HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Regina *v.* Soneji and another (Respondents) (On Appeal from the Court of Appeal (Criminal Division))

[2005] UKHL 49

LORD STEYN

My Lords,

1. The central question of law arising on the appeal before the House is whether the Court of Appeal acted on the correct legal principle when it quashed two confiscation orders made by the Crown Court pursuant to the Criminal Justice Act 1988, as amended by the Proceeds of Crime Act 1995: *R v Soneji and Bullen* [2004] 1 Cr App R(S) 219.

1. The Confiscation Regime.

2. Parliament has firmly adopted the policy that in the fight against serious crime, apart from ordinary sentences, a high priority must be given by the courts to the making of confiscation orders against defendants convicted of serious offences. The purpose of confiscation proceedings is to recover the financial benefit that the offender obtained from his criminal conduct. In England and Wales the confiscation regime was introduced by the Drug Trafficking Offences Act 1986. It was extended by the Criminal Justice Act 1988 to cover other indictable offences and specified summary offences. Since its introduction this legislation has been amended from time to time. The approach reflected in this legislation has been reinforced by the United Kingdom's ratification on 28 June 1991 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs And Psychotropic Substances 1988 and ratification on 28 September 1992 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990.

3. The most recent statute is the Proceeds of Crime Act 2002, which came into force on 24 March 2003. The aim of the new statute is to create an effective unified regime of confiscation law. Given the almost year by year amendment over the last 20 years of sometimes overhasty criminal legislation, and the great difficulties created for the courts by much of this flood of legislation, it would be innocent to predict that the 2002 Act has solved the problems involved in the criminal process of confiscation. On the present appeals the interpretation of the 2002 Act does not arise for consideration. Section 14(11) of the 2002 Act, however, is of some historical interest. It provides:

> "A confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement."

In the course of moving the Bill in the House of Lords the Lord Chancellor explained (Hansard, HL Debates, 25 June 2002, col 1241) that section 14(11) is:

> ". . . designed to stop confiscation orders from being quashed merely because some procedural error has taken place in the application of the postponement procedures. I shall, if I may, provide your Lordships with a little background on this occasion, as it is directly relevant to the amendments.
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> As your Lordships will be aware, the Bill amends the postponement regime in the existing legislation. . . . It is important to understand, however, that the basic mechanics of the postponement regime envisaged by the Bill remain rather similar to those in the existing legislation.
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> Unfortunately, it is becoming increasingly clear that the courts are finding this legislation difficult to operate. A string of appeal cases testifies to the fact that defendants regularly attempt to have the confiscation order overturned on the ground that the postponement procedures were not applied properly by the court. Confiscation orders are being lost as a result. The case of *Woodhead*, [[2002] 2 Cr App R (S) 238] decided by the Court of Appeal in January this year, is a good example. In that case, the postponement procedures had been followed to the letter.

> However, the Court of Appeal overturned a confiscation order of £200,000 on the grounds that the judge had not shown that he was exercising his discretion when agreeing to the postponement."

This provides some retrospectant evidence of the difficulties caused in practice by the postponement procedures under the 1998 Act.

4. The appeals before the House are governed by the 1988 Act, as amended. Under this legislation there is no provision like section 14(11). In other words, there is no express provision that a confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement.

5. For present purposes the relevant provisions of the 1988 Act are section 71(1) and section 72(A). Section 71(1), as amended, reads as follows:

> "Where an offender is convicted, in any proceedings before the Crown Court or a magistrates' court, of an offence of a relevant description, it shall be the duty of the court –
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> (a) if the prosecutor has given written notice to the court that he considers that it would be appropriate for the court to proceed under this section, or
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> (b) if the court considers, even though it has not been given such notice, that it would be appropriate for it so to proceed,
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> to act as follows before sentencing or otherwise dealing with the offender in respect of that offence or any other relevant criminal conduct."

The succeeding subsections of section 71 then spell out the duties of the court in detail. About section 71(1) three points must be noted. First, it places an overarching duty on the court when an offender is convicted to consider how to act in respect of confiscation. Secondly, even if the prosecutor does not seek by notice to persuade the court to consider confiscation, the court must of its own motion consider whether to

embark on confiscation proceedings. Thirdly, the court must act in this way act before sentencing.

6. Section 72(A) of the 1988 Act, as amended, governs postponed determinations. It provides:

> "(1) Where a court is acting under section 71 above but considers that it requires further information before –
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> (a) determining whether the defendant has benefited from any relevant criminal conduct; or
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> (b) . . .
>
> (c) determining the amount to be recovered in his case . . .,
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> it may, for the purpose of enabling that information to be obtained, postpone making that determination for such period as it may specify.
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> (2) More than one postponement may be made under subsection (1) above in relation to the same case.
>
> (3) Unless it is satisfied that there are exceptional circumstances, the court shall not specify a period under subsection (1) above which -
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> (a) by itself; or
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> (b) where there have been one or more previous postponements under subsection above (1) or (4) below, when taken together with the earlier specified period or periods,
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> exceeds six months beginning with the date of conviction.
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> (4) Where the defendant appeals against his conviction, the court may, on that account –
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> (a) postpone making any of the determinations mentioned in subsection (1) above for such period as it may specify; or
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> (b) where it has already exercised its powers under this section to postpone, extend the specified period.
>
> (5) A postponement or extension under subsection (1) or (4) above may be made –
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> (a) on application by the defendant or the prosecutor; or
>
> (b) by the court of its own motion.

(6) Unless the court is satisfied that there are exceptional circumstances, any postponement or extension under subsection (4) above shall not exceed the period ending three months after the date on which the appeal is determined or otherwise disposed of.

(7) Where the court exercises its power under subsection (1) or (4) above, it may nevertheless proceed to sentence, or otherwise deal with, the defendant in respect of the offence or any of the offences concerned.

(8) Where the court has so proceeded -

(a) subsection (1) of section 71 above shall have effect as if the words from 'before sentencing' onwards were omitted;

(b) that subsection shall further have effect as if references to an offence that will be taken into consideration in determining any sentence included references to an offence that has been so taken into account; and

(c) section 72(5) above shall have effect as if after 'determining' there were inserted 'in relation to any offence in respect of which he has not been sentenced or otherwise dealt with".

The genesis of section 72A is as follows. The earlier provisions were premised on the basis that in the normal case the court would deal with the confiscation order before sentencing the defendant. The power to postpone confiscation proceedings was provided in effect as an afterthought by the Criminal Justice Act 1993.

7. Section 72(A) has spawned a substantial case law. A troublesome question has been whether under subsection (3), absent exceptional circumstances, the court is deprived of the power to make a confiscation order after the lapse of six months. In practice lapse of the six month limit has frequently been thought to compel the result that the convicted offender is freed from the penalty of confiscation.

