Michaelmas Term
[2011] UKSC 49
On appeal from: [2010] EWCA Civ 759

JUDGMENT

Gale and another (Appellants) *v* Serious Organised Crime Agency (Respondent)

before

Lord Phillips, President
Lord Brown
Lord Mance
Lord Judge
Lord Clarke
Lord Dyson
Lord Reed

JUDGMENT GIVEN ON

26 October 2011

Heard on 23 and 24 May 2011

Appellant
Andrew Mitchell QC
Jonathan Lennon

(Instructed by Rahman Ravelli Solicitors)

Respondent
Anthony Peto QC
John Law
Robert Weekes
(Instructed by Serious Organised Crime Agency Legal Department)

Intervener (Secretary of State for the Home Department)
James Eadie QC

(Instructed by Treasury Solicitors)

LORD PHILLIPS (WITH WHOM LORD MANCE, LORD JUDGE AND LORD REED AGREE)

Introduction

1. The Proceeds of Crime Act 2002 ("POCA"), as amended by the Serious Organised Crime and Police Act 2005, is designed to prevent the enjoyment of the fruits of criminal activity. Part 2 focuses on the criminal. To the extent that it is proved, in the manner prescribed, that a criminal has benefitted from criminal conduct, a levy can be made upon his assets, whether or not those assets are themselves the product of his criminal conduct, by a process inaccurately described as "confiscation". A conviction of the criminal is a precondition to the power to confiscate.

2. Part 5 concentrates on the fruits of crime themselves. The Serious Organised Crime Agency ("SOCA") is given the task of tracking down and recovering the fruits of criminal activity, whether they remain in the hands of the criminal or have been passed on to someone else – subject to exceptions for which POCA makes provision. The fruits of criminal activity can be recovered under Part 5 whether or not anyone has been convicted of the crime or crimes that have produced them.

3. This appeal is concerned with Part 5 proceedings. SOCA has obtained an order for the recovery of property to the value of some £2m ("the property") held by the appellants, David Gale and his former wife Teresa Gale. SOCA did so by persuading Griffith Williams J, sitting in the High Court, that the property was derived from criminal activity on the part of one or other or both of the appellants, in the form of drug trafficking, money laundering and tax evasion in the United Kingdom, Spain, Portugal and other jurisdictions. The judge so found notwithstanding that David Gale had never been convicted of drug trafficking – albeit that in Portugal he was prosecuted and acquitted of drug trafficking and in Spain criminal proceedings against him for drug trafficking were brought but discontinued.

4. In order to recover property under Part 5 SOCA has to prove that it was obtained by unlawful conduct, or that it is property obtained in place of such property. Section 241 defines unlawful conduct as being conduct which is unlawful under the criminal law of the country in which it occurs, whether this is the United Kingdom or elsewhere. The section requires the court to decide "on a balance of probabilities" whether it is proved that any of the matters alleged to

constitute unlawful conduct occurred. Section 242 provides that in deciding whether property was obtained through unlawful conduct it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct. Thus it is not necessary to prove that individual items of property were derived from specific offences.

5. "Balance of probabilities" is the standard of proof applied in civil proceedings under English law ("the civil standard of proof"). In criminal proceedings guilt has to be proved "beyond reasonable doubt" ("the criminal standard of proof"). In concluding that the property recovered was the product of criminal conduct on the part of the appellants, Griffith Williams J applied the civil standard of proof, albeit that he used language that suggested that the criminal standard might well have been satisfied. It is the appellants' case, advanced without success in the Court of Appeal, that this was contrary to the Human Rights Act 1998 in that it infringed their right to a fair trial under article 6 of the European Convention on Human Rights ("the Convention"). They urge that, despite the language of section 241(3), we should "read down" the subsection so as to accord to it the meaning that the court must decide whether it is proved *beyond reasonable doubt* that matters alleged to constitute unlawful conduct occurred. Alternatively, they submit that the Court should declare the subsection to be incompatible with the Convention pursuant to section 4 of the Human Rights Act. This is the only issue concerning the recovery order that arises with regard to the recovery order; other issues that were raised below have not been pursued.

6. There is a second issue. On 28 July 2005 Collins J made an Interim Receiving Order pursuant to section 246 of POCA. The findings of the Interim Receiver's report formed the basis for commencing the proceedings for civil recovery. At the end of those proceedings the judge made an order for costs against the appellants. He refused, however, to direct that those costs should include the costs of the Interim Receiver's investigation and report. SOCA cross-appealed successfully against that refusal. The appellants seek to reverse the Court of Appeal on this issue and to restore the order of the judge.

Is there scope for reading down?

7. The Secretary of State, represented by Mr Eadie QC, has intervened because of the possibility of a declaration of incompatibility. The Secretary of State has supported the respondent, SOCA, in relation to the first issue. Mr Eadie has submitted, however, that regardless of the merits of the human rights challenge there can be no question of reading down section 241(3). This is because it represents a clear, advised expression of Parliamentary intent lying at the heart of the statutory scheme. This submission runs counter to an obiter view that I

expressed at para 24 in *R v Briggs-Price* [2009] UKHL 19; [2009] AC 1026, when dealing with analogous provisions of the Drug Trafficking Act 1994. Lord Rodger of Earlsferry expressed the same view at para 79. I see the force in Mr Eadie's argument and, if necessary, it will be necessary to reconsider the views that I and Lord Rodger expressed. The first issue is, however, whether section 241(3), if given its natural and very clear meaning, is compatible with the Convention.

8. Section 241(3) forms part of a statutory code of some complexity. I do not believe that for the purposes of resolving the issue raised on this appeal it is necessary to give a more detailed explanation of the legislation than that which I have given. A summary of the relevant provisions of POCA can, however, be found in paras 5 to 11 of the judgment of Carnwath LJ in the Court of Appeal [2010] EWCA Civ 759, [2010] 1 WLR 2881.

The judgment of Griffith Williams J

9. The judgment of Griffith Williams J [2009] EWHC 1015 (QB) runs to nearly 60 closely printed pages. I would endorse the commendation of Carnwath LJ of this "meticulous and comprehensive judgment". The judge started by quoting from the Executive Summary of the Report of the Interim Receiver to the effect that there was no documentary evidence that supported the appellants' assertion that their assets had been derived from legitimate activities but, on the contrary, evidence of unlawful conduct and complex financial dealings indicative of money laundering and concealment.

