echo that. However, the court did not purport to construe section 385 but was, in the passage quoted by the judge, describing how the prosecution might properly invoke it. That was to illustrate the improper approach which it had taken in that case.

40. At all events, in this case, as we have seen, there clearly were errors of both fact and law which had affected the outcome of the hearing on 27 July.

41. Prosecuting counsel referred only to *Iqbal* which he had just been shown, and had not fully read, as he told the judge. The judgment in *Iqbal* occupies 5 pages and has 28 paragraphs. It was 13 years old at 27 July 2023 and it would be a reasonable enquiry first to take the necessary 15 minutes to read it, and then to establish whether it had been doubted or followed in the meantime. A search would quickly produce *T, Johal* and *Guraj*. The "tension" between *Iqbal* and *Soneji* referred to in *Johal* and developed in *Guraj* is the subject of this observation in Blackstone's Criminal Practice at E19.69:-

> "Secondly, in *Guraj* [2016] UKSC 65, the Supreme Court agreed (at [37]) that 'the courts will not wish to see the intention of Parliament defeated by technical points taken to stave off meritorious confiscation orders'. The decision in *Guraj* itself followed *Knights* [2005] UKHL 50, where the House of Lords held that flaws in the postponement procedure under the CJA 1988 would not invalidate a subsequent confiscation order if the judge has acted in good faith (see also *Ashton* [2006] EWCA Crim 794). Subsequently, in *Iqbal* [2010] EWCA Crim 376, the Court of Appeal held that, where there had been an order for postponement but no return date set and the confiscation application was not then revived until after the expiry of the permitted two-year period, there was no jurisdiction to proceed. The decision in *Iqbal* was doubted in *T* [2010] EWCA Crim 2703 and does not survive the decision of the Supreme Court in *Guraj*."

42. Unlike prosecuting counsel, the judge had an awareness of the authorities and says in his judgment of 15 September that he had considered *Johal* prior to the hearing on 27 July. He also consulted Archbold where there is no equivalent observation to that in Blackstone, cited above. But in paragraph [35] of *Johal* Irwin J notes that "it is possible that there is some tension between the approach taken in *R v. Iqbal* and the approach of their Lordships in *Soneji*." The court then distinguishes *Iqbal* on the facts and does not apply the principle to be found in it to the facts of the case before it, citing *T* in support of that approach. In our judgment, the judge was aware that the legal position was not as simple as prosecuting counsel appeared to think, and it was apparent that prosecuting counsel was not fully aware of the law. There was a risk that the public interest would be damaged if he was allowed to proceed without properly considering the matter. That was a risk which the judge could have avoided by declining to permit the withdrawal of the proceedings and requiring full argument on the point after counsel had had time to research the law.

43. Prosecuting counsel was not only wrong about the law, he was also not fully informed about the facts. He correctly told the court at the hearing on 27 July that the permitted period had been extended to 27 July 2023, but was unable to substantiate this when the judge asked whether there had been an application. There does not appear to have been an application, but none is necessary. The court can postpone or extend a postponement of its own motion, see section 14(7)(c) of the 2002 Act. It may be done without a hearing: CrimPR 33.13(12)(c). The order made by Mr. Recorder Waldron KC on 4 November 2022 was, as the judge correctly held on the 15 September 2023, a valid

postponement of the permitted period. Mr. Recorder Waldron did not appreciate that this was what he was doing, because he had been misinformed by a different prosecuting counsel about the date when the original permitted period was to expire. Nonetheless, he made an order fixing the hearing for a date after the expiry of the permitted period, and this can only have been a postponement, see *Neish* and *Soneji* at [18] and [19] above. He did that without considering whether there were exceptional circumstances, but that was remediable, see *Johal*, and not in any event a failure which would deprive the court of jurisdiction. The judge, unlike counsel, had seen the Xhibit note of the hearing of the 4 November 2022, in the absence of anything on the side bar in the DCS or any memorandum or other record of the order. He had some concerns about it, which he did not share with counsel on 27 July, but which he recorded in his judgment on 15 September 2023. The matter is rendered a little unclear in retrospect by counsel's witness statement, but on the day of the hearing it appeared that the decision of prosecuting counsel to withdraw proceedings on 27 July was taken on the basis that there had in fact been no postponement to 27/28 July 2023. Again, the position was not as clear as this and the court should not have allowed proceedings to be "withdrawn" until it had been sorted out.