8. In practice the courts have, as the Lord Chancellor observed during the passing of the 2002 Act, found the postponement procedures under section 72(A) difficult to interpret and apply. Many confiscation orders have been overturned for very technical failures. An example is *R v Palmer*, The Times, 5 November 2002, where the Court of Appeal

quashed a confiscation order of more than £30 million because of a defect in a prosecutor's notice. The Court of Appeal has held that *Palmer* was wrongly decided: *R v Sekhon* [2003] 1 WLR 1655, 1672-1673, para 51-56; subsequently affirmed by a five-member court in *R v Simpson* [2004] QB 118. In both cases it was held that the provisions concerning postponement were directory only. This was an attempt by the Court of Appeal to ensure that mere procedural errors would not in future deprive the court of the power to proceed, if appropriate, to confiscation. *Sekhon* and *Simpson* have, however, not entirely solved the problem of how to deal with errors in the application of postponement procedures. That will become clear when the present case and its disposal by the Court of Appeal after the decision in *Sekhon* is considered.

II. The Confiscation Proceedings.

9. This prosecution concerned a money-laundering scheme. Between September 1997 and July 1999 more than £15 million in used sterling bank notes were laundered through a small bureau de change close to Victoria Station, London. There were cash deposits on 189 different dates in sums of up to £350,000 at a time. In each instance the cash was exchanged either for high-denomination foreign currency notes (with a view to it being physically carried out of the jurisdiction) or for bankers drafts or for electronic transfers. The scheme was masterminded by a man called Raju Soneji. Accused No 1, Kamlesh Soneji, is his brother. Accused No 1 acted as the runner of Raju Soneji and was responsible for physically delivering to the bureau most of the sterling cash deposits. Accused No 2, David Bullen, acted as a link-man between the Soneji brothers and one of the criminal groups making use of their laundering services. On 24 March 2000 in the Crown Court at Southwark Accused No 1 pleaded guilty to an offence of conspiracy to convert property and to remove it from the jurisdiction knowing or suspecting that it represented the proceeds of criminal conduct, contrary to section 1 of the Criminal Law Act 1977. On 3 April 2000 Accused No 2 pleaded guilty to the same offence.

10. On 21 June 2000 the prosecutor served notice under section 71(1)(a) of the 1988 Act that he considered that it would be appropriate for the court to proceed under that section. On 18 August 2000 the judge sentenced Accused No 1 to 4½ years imprisonment (varied on appeal to 3½ years imprisonment) and Accused No 2 to six years imprisonment (varied on appeal to five years imprisonment). In January 2002, the judge made a confiscation order against the Accused No 1 in

the amount of £75,350. Subsequently, the order was varied to £30,284. The judge made a confiscation order against Accused No 2 in the sum of £375,000. Before these orders were made counsel for the two defendants unsuccessfully submitted to the judge that because of the lapse of the six months period under section 72(A)(3) the judge no longer had jurisdiction to make the confiscation orders.

III. The Court of Appeal Decision.

11. The Court of Appeal (Criminal Division) quashed the confiscation orders on the basis that they had been made more than six months beyond the date of conviction. The Court of Appeal accepted that there is a power to postpone the making of a confiscation order under the 1988 Act and a power to adjourn such proceedings at common law, but held these powers may only be exercised where the sentencing court finds that there are established exceptional circumstances which justify the postponement or adjournment. The Court of Appeal held that a failure to consider or make a finding of exceptional circumstances deprived the sentencing court of jurisdiction to make a confiscation order. The Court of Appeal quashed the confiscation orders for want of jurisdiction under the 1988 Act: *R v Soneji* and *Bullen, supra*.

IV. The Certified Questions.

12. The Court of Appeal certified that the following points of law of general public importance were involved in the decision to allow the appeals against the confiscation orders:

> "(i) Is the court's common law jurisdiction to adjourn confiscation proceedings subject to a mandatory time limit of six months from the date of conviction save where 'exceptional circumstances' are present?
>
> (ii) Once the court has assumed jurisdiction under section 71 of the Criminal Justice Act 1988, is its jurisdiction thereafter extinguished by failure to comply either with the provisions of section 72A of the Act or any common law requirements relating to the postponement/adjournment of the proceedings?"

While the Appellate Committee always pays close attention to the formulation of questions certified by the Court of Appeal, it is not bound by the terms of the certification: *Attorney General for Northern Ireland v Gallagher* [1963] AC 349, 365, per Lord Reid. In this case I would prefer, in the first place, to consider what are the legal consequences of failures under the confiscation regime under section 72(A), and in particular the time limit under section 72(A)(3).

V. The Assumption.

13. There is an initial difficulty. Before one can consider the legal consequences of failures under section 72(A) it is necessary to identify those failures. An examination of the tortuous history of the confiscation procedures in the present case left me in some doubt whether there were indeed material failures in the process. On balance I am prepared to assume (without deciding) that the findings of fact of the Court of Appeal were correct. The Court of Appeal took into account what it conceived to be the effect of the *Sekhon* decision. Giving the judgment of the Court of Appeal Pill LJ observed [2004] 1 Cr App R (S) 219, 232-233, paras 26-28:

> "When the judge gave his ruling on 3 November 2000, that is after the six months had elapsed, he acknowledged, with admirable candour if we may say so, that on 18 August, when the earlier decision was confirmed, no enquiry was made of the defendants as to the postponement and that there had been no analysis of the factors which might amount to exceptional circumstances. In his later rulings, the judge also candidly acknowledged, more than once, that there were not exceptional circumstances and to go behind that judicial finding would create a sense of injustice. Even if the judge's finding may be construed as making a general point that listing difficulties are not an exceptional event, so that it might be said that the use of the expression was not itself fatal, the absence of any judicial enquiry and finding upon the circumstances meant that the requirement was not satisfied.
>
> Failure to address the question whether the circumstances could properly be described as exceptional and to make a finding to that effect is in our judgment fatal to the upholding of these confiscation orders. We would respectfully seek to sustain the principle that confiscation

> orders should not be quashed for mere defects in procedure. To give effect to the requirement that there must be exceptional circumstances, and if the expression is not to be a mere incantation, however, enquiry into the circumstances and the possibility and feasibility of a timely hearing, is required . . . To overlook these failures would be to nullify the statutory intention upheld in the cases. . . .
>
> Even if, contrary to the views expressed, the existence of exceptional circumstances is not invariably a pre-requisite of the exercise of the power to postpone or adjourn beyond six months of conviction, any exercise of the power must recognise, in the light of the authorities, the importance of promptness and the consequent need for a judicial appraisal of the circumstances, including those which it is suggested justify delay. A threshold of difficultness must be crossed. In this case, the lack of enquiry into listing difficulties following conviction and on 29 June, when the date of 30 October was pencilled in, and the lack of analysis of the situation then or, as acknowledged by the judge, on 18 August, make it unfair to uphold orders eventually made in early 2002."

This is the basis on which I propose to consider what are the legal consequences of the failures identified by the Court of Appeal. But the issues have a wider significance.