10. The judge then addressed the burden and standard of proof. He held:

> "9. The burden of proof is on the claimant and the standard of proof they must satisfy is the balance of probabilities. While the claimant alleged serious criminal conduct, the criminal standard of proof does not apply, although 'cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not' – see *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at para 55, per Lord Hoffmann."

The judge went on to quote from Lord Carswell's elaboration of this approach, in which the other members of the House concurred, in *In re D (Secretary of State for Northern Ireland intervening)* [2008] UKHL 33, [2008] 1 WLR 1499.

11. In para 18 of his judgment the judge set out his approach to the evidence, in the context of the question of the attitude that he should take to the acquittal of David Gale by the Portuguese Court:

> "It is not contended that the doctrine of issue estoppel applies and clearly the criminal law principle of autrefois acquit has no application in civil proceedings. On behalf of DG, it was submitted that the Portuguese charges cannot be re-litigated without hearing from all the relevant witnesses or considering a full transcript which is not available. However, I do not accept this contention. To consider the evidence adduced in the Portuguese proceedings is not to re-litigate because what is in issue in these proceedings is not the commission of the specific offences alleged against DG in Portugal but whether on the evidence before this court of the material considered by the Portuguese Court, together with the evidence available to the Spanish Courts and other material not considered by the courts in either jurisdiction, the claimant has proved on the balance of probabilities that DG's wealth was obtained through unlawful conduct of a particular kind or of one of a number of kinds, each of which would have been unlawful conduct: see section 242(2)(b) of POCA – that is to say drug trafficking, money laundering and tax evasion."

12. The judge gave detailed consideration to the acquisition of numerous assets by the appellants and the explanations, or lack of explanations, proffered to explain how these were funded. He examined the evidence that had led to the Portuguese prosecution and the commencement of criminal proceedings in Spain, which were subsequently discontinued "on account of prescription". His conclusions were summarised in the following passage from para 140 of his judgment:

> "I am in no doubt that DG and TG engaged in unlawful conduct – in DG's case, money laundering and drug trafficking, in TG's case money laundering. There is also evidence of tax evasion in four jurisdictions. They have acquired capital and various assets as a direct consequence of the money laundering and/or drug trafficking, but it is not possible to quantify the extent of the tax evasion or to estimate the extent, if at all, that it contributed to their capital wealth. For reasons given during the course of the judgment and below, I am satisfied the Receiver has correctly identified recoverable property. I found DG a witness whose evidence, on the central issues, was wholly unreliable. He was so often demonstrably lying. I am not prepared to believe the evidence of TG insofar as she purported to confirm his account or to explain her involvement; she too was

> shown to be a liar about matters of real moment. While I am prepared to accept that DG was the moving force behind all criminal conduct, she was hardly ignorant of what he was doing and played her full part in the money laundering."

The judge then summarised the facts that he had found earlier in his judgment, which formed the basis for his conclusions. They ranged more widely than the facts that formed the basis of the criminal proceedings in Portugal and Spain.

The appellants' case

13. Article 6 of the Convention provides:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing… "

> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Article 6(3) lays down a number of procedural "minimum rights" to be accorded to a person charged with a criminal offence.

14. Mr Mitchell QC's submissions on behalf of the appellants founded upon the fact that an essential stepping stone toward proving that the property owned by the appellants was the product of crime was proof that the appellants had been guilty of criminal conduct, in the form of drug trafficking and money laundering. He submitted that in these circumstances article 6(2) applied. The appellants were entitled to the presumption of innocence afforded by that article. Rebuttal of the presumption of innocence required proof of guilt to the criminal standard, this being implicit in the words "according to law". He added to this the submission that once David Gale had been acquitted of drug trafficking by the Portuguese Court no adverse finding could be made that implicated him in the conduct of which he had been acquitted.

15. As the legal basis for these submissions Mr Mitchell relied first on a considerable body of Strasbourg jurisprudence and secondly on the analysis of this jurisprudence of the House of Lords in *R v Briggs-Price.* In considering the jurisprudence I acknowledge the assistance that I have derived from Mr Eadie's printed case. He has there propounded a number of principles to be derived from

the Strasbourg cases, which were not challenged by Mr Mitchell and which I have found to be both well founded and helpful.

The Strasbourg jurisprudence

16. "Charged with a criminal offence" has an autonomous meaning – see *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647. Thus the fact that POCA unequivocally designates recovery proceedings as "civil recovery" does not establish conclusively that they do not involve the charge of a criminal offence. None the less, the classification of proceedings under national law is one of three relevant considerations ("the three factors") to which the ECtHR always has regard when deciding whether or not article 6(2) is engaged. The second is the essential nature of the proceedings and the third is the type and severity of the consequence that may flow from the proceedings, usually described by the ECtHR as "the penalty that the applicant risked incurring". These three factors, and some of the jurisprudence in which they feature, were identified by Kerr LCJ in *Walsh v Director of the Assets Recovery Agency* [2005] NICA 6, [2005] NI 383, at para 20, where he observed that they tend to blend into each other.

17. If the proceedings are properly analysed as civil rather than criminal, article 6(1) applies, but not article 6(2) or (3). There is a possibility, however, that the requirements of article 6(2) and (3) may creep in by the back door on the basis that the notion of a fair trial demands that they be applied - see *Bochan v Ukraine* (Application No 7577/02) (unreported) 3 May 2007.

18. I now come to a series of cases dealing with the application of article 6(2) after a person has been acquitted in criminal proceedings. These are of relevance in the present case having regard to Mr Mitchell's contention that the Portuguese acquittal posed a bar to reliance in these proceedings on the alleged conduct which formed the basis of the Portuguese proceedings.

19. Some of these decisions are mutually inconsistent and it is not easy to identify the principle underlying others. Before looking at these cases it may be helpful to make some preliminary observations. Many signatories to the Convention require guilt in criminal proceedings to be established according to an enhanced standard of proof in comparison to civil or disciplinary proceedings. In this jurisdiction the standard is proof beyond reasonable doubt. In such circumstances it is perfectly obvious that failure to establish guilt according to the required standard does not demonstrate that the defendant did not commit the criminal act. It demonstrates simply that the evidence adduced against him was insufficient to discharge the enhanced burden of proof. After acquittal, the possibility exists that claims for relief by, or against, the defendant may be brought

that are based upon, or involve consideration of, the evidence that was inadequate to establish the defendant's criminal guilt. The resolution of those claims may turn on lesser standards of proof, or different criteria, from those which governed the criminal proceedings. Examples are a claim by the defendant in respect of his legal costs, a claim by the defendant for compensation for time spent remanded in custody, disciplinary proceedings brought against the defendant in respect of the alleged conduct that formed the subject of the criminal charge, or a claim for damages by an alleged victim of that conduct.

