HOUSE OF LORDS SESSION 2006–07
[2007] UKHL 2

on appeal from: [2005] EWCA Civ 964

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Capewell (Respondent)
v.
Her Majesty's Revenue and Customs (Appellants)
and another

Appellate Committee

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Mance

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Walker of Gestingthorpe. For the reasons he gives, with which I agree, I would allow this appeal.

LORD HOFFMANN

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Walker of Gestingthorpe. For the reasons he gives, with which I agree, I would allow this appeal.

LORD RODGER OF EARLSFERRY

3. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Walker of Gestingthorpe. For the reasons he gives, with which I agree, I would allow this appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

Introduction

4. In *R v Rezvi* [2003] 1 AC 1099, 1146, 1152, Lord Steyn said:

> "It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential."

Parliament's determination that criminals should not profit from their crimes (and especially not from serious organised crimes) led to the enactment of Part VI of the Criminal Justice Act 1988 ("CJA 1988"), the Drug Trafficking Act 1994 ("DTA 1994"), the Proceeds of Crime Act 1995 ("POCA 1995," heavily amending CJA 1988) and Part III of the Terrorism Act 2000. The relevant provisions of these statutes have been replaced by Part 2 of the Proceeds of Crime Act 2002 ("POCA 2002"), which came into force on 24 March 2003, but the earlier legislation is still relevant to criminal proceedings initiated before that date. This appeal by the Commissioners for HM Revenue and Customs, formerly HM Customs & Excise ("Customs") is concerned with the remuneration of a receiver appointed on 30 January 2003 under a restraint order made on 9 October 2002 in respect of the assets of the respondent, Mr Robert Capewell.

The facts

5. Mr Capewell was arrested on 11 April 2002 and on 24 September 2002 he was charged with conspiracy to cheat the public revenue and conspiracy to contravene the Value Added Tax Act 1994. He was charged jointly with thirteen other defendants. The gist of the allegation is what is often called "carousel fraud." The amount of value added tax evaded is said to be of the order of £18m. His criminal trial is at present in progress and is not expected to end for some months. The respondent is of course presumed to be innocent, unless and until he is convicted, of the serious offences with which he is charged.

6. On 9 October 2002 Lightman J made the restraint order already mentioned. This was made under sections 76 and 77 of CJA 1988. On 17 January 2003 Customs applied for the appointment of a receiver in respect of the respondent's assets. The application was opposed but on 30 January 2003 Jackson J made an order appointing Mr Nigel Sinclair of Kroll Buchler Phillips as management receiver of the respondent's realisable property (as defined in section 74 of CJA 1988). This order was made under section 77(8) of CJA 1988. Paragraph (3) of the order provided:

> "The costs of the Receivership shall be paid in the Receivership in accordance with the letter of agreement as exhibited to the witness statement of Colin Jones made on this the 23rd day of January 2003."

7. The letter in question (dated 21 November 2002, and sent to Mr Sinclair by Mr Colin Jones of Customs' Asset Forfeiture Unit) contained (in para 6, headed "Remuneration") provisions about the Receiver's remuneration and expenses. Para 6(a) was the basic provision:

> "It is proposed to seek an order from the Court that your costs in this matter should be costs in the Receivership ie your costs should be paid out of the monies you bring in during the course of this Receivership."

Para 6(d) contained a limited indemnity given to the receiver by Customs. I should perhaps say at once that this letter, and some other documents in the appeal, are far from precise in their use of the expressions "remuneration", "costs" and "expenses". It makes for clarity to confine "remuneration" to professional fees (for the receiver himself and his own staff), to confine "costs" to litigation costs, and to use "expenses" for all other expenditure necessarily or properly incurred by the receiver in the performance of his duties.