VI. The Core Problem.

14. A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance. A brief review of the

earlier case law is to be found in *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286, 1294D-1295H.

VII. A New Perspective.

15. In *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, 189E-190C Lord Hailsham put forward a different legal analysis:

> "When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like 'mandatory,' 'directory,' 'void,' 'voidable,' 'nullity,' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts,

> in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."

This was an important and influential dictum. It led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it is necessary to have regard to the fact that Parliament ex hypothesi did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament.

16. In *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286, in an appeal from Hong Kong, the Privy Council followed and applied the dictum of Lord Hailsham in *London & Clydeside Estates.* At first instance the judge found that the deputy commissioner lacked jurisdiction to make two determinations since he had not done so within a reasonable time required by the imperative language of the statute. The Court of Appeal reversed the decision. On appeal the Privy Council dismissed the appeal on two grounds. First, the Privy Council found on the facts that the determinations were made within a reasonable time. Secondly, on the assumption that there had been a breach of the time limit, the Privy Council held that the deputy commissioner had not been deprived of his jurisdiction. After reviewing earlier case law Lord Slynn of Hadley, giving the judgment of the Privy Council, observed [at 1296D]:

> ". . . their Lordships consider that when a question like the present one arises - an alleged failure to comply with a

> time provision - it is simpler and better to avoid these two words 'mandatory' and 'directory' and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void?
>
> In the present case the legislature did intend that the commissioner should make his determination within a reasonable time. . . . If the commissioner failed to act within a reasonable time he could be compelled to act by an order of mandamus. It does not follow that his jurisdiction to make a determination disappears the moment a reasonable time has elapsed. If the court establishes the time by which a reasonable time is to be taken as having expired, which will depend on all the circumstances, including factors affecting not only the taxpayer but also the Inland Revenue, it would be surprising if the result was that the commissioner had jurisdiction to make the determination just before but not just after that time. Their Lordships do not consider that that is the effect of a failure to comply with the obligation to act within a reasonable time in the present legislation. Such a result would not only deprive the government of revenue, it would also be unfair to other taxpayers who need to shoulder the burden of government expenditure; the alternative result (that the commissioner continues to have jurisdiction) does not necessarily involve any real prejudice for the taxpayer in question by reason of the delay."

It will be noted that Lord Slynn spoke of jurisdiction not being lost. He was using that notion in the traditional sense of conveying that the authority or power of the court had not been lost: *Halsbury's Laws of England,* 4th ed, (Re-issue), para 314.

17. *Charles v Judicial Legal Service Commission* [2003] 1 LRC 422 involved an appeal from Trinidad and Tobago. It is a decision of some importance. The case concerned the effect of failures to observe time limits laid down by regulations dealing with discipline and misconduct in the public service. Giving the judgment of the Privy Council

Tipping J (of the New Zealand Court of Appeal) observed, at pp 428-429, para 12:

> "At the outset their Lordships observe that it seems highly unlikely that the Commission can have intended that breaches of time limits at the investigation stage would inevitably prevent it from discharging its public function and duty of inquiring into and, if appropriate, prosecuting relevant indiscipline or misconduct. A self-imposed fetter of such a kind on the discharge of an important public function would seem inimical to the whole purpose of the investigation and disciplinary regime."

He added at p 430, para 17:

> ". . . If a complaint is made about the non-fulfilment of a time limit the giving of relief will usually be discretionary. This discretionary element to which Lord Hailsham referred [in the *London & Clydeside Estates* case] underlines the fact that problems arising from breach of time limits and other like procedural flaws are not generally susceptible of rigid classification or black and white a priori rules. With this in mind their Lordships note that in the present case the delays were in good faith, they were not lengthy and they were entirely understandable. The appellant suffered no material prejudice; no fair trial considerations were or could have been raised, and no fundamental human rights are in issue."

The reasoning in *Charles* is along the same lines as Lord Hailsham's observations and the *Wang* case.

18. There is also subsequent House of Lords authority to similar effect: *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91. In imperative language Parliament had provided that if a defendant is cleared of an offence fingerprints or samples taken from him in the investigation of the offence must be destroyed. There was a breach of the duty. A DNA profile obtained from swabs taken from a rape victim was found to match that of the defendant. He was charged and convicted. The Court of Appeal quashed the conviction. The House of

Lords reversed the decision of the Court of Appeal. The House declined to apply the mandatory/directory distinction. Instead the House adopted the reasoning of Lord Hailsham, concentrated on the consequence of non-compliance, and addressed the question what in the light of the consequences must Parliament be taken to have been intended. The House held that the Parliamentary intent would have been inimical to holding that that the prosecution was invalid: see my judgment, at pp 117-118; Lord Cooke of Thorndon, at pp 120-121; and Lord Clyde, at p 121. Lord Hobhouse of Woodborough agreed, at pp 125-126. Lord Hutton concurred in the result. This decision involved a rejection of the mandatory/directory distinction in the face of explicit imperative language. It is a strong decision.

19. Apart from these three cases which applied Lord Hailsham's dictum, it is to be noted that the Court of Appeal has adopted the same approach on a number of occasions: *R v Kensington and Chelsea Royal London Borough Council Ex p Hammell* [1989] QB 518; *Crédit Suisse v Allerdale Borough Council* [1997] QB 306; *R v Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] 1 WLR 354.

20. Moreover, in the courts of New Zealand, Australia and Canada parallel developments took place. In *New Zealand Institute of Agriculture Science Inc v Ellesmere County* [1976] 1 NZLR 630. Cooke J (subsequently Lord Cooke of Thorndon) speaking for the court said, at p 636:

> "Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance."

This observation was subsequently cited in the *Charles* case in the Privy Council to which I have referred.

21. In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 the Australian High Court addressed the same problem. In the joint judgment of McHugh, Gummow, Kirby and Hayne JJ the court concluded, at para 93:

> "In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticising the continued use of the 'elusive distinction between directory and mandatory requirements' and the division of directory acts into those which have substantially complied with a statutory command and those which have not They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute.'"

This reasoning contains an improved analytical framework for examining such questions. In the evolution of this corner of the law in the common law world the decision in *Project Blue Sky* is most valuable.

22. In Canada there have been developments along similar lines. The starting point is *British Columbia (Attorney General) v Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)* [1994] 2 SCR 41. The mandatory/directory distinction was strongly criticized. For the majority Iacobucci J observed: "courts tend to ask, simply: would it be seriously inconvenient to regard the performance of some statutory direction as an imperative?" My understanding is that, seven of the Supreme Court Justices were agreed on this point, with Lamer CJ and McLachlin J dissenting. In *Society Promoting Environmental Conservation v Canada (Attorney-General)* (2003) 228 DLR (4th) 693 this development was taken a stage further by the Federal Court of Appeal. Relying on Lord Hailsham's dictum,

Evans JA gave the main judgment for the court with Strayer JA concurring in the result and reasoning on this point, at p 710, para 35:

> "(iv) . . . the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity."