20. The Strasbourg Court has never suggested that it is unlawful to require a defendant who has been acquitted to satisfy some additional criterion in order to qualify for reimbursement of his costs, or for compensation for time spent on remand: see for instance *Leutscher v The Netherlands* (1996) 24 EHRR 181. The Strasbourg Court has also recognised that it is legitimate for a victim to bring a civil claim for compensation in proceedings that apply a lesser burden of proof to the issue of whether the defendant committed the acts that had formed the basis of the criminal charge on which he was acquitted – see for instance *Ringvold v Norway* (Application No 34964/97) (unreported) 11 February 2003. And the Strasbourg Court has recognised that, after acquittal, it may still be legitimate to bring disciplinary proceedings or care proceedings under which a lesser standard of proof may be applied to the question of whether the defendant committed the conduct that had formed the basis of the criminal charge of which he was acquitted: see for example *Moullet v France* (Application No 27521/04) (unreported) 13 September 2007; *HK v Finland* (Application No 36065/97) (unreported) 27 September 2005.

21. Most of the cases to which I have just referred involved discrete proceedings after the defendant's acquittal in the criminal trial. There are a number of cases, however, where the Strasbourg Court has held that the presumption of innocence in article 6(2) was infringed by findings in subsequent proceedings that cast doubt on the validity of a prior acquittal in criminal proceedings. The common factor in these cases has been a procedural connection between the criminal trial and the subsequent proceedings - the mantra oft repeated has been that the latter proceedings were "a consequence and the concomitant" of the criminal proceedings. The Court has also condemned as infringing article 6(2) statements by public authorities suggesting that a person acquitted might none the less have been guilty.

22. This line of authority starts with *Sekanina v Austria* (1993) 17 EHRR 221. The applicant was tried and acquitted of a charge of murder. The jury gave as their reason that there was no "conclusive evidence" on which to convict him. He then claimed compensation for a year during which he was remanded in custody. Under the relevant statute a defendant was entitled to compensation if he was acquitted "and the suspicion that he committed the offence is dispelled". He was refused

compensation by the court which had presided over the trial on the ground that, having regard to the evidence, his acquittal did not dispel suspicion of his guilt. He alleged violation of article 6(2). The Commission in ruling the application admissible adopted the following passage from *X v Austria* (1982) 30 DR 227:

> "No authority may treat a person as guilty of a criminal offence unless he has been convicted by the competent court and in the case of an acquittal the authorities may not continue to rely on the charges which have been raised before that court but which have been proved to be unfounded. This rule also applies to courts which have to deal with non-criminal consequences of behaviour which has been subject to criminal proceedings. They must be bound by the criminal court's finding according to which there is no criminal responsibility for the acts in question although this naturally does not prevent them to establish, eg a civil responsibility arising out of the same facts."

23. The ECtHR agreed that article 6(2) applied. In doing so it relied on a link between the criminal proceedings and the compensation proceedings. It held at para 22:

> "Admittedly, the Linz Regional Court gave its decision rejecting the claim on 10 December 1986, several months after the judgment acquitting the applicant on 30 July 1986. In the Court's opinion, Austrian legislation and practice nevertheless link the two questions – the criminal responsibility of the accused and the right to compensation – to such a degree that the decision on the latter issue can be regarded as a consequence and, to some extent, the concomitant of the decision on the former. Moreover, as is the case under the legislation of several other European countries in which a right to compensation in respect of detention on remand is recognised in the event of acquittal, the criminal court which tries the case on its merits, in this instance the Linz Landesgericht, albeit composed differently, in principle has jurisdiction in the matter.
>
> Finally, the Austrian courts relied heavily on the evidence from the Assize Court's case file in order to justify their decision rejecting the applicant's claims, thus demonstrating that, in their opinion, there was indeed a link between the two sets of proceedings.
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> The applicant can therefore invoke article 6(2) in relation to the impugned decision."

Subsequently, at para 30, the ECtHR made the following comment on the Austrian court's affirmations that there were still grounds for suspicion of the applicant's guilt:

> "Such affirmations – not corroborated by the judgment acquitting the applicant or by the record of the jury's deliberations – left open a doubt both as to the applicant's innocence and as to the correctness of the Assize Court's verdict. Despite the fact that there had been a final decision acquitting Mr Sekanina, the courts which had to rule on the claim for compensation undertook an assessment of the applicant's guilt on the basis of the contents of the Assize Court file. The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final. Consequently, the reasoning of the Linz Regional Court and the Linz Court of Appeal is incompatible with the presumption of innocence."

24. *Sekanina* was followed in *Rushiti v Austria* (2000) 33 EHRR 1331, a case of essentially similar facts. The Court stated at para 31:

> " In any case, the Court is not convinced by the Government's principal argument, namely that a voicing of suspicions is acceptable under article 6(2) if those suspicions have already been expressed in the reasons for the acquittal. The Court finds that this is an artificial interpretation of the *Sekanina* judgment, which would moreover not be in line with the general aim of the presumption of innocence which is to protect the accused against any judicial decision or other statements by state officials amounting to an assessment of the applicant's guilt without him having previously been proved guilty according to law (see *Allenet de Ribemont v France* (1995) 20 EHRR 557, para 35, with further references). The Court cannot but affirm the general rule stated in the *Sekanina* judgment that, following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible. The Court, thus, considers that once an acquittal has become final - be it an acquittal giving the accused the benefit of the doubt in accordance with article 6(2) - the voicing of any suspicions of guilt, including those expressed in the reasons for the acquittal, is incompatible with the presumption of innocence."

25. Taken at face value these decisions seem to convert a presumption of innocence prior to conviction which is rebuttable into an irrebuttable presumption of innocence after acquittal. Two matters demonstrate that this is not the case. The first is the relief granted, or more significantly denied, to the applicants. Each of the applicants sought damages by way of compensation for his detention on remand – ie the relief he had sought in the domestic proceedings, to which he was entitled under domestic law if suspicion of his guilt had been dispelled. This was denied on the ground that there was no connection between the violation of article 6(2) and the damage in question. If, however, the acquittals had been conclusive of the applicant's innocence his right to compensation would logically have followed. The other matter is the reasoning of the ECtHR in a number of subsequent applications against Norway, which were heard together.

