Proportionality of confiscation and compensation orders in *Davenport*

‘Not unfair’ orders made by the prosecution do not stand up to the test of proportionality and fly in the face of common sense, writes Paul Lazarus

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The appeal courts have provided guidance to practitioners on the issues to consider when advising clients in advance of, and indeed during, the important negotiation stage before the inevitable confiscation and compensation agreement is thrashed out. Most notably, it addresses the need to check you have reached the same agreement the other side believes they have reached with you.

Anecdotally, it is rare that confiscation proceedings result in fully contested final hearings. While there are often points that require a ruling, it is, generally speaking, frequently recognised by all that efforts to try to reach broad agreement on the big issues are likely to be fruitful.

The appeal courts have intervened on numerous occasions over the years to provide guidance. Indeed, the level of intervention that has been necessary is perhaps a reflection on the poor drafting of the original legislation, but that is a separate debate.

**Drac onian POCA**

In the early days of the Proceeds of Crime Act 2002, the mantra one would hear repeated by fellow practitioners and the judiciary was, ‘Well, it is meant to be draconian isn’t it.’

Over recent years, a body of authority has emerged that has brought a sense of proportionality to the table. *Davenport* is the latest in this line and provides excellent reading for those who wish to appreciate the history of this evolution.

The case takes us on a whistle-stop tour, taking in the legislation itself, and then *R v Woya* and *R v Jawad*, before grappling with the appeal points raised, the chief of which surrounded the efficacy of the imposition of both a confiscation order and a compensation order cumulatively. Essentially, the losses incurred by the victims of the fraud were included in the benefit figure and then added on top again by way of a direct compensation order.

The prosecution argued: ‘[T]here was no bar in principle to the making of both a compensation order and a confiscation order which included the particular benefit corresponding to the losses of the victims.’

**Lip service is routinely paid to the concept of restitution to victims**

Prosecution persuasion

The trial judge was so unimpressed by Mr Davenport that he considered the prospects of the defendant liquidating his assets in a timely fashion to be so low that he agreed to count the direct losses twice, as urged to do by the prosecution.

After lengthy and detailed consideration, the Court of Appeal reversed this decision, agreeing that it was not proportionate and ultimately unfair, bearing in mind that the stage had been reached where Davenport’s property was on the market and expected to reach a sum capable of satisfying his liabilities in respect of benefit and compensation.

When reading the judgment for the first time, heavily speckled as it is with the original judge’s poor views of Davenport, one might be forgiven for expecting the appeal to be refused. The final paragraphs build to the exciting revelation that common sense seems to have prevailed and the appeal is eventually allowed with a nod to proportionality.

Their Lordships asked the most awkward question of prosecution counsel during the course of argument in *Davenport*: ‘We perhaps should also add that, in the light of the orders as made and in the light of the realisations as made, we asked Mr Mayo if the result to the appellant could be described as fair. His answer, as we noted it – he accepting that there was double counting – was: “Well, not unfair.”

Some may agree that we have got to the point where a review of the legislation in light of the authorities is well overdue. One useful reform highlighted by this case would be the ability for judges to order that direct compensation owed to victims is to be paid from the available amount without the need for a separate order.

Lip service is routinely paid to the concept of restitution to victims; there might now be an opportunity to actually achieve something tangible in this regard. *SJ*