I regard the developments in Canada as very similar to those in New Zealand and Australia.

23. Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in *Attorney General's Reference (No 3 of 1999)*, the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction. In my view it follows that the approach of the Court of Appeal was incorrect.

VIII. Application of the Test Enunciated in Attorney General's Reference (No 3 of 1999).

24. It remains to address the point of statutory interpretation in accordance with the test as I have outlined it. On behalf of the two accused counsel submitted that, given the criminal law context, a strict approach to construction of section 72A of the 1988 statute should be adopted. Bearing in mind that one is not dealing with the definition of crimes, but with the process of making confiscation orders, I would reject this approach. The context requires a purposive interpretation: Sir Rupert Cross, *Statutory Interpretation*, 3rd ed (1995), 172-175. Secondly, counsel argued that such an interpretation would render wholly ineffective the Parliamentary intent of providing for a specific time limit. I would not accept that this is correct. At the very least the courts can, where necessary, vindicate the scheme adopted by Parliament by the abuse of process jurisdiction and perhaps in other ways. Thirdly, counsel for the accused relied on an alleged injustice

caused to the accused by the delay of the confiscation procedures. In my view this argument was overstated. The prejudice to the two accused was not significant. It is also decisively outweighed by the countervailing public interest in not allowing a convicted offender to escape confiscation for what were no more than *bona fide* errors in the judicial process.

25. In my view an objective appraisal of the intent, which must be imputed to Parliament, points against total invalidity of the confiscation orders.

26. For these reasons I would allow the appeal of the Crown.

IX. Two Remaining Issues.

27. For the sake of completeness I deal briefly with two remaining issues which were debated at the oral hearing. 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 72(A)(3) rules out such co-existing powers. I would rule that there is no such common law jurisdiction.

28. Secondly, there were competing arguments about whether the requirement of "exceptional circumstances" in section 72(A)(3) should be strictly construed. In lower courts a very strict approach has sometimes prevailed. An expression such as "exceptional circumstances" must take its colour from the setting in which it appears. Bearing in mind the context I would not adopt a very strict approach to the meaning of exceptional circumstances.

X. Disposal.

29. For these reasons, as well as the reasons given by my noble and learned friends Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood, I would allow the appeal of the Crown.

LORD RODGER OF EARLSFERRY

My Lords,

30. If your young daughter wants to go out with friends for the evening and you agree, but tell her that she must be home by eleven o'clock, she is under a duty to return by then. But this does not mean that her duty is to return by then or not at all. Rather, even if she fails to meet your deadline, she still remains under a duty to return home. On the other hand, if you contract with a conjuror to perform at your daughter's birthday party, you want the conjuror and his tricks only for the party. His duty is accordingly limited to performing at the party held on your daughter's birthday and, if he fails to turn up, he cannot discharge the duty later. In the present cases Parliament has placed the court under a duty, where appropriate, to make a confiscation order before it sentences an offender. If the court fails to do so and proceeds to sentence the offender first, does Parliament intend that – like your daughter – the court should remain under a duty to make the order? Or does Parliament intend that the duty should be limited so that – like the conjuror – the court can perform it only before sentencing?

31. I put the issue in terms of the duty of the court, rather than – as counsel presented their arguments - in terms of its power or jurisdiction, since the House is interpreting a statute and it seems best to stick closely to the language which Parliament has used. So far as material, section 71(1) of the Criminal Justice Act 1988, as amended, provides:

> "(1) Where an offender is convicted, in any proceedings before the Crown Court or a magistrates' court, of an offence of a relevant description, it shall be the duty of the court –
>
> (a) if the prosecutor has given written notice to the court that he considers that it would be appropriate for the court to proceed under this section, or
>
> (b) if the court considers, even though it has not been given such notice, that it would be appropriate for it so to proceed,
>
> to act as follows before sentencing or otherwise dealing with the offender in respect of that offence or any other relevant criminal conduct.

(1A) The court shall first determine whether the offender has benefited from any relevant criminal conduct.

(1B) Subject to subsection (1C) below, if the court determines that the offender has benefited from any relevant criminal conduct, it shall then –

(a) determine in accordance with subsection (6) below the amount to be recovered in his case by virtue of this section, and

(b) make an order under this section ordering the offender to pay that amount."

32. When section 71(1) is engaged, it imposes a duty on the court to act as required by subsections (1A) and (1B) and, where appropriate, to make a confiscation order "before sentencing or otherwise dealing with the offender in respect of that offence or any other relevant criminal conduct." This duty is to be contrasted with the mere power, which the court has under subsection (1C), to make such an order if it is satisfied that a victim of the crime intends to take civil proceedings against the defendant. Section 71(1) requires the court to take these steps before proceeding to sentence. But, in practice, the Crown may not have the necessary financial information readily to hand immediately after the defendant is convicted, or else the defendant may challenge some of it and there may need to be an inquiry into the facts. All of this takes time and so, if the confiscation order has to be made before any sentence can be imposed, the defendant may be left in an uncomfortable limbo. From every point of view, there will often be much to be said for the court proceeding to sentence before deciding about the confiscation order. The defendant can then get on with serving his sentence. Parliament recognised this and so, to allow the court to sentence first, by section 28 of the Criminal Justice Act 1993 it inserted section 72A into the 1988 Act. As further amended and so far as material, section 72A provides:

"(1) Where a court is acting under section 71 above but considers that it requires further information before –

(a) determining whether the defendant has benefited from any relevant criminal conduct; or

...

(b) determining the amount to be recovered in his case …,

it may, for the purpose of enabling that information to be obtained, postpone making that determination for such period as it may specify.

(2) More than one postponement may be made under subsection (1) above in relation to the same case.

(3) Unless it is satisfied that there are exceptional circumstances, the court shall not specify a period under subsection (1) above which -

(a) by itself; or

(b) where there have been one or more previous postponements under subsection (1) above or (4) below, when taken together with the earlier specified period or periods,

exceeds six months beginning with the date of conviction.

...

(5) A postponement or extension under subsection (1) ... above may be made—

(a) on application by the defendant or the prosecutor; or

(b) by the court of its own motion.

...

(7) Where the court exercises its power under subsection (1) ... above, it may nevertheless proceed to sentence, or otherwise deal with, the defendant in respect of the offence or any of the offences concerned.

(8) Where the court has so proceeded –

(a) subsection (1) of section 71 above shall have effect as if the words from 'before sentencing' onwards were omitted....

(9) In sentencing, or otherwise dealing with, the defendant in respect of the offence, or any of the offences, concerned at any time during the specified period, the court shall not –

(a) impose any fine on him; or

(b) make any such order as is mentioned in section 72(5)(b) or (c) above.

(9A) Where the court has sentenced the defendant under subsection (7) above during the specified period it may, after the end of that period, vary the sentence by imposing a fine or making any such order as is mentioned in section 72(5)(b) or (c) above so long as it does so within a period corresponding to that allowed by section 155(1) or (2) of the Powers of Criminal Courts (Sentencing) Act 2000 (time allowed for varying a sentence) but beginning with the end of the specified period."