26. *Ringvold v Norway* (Application No 34964/97) (unreported) 11 February 2003 and *Y v Norway* (2003) 41 EHRR 87 each concerned a case where the victim of conduct that had been the subject of an unsuccessful criminal prosecution was awarded compensation. Under Norwegian criminal law guilt of an accused must be proved beyond reasonable doubt. Under the Code of Criminal Procedure 1981 the civil claim of a victim may be determined "in connection with" a criminal case provided that the claim arises from the same act that forms the basis of the prosecution. Under the Damage Compensation Act 1969 a purported victim is entitled to claim damages for personal injury caused with intent or by gross negligence regardless of the outcome of criminal proceedings. The standard of proof in respect of such a claim is balance of probabilities.

27. In *Y v Norway* the applicant was charged with sexual assault and homicide of his cousin. He was convicted and sentenced to 14 years' imprisonment. In linked civil proceedings he was ordered to pay compensation to the victim's parents. He appealed to the High Court, where the hearing was before three professional judges and a jury. The jury acquitted the applicant. The next day the three professional judges sat to consider the compensation order on the basis of the evidence that they had heard. They upheld the order for compensation. The applicant claimed violation of article 6(2) but did not claim pecuniary damages. The ECtHR considered the three relevant factors to which I have referred in para 16 above. It held at para 40 that the compensation proceedings were classified as civil under Norwegian domestic law. As to the second factor the Court held at para 41 that, notwithstanding that the compensation claim was based on the same evidence and involved the same constitutive elements as the criminal offence, it could not properly be said to render the defendant "charged with a criminal offence". The Court continued:

> "Thus, the Court considers that, while the acquittal from criminal liability ought to be maintained in the compensation proceedings, it should not preclude the establishment of civil liability to pay

compensation arising out of the same facts on the basis of a less strict burden of proof (see, mutatis mutandis, *X v Austria* (1982) 30 DR 227; *MC v United Kingdom* (1987) 54 DR 162).

42. However, if the national decision on compensation contains a statement imputing the criminal liability of the respondent party, this could raise an issue falling within the ambit of article 6(2) of the Convention.

43. The Court will therefore examine the question whether the domestic courts acted in such a way or used such language in their reasoning as to create a clear link between the criminal case and the ensuing compensation proceedings as to justify extending the scope of the application of article 6(2) to the latter.

44. The Court notes that the High Court opened its judgment with the following finding (para 13 above):

> 'Considering the evidence adduced in the case as a whole, the High Court *finds it clearly probable that [the applicant] has committed the offences against Ms T* with which he was charged and that an award of compensation to her parents should be made under article 3-5 (2) of the Damage Compensation Act. ...' (Emphasis added)

45. This judgment was upheld by the majority of the Supreme Court (para 16 above), albeit using more careful language. However, that judgment, by not quashing the former, did not rectify the issue, which in the Court's opinion, thereby arises.

46. The Court is mindful of the fact that the domestic courts took note that the applicant had been acquitted of the criminal charges. However, in seeking to protect the legitimate interests of the purported victim, the Court considers that the language employed by the High Court, upheld by the Supreme Court, overstepped the bounds of the civil forum, thereby casting doubt on the correctness of that acquittal. Accordingly, there was a sufficient link to the earlier criminal proceedings which was incompatible with the presumption of innocence.

> 47. In the light of these considerations, the Court concludes that article 6(2) was applicable to the proceedings relating to the compensation claim against the present applicant and that this provision was violated in the instant case."

The Court awarded 20,000 Euros by way of non-pecuniary damages.

28. In *Ringvold v Norway* the applicant was charged with sexual abuse of a minor, G, on whose behalf a claim was submitted for civil compensation. He was acquitted and the claim for compensation dismissed. G appealed to the Supreme Court against the failure to award compensation. The Supreme Court heard fresh evidence but also had regard to the evidence given in the criminal proceedings. The ECtHR considered the usual three factors and concluded that the compensation claim did not amount to the "bringing of another 'criminal charge'". It observed, however, that had the national decision on compensation contained a statement imputing criminal liability to the applicant this would have raised an issue falling "within the ambit" of article 6(2).

29. The Court then went on to distinguish *Sekanina* and *Rushiti* in the following manner:

> "41. The question remains whether there were such links between the criminal proceedings and the ensuing compensation proceedings as to justify extending the scope of article 6(2) to cover the latter.
>
> The Court reiterates that the outcome of the criminal proceedings was not decisive for the issue of compensation. In this particular case, the situation was reversed: despite the applicant's acquittal it was legally feasible to award compensation. Regardless of the conclusion reached in the criminal proceedings against the applicant, the compensation case was thus not a direct sequel to the former. In this respect, the present case is clearly distinguishable from those referred to above, where the Court found that the proceedings concerned were a consequence and the concomitant of the criminal proceedings, and that article 6(2) was applicable to the former."

30. *Sekanina* and *Rushiti* were, however applied, and *Ringvold* distinguished, in *Hammern v Norway* (Application No 30287/96) (unreported) 11 February 2003. The applicant in that case had been acquitted on charges of sexual abuse of minors. He then sought compensation in respect of time during which he had been remanded in custody. Under article 444 of the Code of Criminal Procedure he was

entitled to this "if it is shown to be probable that he did not carry out the act that formed the basis for the charge." The ECtHR held at para 42 that the compensation proceedings did not give rise to a "criminal charge" against the applicant, but went on to hold that the linkage between the compensation proceedings and the criminal proceedings had the consequence of bringing the former "within the scope" of article 6(2). At para 44 the Court held that it was significant that the proceedings engaged the responsibility of the state, not a private party. It went on to give the following reasons for holding article 6(2) to be applicable:

> "45. …Moreover, unlike in criminal proceedings – where it was for the prosecution to prove beyond reasonable doubt that the defendant had committed the incriminated act - in a compensation case of the present kind it was for the acquitted person to show that, on the balance of probabilities, it was more than 50% probable that he or she did not carry out the act grounding the charge. Leaving aside this difference in evidentiary standards, the latter issue overlapped to a very large extent with that decided in the applicant's criminal trial. It was determined on the basis of evidence from that trial by the same court, sitting largely in the same formation, in accordance with the requirements of article 447 of the Code.
>
> 46. Thus, the compensation claim not only followed the criminal proceedings in time, but was also tied to those proceedings in legislation and practice, with regard to both jurisdiction and subject-matter. Its object was, put simply, to establish whether the state should have a financial obligation to compensate the burden it had created for the acquitted person by the prosecution it had engaged against him. Although the applicant was not 'charged with a criminal offence', the Court considers that, in the circumstances, the conditions for obtaining compensation were linked to the issue of criminal responsibility in such a manner as to bring the proceedings within the scope of article 6(2), which accordingly is applicable."