8. The respondent's principal assets, so far as within Customs' knowledge, were set out in a schedule to the order appointing the receiver. They were a diverse portfolio: a large country house in Staffordshire, half of which is said to belong to the respondent's wife; some expensive cars and personalised number plates; some bank accounts in this country and elsewhere; and some business assets including an unincorporated financial services business run by the

respondent trading as John Ashley Associates. This business seems to have depended largely on the respondent's personal input and contacts, and to have been less profitable in recent years. Indeed the respondent was at the commencement of the receivership involved in some fifty legal actions against clients or former clients. In his first report the receiver stated that the respondent's terms of business entitled him to claim for lost commissions if his clients cancelled policies which they had effected through him, and that he pursued them through the courts, if necessary to bankruptcy.

9. The receivership led to a great deal of friction between the receiver and the respondent. There is copious documentary evidence before your Lordships in relation to the difficulties that arose, but it is unnecessary to go far into it. The receiver complained of non-cooperation (and possible contempts of court) on the part of the respondent; the respondent complained of the size of the amounts which the receiver claimed, in successive reports to the court, for his remuneration. In round figures the total remuneration claimed (inclusive of value added tax) mounted up as follows:

(1) First report (26 April 2003) £74,000
(2) Second report (31 March 2004) £132,000
(3) Third report (2 June 2004) £182,000

These figures may be compared to the receiver's estimate (in the first appendix to his second report) of an eventual net realisation of less than £400,000 (there is no estimate in his third report, but there are some later figures in paras 22 and 23 of the judgment of Lindsay J mentioned below).

The course of the litigation

10. The reason why it is unnecessary to go into any of these contentious issues is because the amount of the receiver's remuneration has not yet been quantified by the court, and is not an issue in this appeal. The point at issue in this appeal is whether the Court of Appeal, exercising its discretion in place of the trial judge, was right to order part of the receiver's remuneration to be paid, not out of assets subject to the receivership, but by Customs.

11. To explain how that issue has emerged I must go back to Jackson J's order of 30 January 2003 appointing the receiver. At that time it was envisaged that an application to discharge the receiver might be made at an early date, as soon as the respondent's counsel had prepared further evidence directed at demonstrating that the receivership was unnecessary (this appears from the part of the order headed "Duration of this Order"). In the event there was no early application. But on 5 February 2004 the respondent applied for the receiver to be discharged on the grounds that his "costs" were disproportionate and excessive. Customs opposed the application. It was dismissed by Lindsay J on 6 April 2004. At the time of his judgment the expected date for the commencement of the criminal trial had slipped from 2004 to 2005; it was to slip again to 2006.

12. Lindsay J's reasons for dismissing the application appear from para 28 of his judgment. After stating that he was not satisfied that the purposes of the receivership had been achieved, he continued:

> "But more importantly, as it seems to me, no costs have yet been paid out of the estate and none have yet been approved by the court. It has all along been open to Mr Capewell, and, indeed, open to the Customs and Excise and the Receiver himself, to seek an assessment of costs, the assessment to be undertaken by the court. There is provision in CPR 69.7 which no one has yet brought into use. It has not been done yet by anyone. How can costs be said to be disproportionate when one does not know what they are? Indeed, a blunt answer to the application notice which seeks discharge on the grounds of excessive costs is that excessive costs are not themselves a ground for discharge, but are a ground, if an argument can be made out, for an assessment downwards of the receiver's bill. So I will not at this stage discharge the receivership on the grounds of disproportionate or excessive costs either, because one does not know yet what the figure that the court would be likely to authorise would be."

The judge proceeded to give directions as to the quantification of the receiver's remuneration (though the ensuing appeals have delayed that process). His reference to "CPR 69.7" is to paragraph 7 in Part 69 of the Civil Procedure Rules 1998 ("CPR") as inserted by the Civil Procedure (Amendment) Rules 2002 (SI 2002 No. 2058, made under section 2 of the Civil Procedure Act 1997) which came into force on 2 December

2002 (that is, about two months before Mr Sinclair was appointed as a receiver).