Where the court considers that it requires further information before making a determination, under subsection (1) it may, for the purpose of enabling that information to be obtained, postpone making the determination. But, unless in exceptional circumstances, the period of postponement must not exceed six months from the date of the defendant's conviction. If the court exercises this power and postpones the determination, under subsection (7) the court may nevertheless proceed to sentence the defendant and, where it does so, under subsection (8) section 71(1) has effect as if the words requiring the court to act before sentencing were omitted. Put shortly, if the court postpones the determination of a matter relating to the confiscation order, it can still sentence the defendant and, if it does so, the words in section 71(1) which require the confiscation order to be made first are deemed to be omitted.

33. As my noble and learned friend, Lord Steyn, has explained, in the present case it is said that, in good faith, the court postponed a relevant determination beyond six months from the date of Mr Soneji and Mr Bullen's convictions, even though there were no exceptional circumstances to justify this. I respectfully agree with him that the court had no common law power to postpone the determination to obtain information. I also agree, however, that "exceptional circumstances" in section 72A(3) should not be interpreted too narrowly. The court must comply with the six-month requirement wherever reasonably possible, even if this means that its timetable has to be adjusted accordingly. Nevertheless, I would certainly not rule out the possibility that some listing difficulties could amount to "exceptional circumstances". But the judge must look into the position and see what can and cannot be done. Here the Court of Appeal held that he had failed to do so and that, accordingly, the court had not been entitled to postpone the determinations beyond six months after the defendants' convictions. The Court of Appeal further held that the resulting confiscation orders should be quashed. Therefore, the principal issue raised by the Crown's appeal in these cases is whether, assuming that the judge had not been entitled to postpone the determinations beyond the six-month limit, the confiscation orders were invalid.

34. My Lords, in approaching this issue, I begin by noticing that, faced with the situation where undesirable delays in sentencing were occurring because of the need to complete the confiscation procedure, Parliament introduced section 72A. In itself, this indicates that, in Parliament's view, the duty to make a confiscation order should not be limited to cases where the order can be made before sentence is passed. Of course, Parliament envisages that the court will make the order first

unless it has exercised its power under section 72A(1) to postpone the relevant determination. But it is of some significance that, on a broad view, Parliament sees it as more important that a confiscation order should be made than that it should be made before the defendant is sentenced.

35. Undoubtedly, section 71(1) is the key provision of this Part of the statute. It lays down the primary rule that the court should make any confiscation order before sentencing the defendant. But one must ask why. Why, in Parliament's view, should the sequence be confiscation order followed by sentence? The answer is that in the legislative scheme confiscation orders are to have primacy over fines and other financial disposals, which must be tailored accordingly. This is laid down in section 72(5). It provides that, where a court makes a confiscation order, it shall be its duty to take account of the order before imposing any fine or making any other financial order against the defendant. Therefore in cases where the judge may be considering whether to impose a fine, either as the entire disposal or as one element in the sentence, he will not be able to decide on the appropriate sentence unless he knows whether the defendant is subject to a confiscation order and, if so, for what amount. So the confiscation order is to be considered first.

36. It follows that the purpose behind the sequence in section 71(1) is to make the sentencing process as effective as possible in a system in which confiscation orders have primacy. To help achieve that purpose, the confiscation order procedure should come first. Or, to put it the other way round, what matters is that sentencing should take place after the court decides on any confiscation order. Of course, as Parliament recognised by enacting section 72A, the idea can be pushed too far since it makes little sense to insist on this rigid sequence where there is no prospect of the court imposing a financial penalty. Hence the power for the court to invert the sequence and to sentence the defendant first. But the court can exercise that power even where it contemplates including a fine or other financial order in the sentence. In that kind of case section 72A(9) prohibits the court from imposing the fine or making the order during the period of postponement. After that, however, when it is known whether the defendant is subject to a confiscation order and, if so, for how much, under subsection (9A) the court can vary the sentence by imposing the fine or making the order. In this way Parliament is careful to maintain the appropriate sequence and to ensure that the court can take account of any confiscation order when deciding on the amount of the penalty – as section 72(5) requires. Thus the purpose behind the

sequence laid down in section 71(1) runs, unmistakably, through the scheme of sections 71 and 72A.

37. In the present cases, both Mr Soneji and Mr Bullen, very understandably, wanted to be sentenced on 18 August 2000 rather than wait until the confiscation order matters could be sorted out. In that way they knew as soon as possible what period of imprisonment they were to serve and they could start their sentence. Each of them appealed successfully against the length of the prison sentence imposed on him. But they do not suggest that those sentences pronounced by the court on 18 August 2000, long before the confiscation orders were made on 7 February 2002, were invalid. Nor do they suggest that the reduced sentences which the Court of Appeal substituted on 24 October 2001 – again, months before the confiscation orders were made - are invalid.

38. The position of the respondents therefore appears to be that, since there was no valid postponement under section 72A(1), the confiscation orders are invalid because they were made after the prison sentences were imposed, but the prison sentences are valid even though they were pronounced before the confiscation orders were made. Prima facie, at least, that is an incoherent position: either both should be invalid, because the provisions of section 71(1) have not been observed, or else both should be valid despite the failure to observe those provisions. In my view both are valid.

39. Since Parliament's purpose in prescribing the sequence in section 71(1) was to ensure that the sentencing process was effective, it is the fact that the respondents were sentenced before the confiscation orders were made that constitutes the real breach of the intendment of the section. And, indeed, there would have been a breach of the section if the sentences had been imposed first, even if, on due consideration, the court had decided, in terms of section 71(1B), that the defendants had not benefited from their criminal conduct and so no confiscation order should be made. Of course, the judge did actually make confiscation orders in these cases. But the respondents do not suggest that the fact that they were sentenced before the confiscation orders were made had any bearing on the judge's decision to impose the periods of imprisonment that he did – or, for that matter, on the Court of Appeal's decision to impose the lesser periods of imprisonment. In fact, they do not suggest that the breach of the section interfered in any way with the sentencing procedure. Nor is there any reason why it should have done since both courts imposed custodial rather than financial penalties. This was therefore exactly the kind of case where it made sense for

sentencing to take place, as it did, ahead of the confiscation order. In that situation, where the breach of the requirements of section 71(1) caused no prejudice of any kind to the respondents in respect of their sentences, I am satisfied that Parliament would not have intended that the sentences passed by the judge should be invalid.

40. A fortiori, Parliament would not have intended that the confiscation orders made by the judge should be invalid merely because the sequence required by section 71(1) was not followed. The purpose of that sequence is to ensure the effectiveness of the sentencing procedure, not the effectiveness of the procedure for making a confiscation order. Failure to observe it might therefore, conceivably, have been a reason why Parliament would have intended a sentence to be invalid. But, given the purpose of the sequence, there is no good reason to suppose that Parliament would have intended that the court's duty to consider making a confiscation order under section 71(1) should be limited so that the court could no longer discharge it if, with his consent, the defendant had been sentenced first. Similarly, it is hard to suppose that Parliament would have intended that a confiscation order should be invalid merely because it was made in those circumstances.