31. *Ringvold* and *Y* were applied by the ECtHR when ruling inadmissible the application in *Lundkvist v Sweden* (Application No 48518/99) (unreported) 13 November 2003. The applicant was charged with setting his house on fire after a row with his wife. He was acquitted on the grounds that, while there was a strong inferential case against him, it did not establish his guilt beyond reasonable doubt. He then brought a civil claim against his insurers for the loss of his house. Evidence was adduced, which included evidence that had been adduced at the criminal trial. The court dismissed his claim, holding that the insurance company had proved, on balance of probabilities that he was responsible for the fire. Considering the three factors the Court held that the civil proceedings did not involve bringing a "criminal charge" against the applicant. It went on to hold:

> "As to the further question of whether there were links between the criminal case and the ensuing compensation case such as to justify extending the scope of the application of article 6(2) to the latter, the Court reiterates that the outcome of the criminal proceedings was not decisive for the compensation issue. In this particular case, the situation was reversed: despite the applicant's acquittal it was legally feasible to deny him insurance compensation for the destroyed house. Regardless of the conclusion reached in the criminal trial against the applicant, the compensation case was therefore not a direct sequel to the former or a consequence and concomitant of it."

Discussion

32. With respect, I find unconvincing the attempts of the Strasbourg Court to distinguish between claims for compensation by an acquitted defendant and claims for compensation by a third party against an acquitted defendant. As the cases to which I have just referred show, the link between the criminal proceedings and the subsequent proceedings can be close in either case. The evidence may be common to both proceedings, as may the judges who have to consider it. In each case the compensation proceedings can put in issue the facts that were alleged as the foundation of the criminal charges. In each case facts were held proved according to the civil standard of proof which had not been established according to the criminal standard in the earlier proceedings. How can it credibly be said that the claim for compensation by the defendant is "consequential and concomitant" to the criminal proceedings but not the claim by a third party? May it not be that the Strasbourg Court took a wrong turn in *Sekanina* and *Rushiti*? It might be thought that the judges who sat on the criminal proceedings will be well placed to determine the outcome of issues that depend upon the application of a lesser standard of proof to the same factual evidence; the Norwegian procedure, illustrated in *Y*, proceeded on that basis. Yet this is something that the Strasbourg jurisprudence appears to discourage. This confusing area of Strasbourg law would benefit from consideration by the Grand Chamber.

33. What follows from the findings of the Strasbourg Court that claims for compensation by acquitted defendants fall "within the scope" of article 6(2)? This is a question to which I drew attention in para 25 above. It was considered in a concurring opinion by Judge Greve in *Hammern*. The judge's conclusion was that the test laid down by the Norwegian Code of Criminal Procedure for recovering compensation – could the defendant show that on balance of probabilities he did not carry out the act that formed the basis of the charge -was simply not viable because it violated article 6(2). The focus had to be on whether the prosecution had been warranted on the facts known at the time. I comment that if this were correct the effect of article 6(2) was to prejudice the rights of the defendant that it was designed to protect.

34. An alternative view is that all that the cases establish is that article 6(2) prohibits a public authority from suggesting that an acquitted defendant should have been convicted *on the application of the criminal standard of proof* and that to infringe article 6(2) in this way entitles an applicant to compensation for damage to reputation or injury to feelings. I am inclined to this view, albeit that it involves a remarkable extension of a provision that on its face is concerned with the fairness of the criminal trial – see my comment on *Taliadorou and Stylianou v Cyprus* (Application Nos 39627/05 and 39631/05) (unreported) 16 October 2008) in *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2011] 2 WLR 1180.

35. On no view does this jurisprudence support Mr Mitchell's submission that the appellant's acquittal in Portugal precludes the English court in proceedings under POCA from considering the evidence that formed the basis of the charges in Portugal. The link between the Portuguese criminal proceedings and the English civil proceedings, which Strasbourg would appear to consider so critical, is not there. Nor does this jurisprudence lend any support to the proposition that the criminal standard must be applied to proof of criminal conduct in proceedings under POCA. That proposition requires further consideration of Strasbourg authority.

Consideration of Strasbourg jurisprudence resumed

36. Before the decision of the ECtHR in *Geerings v The Netherlands* (2007) 46 EHRR 1222 and the decision of the House of Lords in *R v Briggs-Price* [2009] AC 1026 the law was not in doubt. Confiscation proceedings that proceed on the basis that property in the hands of a convicted criminal was derived from other criminal activity did not involve the defendant being "charged with a criminal offence" in relation to the other offending, or engage article 6(2). The cases supporting this proposition, and applying them to the United Kingdom confiscation legislation, are analysed in detail in *Briggs-Price* and I do not propose to repeat that exercise. I should record, however, that Mr Eadie referred the Court to two lines of Strasbourg authority, not considered in *Briggs-Price*, that supported this proposition. The first involved admissibility decisions in relation to proceedings in Italy to seize and confiscate the assets of those associated with Mafia activities: *M v Italy* (1991) 70 DR 59, *Raimondo v Italy* (1994) 18 EHRR 237; *Arcuri v Italy* (Application No 52024/99) (unreported) 5 July 2001.

37. *M v Italy* was a decision of the Commission. The application related to confiscation of property on the ground that there was circumstantial evidence that the property was derived from unlawful activities. The Commission considered the usual three factors and concluded that the proceedings did not involve a criminal charge so as to engage article 6(2). Rather they were preventative in character.

38. In *Raimondo v Italy* the ECtHR made a similar finding at para 43, although article 6(2) itself was not invoked. The position was the same in *Arcuri v Italy.*

39. The other authorities were two admissibility decisions in relation to seizure and confiscation of cash on the ground that it was the proceeds of, or intended to be used for, drug trafficking, pursuant to sections 42-43 of the Drug Trafficking Act 1994: *Butler v United Kingdom* (Application No 41661/98) (unreported) 27 June 2002 and *Webb v United Kingdom* (Application No 56054/00) (unreported) 10 February 2004. In each case the ECtHR rejected the contention that the proceedings involved a "criminal charge" and resulted in the imposition of a penalty or punishment. It held that forfeiture was preventative and not a penal sanction. Accordingly it was permissible that, pursuant to section 43(3), the standard of proof required to justify forfeiture was that applicable to civil proceedings.