44. "Withdrawal" of proceedings by the prosecution does not bring them to an end. That only occurs when the court decides not to make a confiscation order. This is the plain meaning of section 6 of the 2002 Act, and is a consequence of the duty being placed on the court. Confiscation proceedings are not civil litigation brought for the benefit of the person making the claim. They are driven by the court, acting in the public interest further to its statutory duty under section 6. Once that duty arises, there is nothing in the Act which says that it ceases if the prosecution purports to withdraw the proceedings. Of course, the court will rely heavily on the prosecution in deciding whether to make a confiscation order and in what terms it should be made, but the final responsibility is that of the court. We do not accept that Crown Court judges face an impossible burden in discharging that responsibility. It will often be entirely reasonable to rely on the prosecution. If the prosecutor decides that the continuation of confiscation proceedings is no longer justified by the evidence or the public interest, they should be able to explain why that is so quite succinctly. Where the explanation reveals that proper thought has been given and the outcome is sensible, the court will act on it and will decide not to make a confiscation order. The decision not to make a confiscation order once the court has decided to act in accordance with section 6 is always one for the court. In this case, the judge did not make a confiscation order on 27 July because he wrongly held that the withdrawal of the proceedings by the prosecution, without more, brought them to an end. That is wrong as a matter of law. In the circumstances that misdirection was a decision not to make a confiscation order.

45. On the facts of this case, the explanation given by the prosecutor for the decision to withdraw the proceedings was manifestly flawed as a matter of fact and law as we have explained. The judge should have refused to act in accordance with it and heard submissions from all sides. If he was satisfied that the proceedings had been postponed on 4 November 2022 to a two day hearing starting on 27 July 2023 he should have established whether that order was challenged on the basis that the Recorder who made it had not decided whether there were exceptional circumstances to justify the postponement after the two year permitted period. He should then have decided whether it was arguable that this failure deprived the court of jurisdiction unless remedied. If so, the judge should have applied *Johal* and the broad view of

"exceptional circumstances" required by *Soneji*, see the main judgment. The late arrival into already complex proceedings of two third parties whose fair trial rights had to be protected by the court when proceeding under section 10A of the 2002 Act was an exceptional circumstance. In fact, Mr. Recorder Waldron fixed the first date for the hearing which the court offered which was convenient to the parties. It is well known that waiting times in the Crown Court for 2 day fixtures where custody time limits do not apply are very long, given the exceptional circumstances which have contributed to the current backlog. As events were to show, the preparation for hearings of this kind takes longer than perhaps it should, see the respondent's application for an extension of time made on 29 April 2023 at [5](xi) above. For all these reasons there clearly were exceptional circumstances which justified fixing the hearing for 27/28 July 2023 and granting the necessary extended postponement. The judge was plainly wrong to find otherwise. He was exercised by various failures by the prosecution, but none of these was the cause of the decision of the court in November 2022 to fix the hearing for 27 July 2023.

46. On 15 September the judge had knowledge of all relevant facts and significant assistance from new counsel to deal with the law. He should have concluded that his decision (for that is what it was) not to make a confiscation order on 27 July should be rescinded and he should have granted a further postponement to a fixed hearing date, and given any necessary directions.