13. Lindsay J recognised the existence of CPR 69.7 but did not have occasion to consider how it might apply to this case. CPR 69.7 has become the central issue in this appeal. It is in the following terms:

> "Receiver's remuneration
>
> 69.7 (1) A receiver may only charge for his services if the court—
>
> (a) so directs; and
>
> (b) specifies the basis on which the receiver is to be remunerated.
>
> (2) The court may specify—
>
> (a) who is to be responsible for paying the receiver; and
>
> (b) the fund or property from which the receiver is to recover his remuneration.
>
> (3) If the court directs that the amount of a receiver's remuneration is to be determined by the court—
>
> (a) the receiver may not recover any remuneration for his services without a determination by the court; and
>
> (b) the receiver or any party may apply at any time for such a determination to take place.
>
> (4) Unless the court orders otherwise, in determining the remuneration of a receiver the court shall award such sum as is reasonable and proportionate in all the circumstances and which takes into account—
>
> (a) the time properly given by him and his staff to the receivership;
>
> (b) the complexity of the receivership;
>
> (c) any responsibility of an exceptional kind or degree which falls on the receiver in consequence of the receivership;
>
> (d) the effectiveness with which the receiver appears to be carrying out, or to have carried out, his duties; and
>
> (e) the value and nature of the subject matter of the receivership.
>
> (5) The court may refer the determination of a receiver's remuneration to a costs judge."

14. While the appeal was pending there was a further first-instance hearing before Davis J, initiated by the receiver's application for directions but overtaken by the respondent's renewed application for the discharge of the receiver. At the hearing on 13 October 2004 neither Customs nor the receiver opposed the ending of the receivership and the judge discharged the receiver for reasons which he gave on the next day. The judge said that the meat of the argument had been over whether the receiver should be entitled to payment on account of his remuneration. Davis J was satisfied that he had power to make an interim award, and he did so in the sum of £100,000. In para 18 of his judgment he observed:

> "It is also appropriate to spell out by way of background that the law has for some time been, and as has been confirmed in the case of *Hughes* [2003] 1 WLR 177, a decision of the Court of Appeal, that a Receiver is ordinarily entitled to look for his remuneration and costs out of the assets of the defendant in question, which are the subject of the Receivership. That has been confirmed by the Court of Appeal in *Hughes* as continuing to be the case; and there is no basis that I can see that the decision in *Hughes* can be said to have been overtaken by the new provisions of Rule 69. Although at one stage Mr Mitchell QC alluded to an argument to the contrary, he did not pursue such an argument and Ms Barber has subsequently disclaimed such an argument."

In para 29 he observed:

> "I have come to the view that it cannot realistically be disputed that, even allowing for the allegation that the Receiver has needlessly run up excessive costs, nonetheless very substantial costs were inevitably and properly incurred in the conduct of this Receivership under the terms of the order of Jackson J. Under that order, the Receiver is entitled to look to the Receivership assets for recovery of his costs and remuneration."

At the end of the judgment there was some discussion as to whether the appeal from Lindsay J (in which a hearing was imminent) had become moot, or was still live on questions of costs.

15. The appeal did proceed and in due course the same constitution of the Court of Appeal (Laws, Longmore and Carnwath LJJ) sat on it twice. At the first stage (hearing 26 October 2004; judgment of the Court delivered by Carnwath LJ on 2 December 2004) the Court of Appeal decided that Lindsay J had misdirected himself as to the test for whether the receivership should be continued, and that the receiver should have been discharged at a date which the Court set at 1 June 2004. As he had been discharged by the order of Davis J, made on 13 October, the Court of Appeal made no substantive order on the appeal, but adjourned the matter for further argument on what was described in the order as "the resolution of any consequential orders including costs of the appeal and the hearing at first instance."

16. The Court of Appeal also set out, in an appendix to its first judgment, guidelines (suggested and agreed by counsel) for the appointment of management receivers in this type of case. Those guidelines have been reported (*Capewell v Customs & Excise Commissioners: Note* [2005] 1 All ER 900). Neither side has raised any criticism of the guidelines before your Lordships.