Geerings and Briggs-Price

40. Mr Mitchell did not deal in detail with earlier authority. Rather he founded his argument on the decision of the Strasbourg Court in *Geerings*, as applied by the House of Lords in *Briggs-Price.* I do not propose to repeat the review of the earlier authorities that is to be found in the speeches in that case. The relevant background to *Geerings* was the decision of the ECtHR in *Phillips v United Kingdom* (2001) 11 BHRC 280 and in *van Offeren v The Netherlands* (Application No 19581/04) (unreported) 5 July 2005. In each case the Court held that confiscation proceedings in relation to the benefits of drug trafficking did not involve charging the defendant with a criminal offence so as to bring them within the scope of article 6(2). In each case the applicant had been convicted of drug offences and the confiscation proceedings related to property held by him. The issue was whether article 6(2) was infringed by a presumption that this property was derived from similar offences. In holding that it was not the Court treated the confiscation procedure as analogous to the sentencing process. It does not seem to me that the analogy is very precise. The important point is, however, that the ECtHR approved of the confiscation of property on the basis that it was derived from drug trafficking without treating the proof that it was so derived as involving criminal charges and thus involving the application of article 6(2).

Geerings v The Netherlands

41. The position in *Geerings* 46 EHRR 1222 was very different. The applicant had been charged with a number of specific offences of theft and handling stolen goods and initially convicted of these. On appeal most, but not all,

the convictions were quashed on the ground that the evidence did not satisfy the criminal standard of proof. None the less the Public Prosecutions Department sought a "confiscation" order for payment by the defendant of a sum equivalent to the benefit that he had derived from not merely the offences of which he had been convicted, but also from the offences of which he had been acquitted. The Supreme Court held that the Department was entitled to this order on the basis that, for the purposes of the confiscation proceedings, the standard of proof that he had benefited from the offences in question was less stringent than the standard of proof that had been required to procure his conviction of them. Thus the fact that he had been acquitted of the offences was no bar to the claims in respect of them in the confiscation proceedings.

42. As a matter of strict logic I am in sympathy with the reasoning of the Supreme Court. None the less there is something unattractive about a prosecuting authority, which has failed to procure a conviction, proceeding to seek a confiscation order on the basis that the defendant committed the specific crimes of which he was acquitted. The ECtHR declined to accept this situation. The following passage from the judgment of the Court sets out the basis upon which it avoided doing so:

> "44. The Court has in a number of cases been prepared to consider confiscation proceedings following on from a conviction as part of the sentencing process and therefore beyond the scope of article 6(2) (see, in particular, *Phillips*, cited above, para 34; *van Offeren v The Netherlands* (Application No 19581/04), 5 July 2005). The features which these cases had in common are that the applicant was convicted of drugs offences; that the applicant continued to be suspected of additional drugs offences; that the applicant demonstrably held assets whose provenance could not be established; that these assets were reasonably presumed to have been obtained through illegal activity; and that the applicant had failed to provide a satisfactory alternative explanation.
>
> 45. The present case has additional features which distinguish it from *Phillips* and *van Offeren*.
>
> 46. First, the Court of Appeal found that the applicant had obtained unlawful benefits from the crimes in question although the applicant in the present case was never shown to hold any assets for whose provenance he could not give an adequate explanation. The Court of Appeal reached this finding by accepting a conjectural extrapolation based on a mixture of fact and estimate contained in a police report.

47. The Court considers that 'confiscation' following on from a conviction – or, to use the same expression as the Netherlands Criminal Code, 'deprivation of illegally obtained advantage' – is a measure (*maatregel*) inappropriate to assets which are not known to have been in the possession of the person affected, the more so if the measure concerned relates to a criminal act of which the person affected has not actually been found guilty. If it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt. This can hardly be considered compatible with article 6(2) (compare, mutatis mutandis, *Salabiaku v France* (1988) 13 EHRR 379, para 28).

48. Secondly, unlike in the *Phillips* and *van Offeren* cases, the impugned order related to the very crimes of which the applicant had in fact been acquitted.

49. In the *Rushiti* judgment (cited above, para 31), the Court emphasised that article 6(2) embodies a general rule that, following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible.

50. The Court of Appeal's finding, however, goes further than the voicing of mere suspicions. It amounts to a determination of the applicant's guilt without the applicant having been 'found guilty according to law' (compare *Baars v The Netherlands*, (2003) 39 EHRR 538, para 31).

51. There has accordingly been a violation of article 6(2)."

43. This passage might be read as supporting one or more of the following propositions in relation to "confiscation" proceedings, by which I mean proceedings that require payment by a defendant of a sum equivalent to the value of property derived directly or indirectly from crime:

i) Where a defendant has been tried and acquitted of an offence no claim can be based upon an assertion that he committed that offence.

ii) In no case can confiscation be ordered unless it is proved to the criminal standard that the defendant committed the offences from which the property is alleged to have been derived.

iii) Where it is not proved by independent evidence that the defendant possesses or possessed property for which there is no innocent explanation, but asserted that this is to be inferred from the fact that he committed a crime or crimes, the latter fact must be proved according to the criminal standard of proof.

44. The first proposition can readily be deduced from paras 48, 49 and 50. None the less, as I have already indicated, I believe that this proposition is contrary to principle. If confiscation proceedings do not involve a criminal charge, but are subject to the civil standard of proof, I see no reason in principle why confiscation should not be based on evidence that satisfies the civil standard, notwithstanding that it has proved insufficiently compelling to found a conviction on application of the criminal standard. At all events, insofar as other Strasbourg jurisprudence supports the first proposition, it is only in circumstances where there is a procedural link between the criminal prosecution and the subsequent confiscation proceedings. There was no such link in the present case. The acquittal was in Portugal and the recovery proceedings here in England. Furthermore, the evidence in the latter ranged much wider than the evidence that was relied upon in the Portuguese prosecution.

45. The third proposition is also one that can readily be derived from the passages cited in para 44. That proposition would not, however, put the decision of Griffith Williams J in doubt, for that decision was founded on property in the hands of the appellant whose provenance had not been sufficiently explained.