47. However, the matter does not end quite there. This is a prosecutor's appeal under section 31(2) of the 2002 Act. Such an appeal only lies against a decision not to make a confiscation order. That decision was taken on 27 July and not 15 September. We do not consider that section 31(2) gives the prosecutor a right of appeal against a decision under section 385 of the Sentencing Act 2020. Accordingly, the appeal as advanced cannot succeed. In a footnote to the Application for Permission to Appeal, the prosecution contemplated this possibility. They said:-

> "If the Court of Appeal concludes the Learned Judge erred, and had decided not to make a confiscation order on 27 July 2023 an application is made to extend the time permitted for the lodging of this application. The reason it has been served at this time is the Prosecution first invited the Court to reconsider the matter pursuant to *section 385 SA 2020* (the *"slip rule"*) as it considered that was the appropriate course where the reason no order was made was because the Court was in error as to whether there had been a valid extension of the period of postponement which could then be corrected by a finding of exceptional circumstances."

48. The court floated in argument the possibility of allowing an amendment to the appeal to challenge the decision of 27 July 2023 and Mr. Perry KC said that he would seek to proceed that way if we decided in the way explained in this paragraph, and relied on this footnote. This would require an extension of time. It was common ground that he usual principles for the grant of such extensions apply. In this case, the appeal as so formulated has strong merits and allowing it to be advanced out of time would cause no prejudice to the respondent or the interested parties. The issues have been fully argued before us and no further delay is involved. Whether the judge took a decision on 27 July and, if so, whether that decision was obviously wrong, are questions which

have been central to the appeal as formulated and we have received full submissions on them from both parties to the appeal.

49. It would not be in the interests of justice for the prosecution to fail in its appeal because of the way it formulated its challenge when the substance of that challenge is meritorious. A great deal of public time and money has been invested in these proceedings and it is in the public interest that they should be brought to a conclusion on the merits.

50. It would have been prudent for the prosecution to appeal against the decision of the 27 July as well as making its application under section 385. That application should, as we have held, succeeded and if so it would have rendered pursuit of the appeal unnecessary. If it had failed, as it did, then a further challenge could have been added to the appeal at that stage, if so advised.

51. Accordingly, we grant:-

i) leave to amend the Notice of Appeal to challenge the decision not to make a confiscation order made on 27 July 2023;

ii) the necessary extension of time;

iii) leave to appeal in respect of the new challenge now permitted.

52. For the reasons which we have set out in full above, we are satisfied that the judge erred in principle and on the particular facts of the case in deciding that because the prosecution withdrew the proceedings he "had no decision to make". This conclusion was a decision not to make a confiscation order and the appeal as now formulated is allowed. The Crown Court will be directed to proceed afresh, which in this case means that there should be a review hearing in which the court will proceed as the judge should have done on either 27 July or 15 September 2023. This must be fixed within 28 days of the handing down of this judgment. A hearing date will then be fixed, an extension of the permitted period will be granted to that date, and any further necessary directions will be given. Whether or not the circumstances of this case were exceptional before, they certainly are now.

53. We have no jurisdiction to set aside the statutory surcharge order made on 27 July 2023. The judge should have done that on 15 September but no appeal lies against that decision. There has been no appeal against the surcharge by the respondent. It ought not to have been made in the first place because of section 15(2)(ca) of the 2002 Act. Its continued existence does not obstruct the continuation of the confiscation proceedings. Blackstone at E19.68 deals with the matter in this way:-

> "….a postponed confiscation order is not invalidated simply by the making of such orders beforehand (*Guraj* [2016] UKSC 65, and see *Sachan* [2018] EWCA Crim 2592, where the order erroneously imposed during the period of postponement was a compensation order which did not invalidate the subsequent confiscation order, and likewise *Bristowe* [2019] EWCA Crim 2005, which concerned a 'victim surcharge')."

54. The significance of the making of a financial order within section 15(2) of the 2002 Act before the confiscation order is made is that section 14(11) is disapplied by section 14(12) of the Act. The impact of that is explained by *Guraj* which on this issue is binding on us. A confiscation order made after the Crown Court proceeds afresh in compliance with the directions of this court will not be liable to be quashed because of any defect or omission in the procedure connected with the application for or the granting of a postponement.