41. In the present case the reason why the postponement under section 72A(1) is said to have been invalid is because the period specified took the determination beyond the six-month period in circumstances which were not exceptional. Strictly, the six-month period in section 72A(3) relates to the postponement of a determination in terms of section 71(1A) or (1B)(a), rather than to the postponement of the making of an order under section 71(1B)(b). But, in practice, a court will make an order once it has determined the amount to be recovered. So, at least in the case of a postponement under section 72A(1)(c), the six-month limit means that, unless there are exceptional circumstances, any confiscation order should be made, at the latest, about six months after conviction. That is a protection which Parliament has built into the legislation. But it is a protection for the public interest represented by the prosecution, as well as for the defendant's interest, since the time-limit applies where the court considers it requires further information, irrespective of whether the information is designed to clarify a matter that is favourable to the Crown or to the defence. Presumably, Parliament was concerned that, in the absence of a time-limit, matters might tend to drift once the sentencing was over.

42. In the present cases, the confiscation orders were made not much less than two years after the respondents' convictions. It may be that, if

actings or failures on the part of the prosecution or the court authorities were to lead to a delay of more than six months, this might, depending on the circumstances, amount to an abuse of process which would make it unfair and inconsistent with the spirit of the Act for the court to make a confiscation order. But, here, about six months of the delay were due to the need for the court to resolve points, raised by the respondents, about its jurisdiction to make the orders. Nor is there any suggestion that the prosecution or court authorities were deliberately dragging their feet or otherwise acting in bad faith. In these circumstances I am satisfied that the delay in making the orders does not affect their validity.

43. For these reasons, which are substantially the same as those of the other members of the committee, I consider that the confiscation orders made by the judge were valid and that the Court of Appeal were wrong to quash them. I would accordingly allow the appeal.

LORD CULLEN OF WHITEKIRK

My Lords,

44. This appeal involves an examination of the significance of, and the relationship between, section 71 and section 72A of the Criminal Justice Act 1988, as amended, prior to the coming into force of the Proceeds of Crime Act 2002.

45. The fact that section 71(1) imposes a duty, rather than confers a power, on the court to consider making determinations leading to a confiscation order plainly reflects the importance attached by Parliament to the need to prevent offenders from benefiting by their crimes. For this duty to become operative it is sufficient that the prosecutor or the court considers that it would be appropriate for the court to proceed under that section.

46. According to the terms of section 71(1), the court is to "act as follows before sentencing or otherwise dealing with the offender in respect of that offence or any other relevant criminal conduct". The requirement that consideration of confiscation should precede that of sentence is evidently intended to ensure that account can be taken of any

confiscation order in the sentencing of the offender. Section 72(5) explicitly provides for this when the court is proceeding to impose a fine or make an order such as for the compensation of the victim.

47. Section 72A by subsections (1) and (2) gives the court power to postpone the making of such determinations, and hence a confiscation order, for such period or periods as it may specify, where it "considers that it requires further information" before making them. This is the sole statutory provision for such postponement. It pre-supposes that the court has already come under the duty in section 71(1). The reason for the reversal of the order provided for in section 71(1) is not hard to find. It could take some time for the information in regard to confiscation to be collected and presented to the court. In the result the effect of requiring the determination of confiscation to precede sentencing – as was the case before this section was introduced by the amendment of the 1988 Act – was that it could delay the whole outcome, thus leaving the offender in additional uncertainty.

48. Subsection (3) of section 72A provides that the court "shall not specify a period" which goes beyond a certain time limit "unless it is satisfied that there are exceptional circumstances". Although the terms of the subsection are not entirely straightforward, it is reasonably plain that the intention is that postponement is not to go beyond the date that is six months after the conviction unless there are exceptional circumstances. That subsection appears to be aimed at avoiding undesirable delay in the process which may lead to the making of a confiscation order.

49. Subsections (7) and (8) of section 72A are of some importance in showing the relationship between that section and section 71. The first of these subsections means that in proceeding to sentence the offender the court is not to be hampered by the fact that it has exercised its power of postponement of a determination, subject to the proviso in subsection (9) that during the specified period it is not to impose a fine or make one of the orders to which section 72(5) refers. Paragraph (a) of subsection (8) goes further: when the court exercises its power of postponement and proceeds to sentence the offender, it is no longer required to deal with confiscation first.

50. I do not consider that there is a common law power to postpone determinations which coexists with the power provided for in section 72A. There is no need to regard the terms of section 72A as so limited

in scope as to indicate that such a common law power must exist. The court's requirement for "further information" in subsection (1) may arise from the fact that the information which it requires has not yet been collected. But it may also arise from the fact that it has not yet been presented. "Exceptional circumstances" in subsection (3) does not have to be given a strict interpretation. If there were such a common law power, this would call in question the need for section 72A, and would not sit well with the express terms of that section.

51. As regards the second certified question, I have had more difficulty. It is contended that where the court fails to comply with section 72A it would lose its "jurisdiction" to make the determinations referred to in section 71(1A) and (1B), and hence to make a confiscation order. In the present cases the Court of Appeal held that the failure of the court to address the question whether the circumstances were exceptional when postponing the making of determinations beyond the expiration of the six months was fatal to the confiscation orders.

52. Since the statute does not spell out the legal consequences for the offenders of non-compliance with subsection (3) it is necessary to work out those consequences, applying the authorities to which the noble and learned Lord Steyn has referred. The failure to comply with subsection (3) has to be seen in the light of the purposes of the statutory provisions as a whole, in order to determine whether or not the failure was of such significance as to make the ensuing confiscation orders of no effect.

53. Subsection (3) of section 72A expressly states that the court is not to postpone beyond the end of the six months unless it is satisfied that there are exceptional circumstances. There is a similar prohibition where there is an appeal against conviction. There is force in the view that the section shows that the court cannot proceed except where it is so satisfied. However, it is necessary to scrutinise these provisions in the whole context. Substance may be more important than form. A number of considerations seem to me to be material.

54. First, it is plain that the underlying purpose of the general rule that consideration of a confiscation order is to precede the sentencing of the offender is mainly, if not entirely, directed to cases in which the court is likely to proceed to impose a fine or an order of the type referred to in section 72(5).

55. Secondly, it is important to bear in mind the relatively narrow point in respect of which there was non-compliance. The basis for the contention that the court lost its "jurisdiction" is not that it made a postponement, nor that it postponed beyond the end of the six month period, but that it made that postponement without consideration of whether the circumstances were exceptional. It is not in doubt that the court made the postponement in good faith and with the assent of the parties. It appears to be the case that if the court had complied with the letter of subsection (3) it could have made further postponements thereafter without being subject to the express terms of subsection (3).