46. The second proposition is the critical one in the present case. If it is sound this appeal must be allowed, for Griffith Williams J applied the civil, not the criminal standard of proof. In *Briggs-Price* I held that the proposition could not properly be derived from *Geerings.* I remain of that view. The second proposition is inconsistent with the decisions in *Phillips* and *van Offeren.* The ECtHR in *Geerings* did not purport to depart from those decisions. On the contrary, in para 45 it expressly distinguished those cases on the basis that there were “additional features” in *Geerings.*

Briggs-Price

47. The procedural position in *Briggs-Price* was, happily, unusual. It is summarised in paras 8 to 15 of my speech in that case. To summarise that summary, the appellant had been convicted of conspiring to import heroin. The conspiracy was, however, never implemented, so it produced no benefit. Evidence was adduced at the trial, however, that the appellant had carried on substantial dealings in cannabis. After his conviction the trial judge embarked on confiscation proceedings under the Drug Trafficking Act 1994. He held, on the basis of the evidence that he had heard about the appellant's cannabis dealing that he was satisfied that the appellant had benefited from such dealing to the extent of at least £2,628,490 and made a confiscation order in that sum. The judge made it clear that he was satisfied that the appellant's involvement in dealing in cannabis had been proved to the criminal standard.

48. The House was unanimous in finding that the judge had been satisfied on the evidence to the criminal standard of proof that the appellant had benefited from cannabis dealing to the extent found. Thus, even if article 6(2) applied to the confiscation exercise, its requirement that the appellant's criminal behaviour should be established according to the criminal standard of proof had been satisfied. The House gave, however, lengthy obiter consideration to the question of whether, taking due account of the decision in *Geerings*, the confiscation order could only be made if the judge was satisfied to the criminal standard of proof that the appellant had committed the cannabis offences in respect of which evidence had been led at his trial.

49. At paras 38 to 41 in *Briggs-Price* I gave my reasons for concluding that *Geerings* did not support the proposition that, in confiscation proceedings, the commission by the defendant of the offences from which benefit had been derived had to be proved to the criminal, rather than the civil, standard of proof.

50. At paras 112 to 132 Lord Mance carried out a detailed analysis of the Strasbourg jurisprudence, culminating in *Geerings.* He also decided that this did not justify the conclusion that article 6(2) applied to the confiscation order procedure, nor to proving the commission of criminal offences as part of that procedure.

51. Lord Rodger expressed a contrary view at para 79. He concluded that in confiscation proceedings the commission of the criminal offences from which the relevant benefit was derived had to be proved to the criminal standard of proof, although the derivation of the benefit could be proved to the civil standard. In para 77 he summarised his reason for so concluding:

> "Although I do not share his view that article 6(2) applies, I have none the less reached the same conclusion as Lord Brown on the standard of proof. If a presumption of innocence is implied into article 6(1), then it, too, must require that the person be proved guilty according to law. In the context of a criminal trial, the standard of proof, according to our law, is beyond reasonable doubt. Indeed, if that were not the position, the Crown could ask the court to make a confiscation order on the basis of an alleged benefit from a specific offence of which the defendant would have been acquitted if he had been prosecuted for it."

52. Lord Neuberger of Abbotsbury at para 152 agreed with Lord Rodger's conclusions on standard of proof.

53. Lord Brown of Eaton-under-Heywood concluded that *Geerings* established the third of the propositions that I have set out at para 45 above. His reasoning is set out in the following passage from his opinion:

> "94. …I understand the Court's reasoning in paras 46 and 47 to amount to this: the prosecution must either demonstrate that the defendant holds or has held assets the provenance of which he cannot satisfactorily explain (as in *Phillips* and *van Offeren*: see para 44), or must establish beyond reasonable doubt that the defendant has committed some other offence (or offences) from which it can be presumed that he obtained advantage. In the latter case, of course, article 6(2) applies but is satisfied."

Conclusions

54. The views on standard of proof expressed in *Briggs-Price* by members of the House were obiter but the application of the common ground in the views of Lord Phillips, Lord Brown and Lord Mance leads to the following conclusion. The commission by the appellants in the present case of criminal conduct from which the property that they held was derived had to be established according to the civil and not the criminal standard of proof. For the reasons that I have given that remains my conclusion. It is a conclusion which, prior to *Geerings*, appeared to be firmly founded on the decision of the Privy Council in *McIntosh v Lord Advocate* [2001] UKPC D1; [2003] 1 AC 1078. In my view that foundation is unshaken.

55. The starting point in this case is the possession of property by the appellants for whose provenance they were unable to provide a legitimate

explanation. There was an abundance of evidence, set out at length by the judge with great care, which implicated them in criminal activity that provided the explanation for the property that they owned. The judge rightly applied the civil standard of proof, but on my reading of his judgment he would have been satisfied to the criminal standard of the appellants' wrongdoing. For the reasons that I have given I would dismiss the appeal in relation to the first issue.

LORD CLARKE (WITH WHOM LORD PHILLIPS, LORD MANCE, LORD JUDGE AND LORD REED AGREE)

The first issue

56. Lord Phillips and Lord Dyson and, to a lesser extent, Lord Brown have discussed the Strasbourg jurisprudence at some length. As I read their judgments, however, their view that the appeal should be dismissed on the first issue does not depend upon that analysis. I agree with Lord Phillips' opinion expressed at para 35 (and those of Lord Brown at para 111 and Lord Dyson at para 133) that on no view of the Strasbourg jurisprudence does it support the submission that Mr Gale's acquittal in Portugal precludes the English court in proceedings under POCA from considering the evidence that formed the basis of the charges in Portugal. There is here no procedural link between the two sets of proceedings.

57. As to the standard of proof, I agree with Lord Phillips that the Strasbourg jurisprudence does not support the proposition (ie the second proposition in para 43 above) that in no case can confiscation be ordered unless it is proved to the criminal standard that the defendant committed the offences from which the property is said to have been derived. I agree with his conclusion and reasons summarised in para 54 to the effect that the commission of criminal conduct from which the property the appellants held was derived had to be established according to the civil and not the criminal standard of proof. I also agree with his conclusion in para 55 that there was ample evidence upon which the judge could find that the civil standard of proof was satisfied.

58. Lord Dyson concludes at paras 141 and 142 that the judge did not impute criminal liability to the appellants and that the judge's approach to the evidence was correct. I agree.

59. For these reasons I too would dismiss the appeal on the first issue. This conclusion does not involve a detailed consideration of the issues raised by the Strasbourg jurisprudence or a resolution of the issues or potential issue identified by Lord Phillips and Lord Dyson. I would prefer to defer reaching definitive

conclusions on them until they require a decision on specific facts. I would only add two points.

60. First, I agree with Lord Brown that it is highly desirable that these issues should be considered by the Grand Chamber in Strasbourg in order to clarify and rationalise what he aptly calls this whole confusing area. Secondly, I note that in the recent case of *R (Adams) v Secretary of State for Justice (JUSTICE intervening)* [2011] UKSC 18; [2011] 2 WLR 1180, where some of these issues were touched on, Lord Hope said at para 111 that the principle that is applied in Strasbourg is that it is not open to a state to undermine the effect of an acquittal. It appears to me that that is indeed the underlying principle and that if, as here and indeed in *Adams*, the effect of the acquittal is not undermined there should be no question of holding that there is any conflict with the presumption of innocence enshrined in article 6(2) of the European Convention on Human Rights.