17. The second stage of the appeal followed in 2005 (hearing 7 July 2005; judgment of Carnwath LJ, concurred in by Laws and Longmore LJJ, 29 July 2005). The Court of Appeal referred extensively to *Hughes v Customs & Excise Commissioners* [2003] 1 WLR 177 ("*Hughes*"), which had also been referred to in the Court's earlier judgment, but decided that the introduction of CPR 69.7 had made a significant change in the law and practice relating to receivers, although only in relation to remuneration (as distinguished from expenses). The outcome was summarised in paras 23 and 25 of the judgment of Carnwath LJ:

> "23. Rule 69.7(2) is relied on by Mr Capewell as giving us the necessary power. On its face, it gives us an unlimited discretion in respect of the receiver's remuneration. Without more detailed information as to the background, I am prepared to assume that the rule was not intended to make a radical change to the previous practice. However, it seems clearly designed to give the Court some discretion in the matter, at least in special circumstances where application of the ordinary rule would cause unfairness or hardship.
>
> . . .
>
> 25. Accordingly, in my view, we can and should order under rule 69.7(2) that the Customs should be responsible

> for payment of the receiver's remuneration from 1 June 2004. We can make no corresponding order in respect of his expenses, which will fall to be met from the realisable assets in the ordinary way."

That is the conclusion of which Customs complains in this appeal. There are also consequential issues as to costs.

Receivership

18. My Lords, in summarising the facts and the rather tortuous course of the litigation, I have made some passing references to some of the relevant statutory provisions, and to the general law of receivership. I must now address these matters more systematically, since (as Simon Brown LJ said in *Hughes*, para 50):

> "Statutory receivers are to be treated precisely as their common law counterparts save to the extent that the legislation expressly provides otherwise. The statute is not to be regarded as an entirely self-contained code incorporating nothing from the common law. The fact that, unusually (although not uniquely: consider such cases as *F Hoffmann-La Roche & Co AG v Secretary of State for Trade & Industry* [1975] AC 295 and *Attorney General v Wright* [1988] 1 WLR 164), the prosecutor cannot be required to give a cross-undertaking in damages (see RSC Ord 115, r 4(1)) does not constitute so fundamental a difference between statutory and common law receivers as to give rise to wholly discrete schemes for their remuneration."

19. The Court's power to appoint a receiver, as part of its auxiliary equitable jurisdiction, is of very ancient origin. It was described in *Hopkins v Worcester & Birmingham Canal Proprietors* (1868) LR 6 Eq 437, 447, as one of the oldest remedies in the Court of Chancery. It was used in a wide variety of situations in which there was a need for the interim protection of property (and the income of property), including disputes about partnerships, sales or mortgages of land, and administration of estates. Receivers could also be appointed by way of equitable execution. The receiver, being appointed by the Court, was an officer of the Court. His duty was to act impartially, and in accordance

with the directions of the Court, in administering the property to which the receivership extended.

20. In short, the appointment of a receiver was in many cases the most effective way of "holding the ring" between warring litigants until the disputed issues could be finally determined. Because it is a useful procedure, Parliament has from time to time extended the range of situations in which a receiver or manager could be appointed—for instance, in order to enforce the repairing obligations of the absentee landlord of a block of flats (see Landlord and Tenant Act 1987 section 21). The provisions of section 77(8) of CJA 1988, section 26(7) of DTA 1994 and section 48 of POCA 2002 are a further important extension of the situations in which the court has a statutory power to appoint a receiver. Sections 48, 50 and 52 of POCA 2002 provide for three types of receivers (management receivers, enforcement receivers and Director's receivers, the latter appointed by the Director of the Assets Recovery Agency) but it is unnecessary to go into those details on this appeal.

21. It has always been a basic principle of receivership that the receiver is entitled to be indemnified in respect of his costs and expenses, and his remuneration if he is entitled to be remunerated, out of the assets in his hands as receiver. Warrington J stated the principle in a well-known passage in *Boehm v Goodall* [1911] 1 Ch 155, 161:

> "Such a receiver and manager [that is one appointed by the court] is not the agent of the parties, he is not a trustee for them, and they cannot control him. He may, as far as they are concerned, incur expenses or liabilities without their having a say in the matter. I think it is of the utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of the court. The court itself cannot indemnify receivers, but it can, and will, do so out of the assets, so far as they extend, for expenses properly incurred; but it cannot go further. It would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control."