56. Thirdly, the terms of subsection (8)(a) of section 72A are of some importance. If the court has made a postponement for a period which does not extend beyond the end of the six month period the requirement of section 71(1) that consideration of a confiscation order should take precedence is to be treated as disapplied. If thereafter the court makes a further postponement which does extend beyond the end of the six-month period but without considering whether there are exceptional circumstances, it is very difficult to see how that could re-apply the requirement of section 71(1) and hence support to the argument that it was too late for a confiscation order to be made, let alone that the sentence was incompetent. The present case is, of course, different, in respect that the first postponement was for a period which extended beyond the end of the six-month period. However, the point remains that it cannot be said that there is a universal problem created by the failure to comply with subsection (3) of section 72A.

57. Lastly, and most fundamentally, section 71 creates a **duty** on the court to consider the making of a confiscation order. The repeated use of the expression "jurisdiction" tends to distract attention from the fact that what is an issue is not the loss of a power to consider the making of such an order but the dissolution of a duty to do so. It is a duty which Parliament plainly envisaged as capable of subsisting after the offender had been sentenced and after more than six months since his conviction. The power of postponement under section 72A is expressly for the purpose of enabling the court to do its duty, whether information is awaited from the prosecutor or the offender. That is not to say that the six month period can simply be ignored: the court must do the best that it reasonably can to comply with subsection (3). If there were a question of unfairness to the offender, the court would have to consider the offender's rights under article 6 of the European Convention on Human Rights. Any abuse of process could be corrected on appeal.

58. These considerations lead me to the conclusion that Parliament cannot have intended that non-compliance with the terms of subsection(3) of section 72A would deprive the court of its duty to consider the making of a confiscation order.

59. For these reasons I consider that the confiscation orders were valid and should not have been quashed. I would accordingly allow the appeal.

LORD CARSWELL

My Lords,

60. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Steyn. I am in full agreement with his reasons and conclusions, and wish only to add a few observations of my own.

61. The distinction between mandatory and directory provisions, which was much discussed in judicial decisions over many years, has gone out of fashion and been replaced, as Lord Steyn has said, by a different analysis, directed to ascertaining what the legislature intended should happen if the provision in question were not fully observed. I do not seek to question the correctness of the altered approach to this, but I do feel that the principles inherent in the rejected dichotomy may in some cases offer assistance in the task of statutory construction.

62. It has long been appreciated that the essence of the search is the ascertainment of the intention of the legislature about the consequences of failure to observe the requirement contained in the provision in question. That is spelled out clearly in the decisions given in more recent years which have been cited by Lord Steyn. Failure to appreciate this properly and excessive focus on the distinction between mandatory and directory provisions did, as Lord Slynn of Hadley observed in *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286, 1294, lead to much litigation and on occasion to somewhat refined distinctions. The germ of the approach now accepted as correct may, however, be discerned as far back as 1877 in a judgment of Lord Penzance in the Court of Arches in *Howard v Bodington* (1877) 2 PD 203, 210-211:

> "Now the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the courts at Westminster. I am not sure that it is the most fortunate language that could have been adopted to express the idea that it is intended to convey; but still that is the recognised language, and I propose to adhere to it. The real question in all these cases is this: A thing has been ordered by the legislature to be done. What is the consequence if it is not done? In the case of statutes that are said to be imperative, the courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the courts hold a provision to be mandatory or directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail. Still, whatever the language, the idea is a perfectly distinct one. There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end."

63. The traditional dichotomy between mandatory and directory provisions has been used as a convenient shorthand for a very long time, and, as in the case of many shorthand labels for concepts, those concerned with statutory interpretation may have tended to forget the object summarised by the useful labels. A salutary reminder of the correct approach is contained in the modern case-law cited by Lord Steyn. There is, however, some value still in the principles enshrined in the dichotomy, particularly that which relates to substantial performance.

64. I agree with your Lordships that Parliament did not intend confiscation proceedings to fail in all cases where the timetable contained in section 72A of the Criminal Justice Act 1988 was not observed. One may approach cases of such failure to observe the timetable via either of two avenues. First, one can give the phrase

"exceptional circumstances" a broad and purposive construction, as Lord Steyn has proposed in paragraph 28 of his opinion. Secondly, one can adopt the view that the failure to keep to the time limit of six months laid down in section 72A(3) does not invalidate the order for confiscation. I think that it is necessary to consider both avenues, since there may be cases which cannot be dealt with by a broad interpretation of the phrase "exceptional circumstances".

65. The traditional consequence of finding that a provision was merely directory was that substantial performance would constitute a sufficient compliance with the statutory requirement. This concept can be more readily applied where a statute prescribes an exact method or sequence of carrying out specified acts or a time within which they are to be performed. A minor and insubstantial deviation from the requirements will not make the resulting proceedings invalid. A convenient example is to be found in *Foyle, Carlingford and Irish Lights Commission v McGillion* [2002] NI 86, in which it was held that an appellant's failure to serve a copy of a case stated upon the opposite party within the prescribed time was directory and that accordingly late service did not bar his appeal. It is less easy to apply the approach to the determination of what constitutes exceptional circumstances, but I think that the correct method is to ask whether the circumstances can be broadly regarded as exceptional.

66. The present case may be approached via this broad construction of "exceptional circumstances". The trial judge, who was best placed to decide the issue of confiscation, was not available to hear that issue within the six-month period laid down by section 72A(3). The reason was that he was committed to other cases because of the heavy lists in his court. Other cases may arise where the judge is prevented by illness or some other pressing reason from dealing with confiscation within the prescribed period. The judge himself said, in a somewhat resigned fashion, that listing problems are not exceptional, being an unhappily common occurrence in these times. He would nevertheless have heard the case within time if he had been free to do so, and I consider that one can properly regard the circumstances as exceptional for the purposes of section 72A(3).

67. The other avenue is by means of holding that if the time limit is not strictly observed the confiscation is nevertheless not invalidated. It is here that the doctrine of substantial performance may offer some assistance. I would not regard it as justified to extend the time limit indefinitely, for I do not think that Parliament would have so intended.

Nor would it be sufficient to ask merely if it would be fair and reasonable to accept the validity of an act done out of time. I would suggest that one should ask if there has been substantial observance of the time limit. What will constitute substantial performance will depend on the facts of each case, and it will always be necessary to consider whether any prejudice has been caused or injustice done by regarding the act done out of time as valid.

68. If one approaches the present case by the second avenue, I think that the answer will be the same. There was a small departure from the prescribed time and no prejudice was created or injustice done by regarding the confiscation order as valid. I am satisfied that this approach is not only consistent with the intention of Parliament but is the proper way to ensure that its intention is carried into effect.

69. I would therefore allow the appeal and restore the confiscation orders.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

70. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Steyn and Lord Rodger of Earlsferry. I agree with all that they say and there is very little that I wish to add.