This passage was cited and applied by Vinelott J in *Evans v Clayhope Properties Ltd.* [1987] 1 WLR 225, 229-230 (upheld by the Court of Appeal [1988] 1 WLR 358, Nourse LJ, at p 363, sharing Vinelott J's doubts as to whether a receiver's remuneration could be recovered as litigation costs).

22. These principles were applied (though with some reluctance) by the Court of Appeal in *Re Andrews* [1999] 1 WLR 1236, a case of alleged VAT and PAYE frauds in which restraint and receivership orders were made against a father (who was eventually acquitted and awarded his costs out of public funds) and a son (who was eventually convicted of fraud). The facts were rather obscure since their business activities were carried on by three different companies, and the degree of control and financial interest enjoyed by different members of the family was uncertain. Ward LJ and Aldous LJ (with both of whom Hirst LJ agreed) said that remuneration and expenses (as such) could be charged only against receivership assets, and could not (under guise of litigation costs) be charged to anyone else on the principle in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, 975.

23. *Re Andrews* was considered and followed by the Court of Appeal in *Hughes* (one of three appeals by prosecuting authorities concerned with receiverships under CJA 1988 and DTA 1994). Simon Brown LJ set out ([2003] 1WLR 177, para 45) the appellants' argument (which the Court of Appeal accepted):

> "Mr Mitchell's central argument to the contrary focuses, first, on the use of the word 'receiver' to describe the person being appointed under this legislation to conserve, manage and realise assets. A receiver is a recognisable creature of the common law, an officer of the court, someone whose essential rights, powers and duties have been established down the years. It is not apparently disputed that a receiver appointed under the CJA—despite the statute's silence on the matter—will have the right, for example, to bring an action or to sell property. Why then, unless the statute expressly so provides, should he be denied the other ordinary consequences of his receivership, including not least the right (indeed the requirement) to recover the costs of the receivership from the assets under his control?"

24. Money payable under a CJA 1988 confiscation order is treated as a fine (section 75(1) and (2) of CJA 1988) and is to be collected by the chief executive of the appropriate justices (section 81(3)). Section 81(5) provides:

> "If the money was paid to the justices' chief executive by a receiver appointed under this Part of this Act or in pursuance of a charging order, the justices' clerk shall next pay the receiver's remuneration and expenses."

Section 88(2) provides:

> "Any amount due in respect of the remuneration and expenses of a receiver so appointed shall, if no sum is available to be applied in payment of it under section 81(5) above, be paid by the prosecutor or, in a case where proceedings for an offence to which this Part of this Act applies are not instituted, by the person on whose application the receiver was appointed."

In *Hughes* Simon Brown LJ explained that neither of these provisions, properly understood, assisted the respondents in the three appeals then before the Court (paras 46 and 47):

> "At first blush one of the respondents' stronger arguments is that section 81(5) really makes little sense if the receiver can in any event deduct his costs from the assets under his control. Why, they ask rhetorically, would he in those circumstances pay over to the justices' clerk a gross sum of money so as to enable the clerk then to pay his remuneration and expenses? Inevitably, he would first deduct them. There is, however, an answer to this question and it provides, perhaps, the key to a proper understanding of the remuneration provisions of the statute. The reason why it is necessary, once a confiscation order has been made, for a receiver (whether appointed initially as a management receiver or only later as an enforcement receiver) thereafter to pay over any sum to the justices' clerk gross of his remuneration and expenses is because, as provided by section 81(3), that sum operates to reduce the amount payable under the

> confiscation order. In the great majority of cases the amount of the confiscation order is determined not by reference to the calculated benefit of the defendant's criminality, but rather by reference to the substantially lesser value of his realisable property. Once the latter has been established and the confiscation order made, it would clearly be wrong to deplete the value of the defendant's assets by deducting the receiver's costs until such assets have been paid to the justices' clerk and thus reduced the amount payable under the order.
>
> That is not to say, however, that *before* any confiscation order is made the receiver cannot in the usual way recover his remuneration and expenses from the assets, and nor is that precluded by section 88(2). Section 88(2) is simply one of two 'supplementary provisions' for receivers and its effect is merely to ensure that if in any case . . . the receiver has not been paid in full, he shall be paid by the prosecutor or whoever else was responsible for his appointment."

In other words section 88(2) is simply a statutory long-stop, similar in its effect to the long-stop of a contractual indemnity from Customs which Mr Sinclair has under para 6(d) of his agreement letter.

25. I have set out the decision in *Hughes* at some length because it does in my opinion state clearly and correctly the somewhat opaque relationship between the general law of receivership and the detailed provisions of CJA 1988. The real issue in this appeal is not whether *Hughes* was rightly decided, but whether it is no longer good law as a result of the coming into force of CPR 69.7.

CPR 69.7

26. In my opinion CPR 69.7 has not had that far-reaching and surprising result. The function of CPR 69 is to set out a procedural code applicable to the generality of receiverships of all types. Its text gives no indication that its draftsman had particularly in mind the new species of receiverships in support of restraint orders and confiscation orders. No doubt its provisions do in general apply to such receiverships but they cannot override the scheme inherent in the detailed provisions of CJA 1988. That scheme is for the receiver's remuneration and expenses to be paid out of the receivership assets, but in a way which counts

towards satisfaction of any confiscation order, and subject to the statutory long-stop already mentioned. If an individual subject to a restraint order is not ultimately convicted and made subject to a confiscation order, section 89 of CJA 1988 gives a statutory right to compensation in some circumstances. But Parliament has deliberately framed the right to compensation in narrow terms. That is an aggrieved individual's only right to compensation as such. He would not normally have the benefit of an undertaking in damages since (as Simon Brown LJ observed in *Hughes* at para 50) a prosecutor cannot be required to give an undertaking in damages as a condition of obtaining the appointment of a receiver. An aggrieved individual's only other recourse would be to challenge the amount of the receiver's remuneration, as the respondent has done in this case. There is a similar scheme under POCA 2002 and the Crown Court (Confiscation, Restraint and Receivership) Rules 2003 (SI 2003/421) made under that Act, but in these new provisions it is made perfectly clear that receivership expenses and remuneration are to come out of the assets subject to the receivership.

27. The Court of Appeal was in my opinion wrong to suppose that CPR 69.7 has made (or could have made) a fundamental change either in the general law of receivership, or in the position of receiverships under CJA 1988 and the other comparable statutory powers. I would allow this appeal on that ground. There is also a further, narrower ground for concluding that the order of the Court of Appeal cannot be upheld. In the original order appointing Mr Sinclair as receiver, Jackson J directed that "the costs of the receivership" (which in the context must mean expenses and remuneration) were to be paid in accordance with the agreement letter of 21 November 2002. That order was not appealed at the time (although it was contemplated that an early application would be made for discharge of the receiver) nor has there been any subsequent application for permission to appeal from it out of time. A receiver takes on heavy responsibilities when he accepts appointment, and he is entitled to the security of knowing that the terms of his appointment will not be changed retrospectively—even if an appellate court later decides that the receivership should have been terminated at an earlier date. Before Davis J the respondent's counsel more or less abandoned any point on CPR 69.7. Before the Court of Appeal, Customs seem not to have objected strongly to the point being reventilated, possibly because of the general importance of getting the point decided.

28. For these reasons I would allow the appeal and set aside paragraph 4 of the Court of Appeal's order of 29 July 2005. As to paras

1, 2 and 3 of that order (relating to the costs below) and as to the costs of this appeal I would invite written submissions from the parties within 14 days.

LORD MANCE

My Lords,

29. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Walker of Gestingthorpe, with which I am in full agreement. I therefore agree that the appeal should be allowed.