71. Lord Rodger must surely be right in his analysis of Parliament's thinking at the various stages of this legislation. When first enacted, the 1988 Act required that any confiscation proceedings be concluded and the order made before the court proceeded to sentence. In that way the fullest information would be available to the court and all sentencing options open. Because, however, such an approach necessarily delayed the passing of sentence which on occasion could with advantage be passed earlier—most obviously when custodial sentences are imposed which cannot conceivably be affected by the outcome of any confiscation proceedings—Parliament in 1993 introduced into the 1988 Act section 72A which allows the court to postpone confiscation proceedings until after sentence. Provided that the court "is acting under section 71" and "requires further information" before it can finally

determine whether to make a confiscation order and, if so, in what sum, the power of postponement arises and, if exercised, allows the court thereupon to proceed to sentence.

72. All that is required for the court to be "acting under section 71" is that, following the offender's conviction, the court recognises its duty to embark upon confiscation proceedings (either because the prosecutor has given notice or because the court itself considers such proceedings appropriate). Until, moreover, all investigations have been completed and any necessary hearing concluded, the case will necessarily be one where the court "requires further information".

73. So far so good. In the vast majority of cases, one assumes, the court will conclude any confiscation proceedings, either as part and parcel of the sentencing hearing itself or on a later date, within a comparatively short time after conviction. This appeal, however, concerns one of those cases where this was not achieved—where, indeed, the confiscation orders were not finally made until some two years following conviction. In this case, therefore, attention has been focused principally upon section 72A(3) of the Act, Parliament's stipulation that:

> "Unless it is satisfied that there are exceptional circumstances, the court shall not specify a period under subsection (1) above which–
>
> (a) by itself; or
>
> (b) where there have been one or more previous postponements under subsection (1) above or (4) below, when taken together with the earlier specified period or periods,
>
> exceeds six months beginning with the date of conviction."

74. What is contended by these appellants is that that requirement was not satisfied in the circumstances of this case; that the court was therefore disabled from postponing the confiscation proceedings beyond the six month period, that it had accordingly not "exercise[d] its power under subsection (1)"; that the court had thus not been entitled to "proceed to sentence" pursuant to section 72A (7); and that, having done so, it was thereby precluded from continuing further with the confiscation proceedings which, under section 71(1), were only open to

the court (absent an effective postponement under section 72A) "before sentencing".

75. In addressing that argument, and in particular in divining the intention of Parliament with regard to the consequences of non-compliance with the strict requirements of section 72A, one obvious question to be asked is why Parliament provided that, except in "exceptional circumstances", confiscation proceedings must be completed within six months of conviction (this being the essential effect of section 72A(3)).

76. The appellants seek to argue that the six months stipulation is essentially for the benefit of the defendant, to ensure that this further part of his sentence is not too long delayed after the imposition of his initial sentence. And certainly there are dicta in the many Court of Appeal judgments shown to your Lordships tending to support such a view. Take these passages from the court's judgment in *R v David Ruddick* [2004] 1 Cr App R (S) 52, 58-60, para 30:

> "It seems to us that the structure and purpose of the statutory provisions is essentially to ensure that the defendant is not exposed to double jeopardy; that is, he should not be sentenced and then find that he is being punished yet again with a … confiscation order. … Two sentencing processes for one offence is unfair; but two or more orders made during one sentencing process is not unfair, even where the orders are not made during just one court appearance. The second and important requirement, as a matter of fairness, is that the one sentencing process should not be protracted over an unduly long period." (para 30(2)).
>
> "Will a failure to hold a [confiscation] hearing within six months make any [confiscation] order a nullity? If without exceptional circumstances the defendant had not had a [confiscation] order made against him within six months of the date of postponement, then in our view no such order could lawfully be made. The time limit is there to protect the defendant from unfairness through justice being unduly delayed. Like other limitation periods, Parliament has intended a cut-off date which, subject only to exceptional circumstances, entitles a defendant to be free from the risk of further punishment. The fact that the court is given a limited discretion to extend the time

> beyond that date ["exceptional circumstances"] supports this view." (para 30 (4)(c)).

But I have difficulty with those observations. Section 72A(3) can hardly have been designed to maintain a close temporal connection between the initial sentence and any subsequent confiscation order. Assume that an offender, A, pleads guilty and is remanded for sentence until the conclusion of co-offender B's trial. If B's trial takes six months and A's confiscation order is thus delayed for more than six months there will necessarily have been a non-compliance with section 72A(3) (unless of course a postponement order was specifically made on grounds of exceptional circumstances). And this will be so even if the confiscation order is made *before* the appellant is sentenced.

77. The same point can be made by reference to section 72A(6): the three months limit imposed by this provision relates to the date of determination or other disposal of the offender's appeal against conviction. What Parliament is clearly concerned to achieve is not that any confiscation order is made within a given time after sentence but rather that it is not too long delayed after conviction (or, indeed, after a failed appeal against conviction). Far from these time limits being imposed in favour of the offender they seem to me designed rather to ensure that not too long passes before the offender is stripped of his ill-gotten gains instead of being left in a position to enjoy and all too probably dissipate them.

78. Postulate, then, a non-compliant postponement of the confiscation proceedings—a postponement beyond the six month period without there being exceptional circumstances to justify such a delay. What should be the consequences of that? Posing the "ultimate question" formulated by Lord Steyn (para 23), can Parliament in these circumstances "fairly be taken to have intended total invalidity"?

79. The answer to that question seems to me perfectly plain. As Lord Rodger points out (para 38), if the consequence of a non-compliant postponement was that it remained unlawful to pass sentence before the conclusion of the confiscation proceedings, then logically the premature sentence would be no less invalid than the impermissibly postponed confiscation order. And, indeed, that would be so even had the final outcome of the confiscation proceedings been no order at all—the court, say, having eventually determined that the offender had not after all benefited from his criminality or had no realisable assets left. Section

71(1), (1A) and (1B), be it noted, requires that (subject only to postponement under section 72A) each of these questions be addressed "before sentencing or otherwise dealing with the offender".

80. Given these considerations; given that section 71(1) now imposes upon the court a positive *duty* to proceed with confiscation proceedings (in place of what was originally a mere power to do so—and, indeed, under section 72(1) of the unamended legislation, an explicit embargo upon the making of a confiscation order "unless the prosecutor has given written notice to the court"); given that the time limits under section 72A, linked as they are to the date of conviction rather than sentence, appear to be imposed rather with a view to the early disgorgement of the offender's gains than for his benefit, Parliament cannot in my judgment have been intending to disable the court from making a confiscation order after sentence merely because the time limits were not strictly adhered to. Provided always that the court, as here, was acting in good faith in the purported exercise of its section 72A power to postpone the confiscation proceedings, its subsequent determinations will not be invalidated despite its having proceeded first to sentence and only later to the making of a confiscation order.

81. I too would allow the appeal.