Issue 2 - Introduction

61. The second issue in this appeal relates to costs. It raises a single question of principle. That question is whether an order for costs made in favour of SOCA against a person against whom a recovery order has been made under section 266 of the Proceeds of Crime Act 2002 ("the 2002 Act") can include the investigation costs incurred by an interim receiver ("the receiver") appointed under section 246 of the 2002 Act. Griffith Williams J ("the judge") made a recovery order against the appellants on 2 June 2009. By a later order of 6 July 2009, the judge ordered the appellants to pay SOCA's costs but refused an application that those costs should include the remuneration of the interim receiver in respect of his investigation.

62. The application for costs was made pursuant to the jurisdiction conferred on the court by section 51(1) of the Senior Courts Act 1981 ("the SCA"). In refusing to make the part of the order relating to the costs of the investigation, the judge followed the decision of the Northern Ireland Court of Appeal in *SOCA v Wilson* [2009] NICA 20; [2009] NI 28. In the instant case the Court of Appeal allowed an appeal against that refusal. In doing so, it declined to follow *SOCA v Wilson*. On 29 July 2010 it ordered that the appellants pay SOCA's legal costs of and occasioned by the proceedings against them on an indemnity basis and that they pay to SOCA the receiver's remuneration for his investigative function on the standard basis. It directed that in each case the costs should be subject to detailed assessment. No such assessment has yet taken place. The question in this part of the appeal is whether the Court of Appeal erred in principle in ordering the appellants to pay to SOCA the costs of the receiver's investigation.

The appointment of the receiver and his powers and duties

63. On 28 July 2005, on the application of the Director of the Assets Recovery Agency (the functions of which were transferred to SOCA on 1 April 2008), Collins J made an interim receiving order and appointed Mr James Earp as the receiver. The order was made under section 246 of the 2002 Act, which is contained in Part 5. Paras 2 to 4 of the order, which appear under the heading detention, custody, preservation and custody of property, provided inter alia that the appellants must not remove the property identified in a schedule from England and Wales or in any way dispose of or deal with the property and that they must transfer monies to an account specified by the receiver and deliver certain property into his possession. Under the heading of disclosure, paras 5 to 8 made detailed provision for disclosure of the existence and whereabouts of the appellants' assets.

64. Para 9 set out the powers of the receiver, which were stated to be in accordance with Schedule 6 to the 2002 Act and to be without prejudice to any existing powers that the receiver might have whether by statute or otherwise. It included powers to seize property, to take possession of property and to manage it, to enter and search premises, to execute all such documents on behalf of the appellants as might be necessary to manage the property, to require the appellants and others to take such steps as may be required to enable the receivership to be conducted and to obtain information from the appellants and others. In addition it included a power to appoint lawyers, accountants and others to advise and/or act on behalf of the receiver and a power to bring proceedings in the name of or on behalf of the appellants against any person having possession of relevant property. In short the powers were very extensive indeed.

65. Paras 11 to 14 of the order set out the duties of the receiver. By para 11 it provided that, pursuant to section 247(2)(a) of the 2002 Act, the receiver must consider such information and documents as were obtained by him in pursuance of the order to establish whether or not the property in the schedule was recoverable property or associated property and, if the latter, to what extent. By para 12, it provided that, pursuant to section 247(2)(b), the receiver must take all reasonable and necessary steps to establish whether or not any other property was recoverable property (in relation to the same unlawful conduct) and, if so, who was holding it. The order also provided by paras 13 and 14 that the receiver must provide certain information to SOCA and to the court and make a report to SOCA under section 255(1) and (2) respectively. It can thus be seen that the receiver had both extensive powers and duties of investigation under the order. He also had powers of management of the relevant property.

66. The order further provided, in para 26, that the receiver could charge for his services and that he must prepare and serve on SOCA accounts in accordance with

terms set out in a letter dated 19 July 2005 inviting him to accept nomination as an interim receiver. The letter enclosed a draft Memorandum of Understanding ("MOU") and a draft of the proposed order. It also described the property in some detail. It made it clear that the terms of the MOU formed part of the terms upon which the receiver was to proceed. Although the MOU states that it was not (and was not intended to be) a binding contract, it was a detailed document which provided for the assessment that the receiver was to carry out and made provision for the fees to be charged and the accounts to be kept. For example, it provided for bills to be submitted and for them to be paid by SOCA within 28 days. The MOU was signed by the receiver on 25 July 2005.

67. As stated above, the order was made under section 246 of the 2002 Act. By section 246(2), an interim receiving order is an order for "(a) the detention, custody or preservation of property, and (b) the appointment of an interim receiver". By section 246(7) SOCA may not nominate an interim receiver who is a member of its staff. Section 247 defines the functions of the interim receiver, so far as relevant, as follows:

> "(1) An interim receiving order may authorise or require the interim receiver -
>
> (a) to exercise any of the powers mentioned in Schedule 6,
>
> (b) to take any other steps the court thinks appropriate,
>
> for the purpose of securing the detention, custody or preservation of the property to which the order applies or of taking any steps under subsection (2).
>
> (2) An interim receiving order must require the interim receiver to take any steps which the court thinks necessary to establish –
>
> (a) whether or not the property to which the order applies is recoverable property or associated property,
>
> (b) whether or not any other property is recoverable property (in relation to the same unlawful conduct) and, if it is, who holds it."

68. Section 255 provides that an interim receiving order must require the receiver to report his findings to the court. The combined effect of section 246(7) and section 247(2) is that the interim receiving order must provide that the interim receiver will conduct the investigation.

69. Schedule 6 provides for an interim receiver to have powers ancillary to those contained in section 247. They include a power to seize property to which

the order applies; a power (subject to certain safeguards) to obtain information or to require a person to answer any question; and powers of entry and search. They also include in paragraph 5(1) a power to manage any property to which the order applies. By sub-paragraph (2), managing property includes (a) selling or otherwise disposing of assets comprised in the property which are perishable or which ought to be disposed of before their value diminishes, (b) where the property comprises assets of a trade or business, carrying on, or arranging for another to carry on, the trade or business, and (c) incurring capital expenditure in respect of the property. The provision that there is a power to sell only where assets are perishable or diminishing in value is consistent with the fact that the receiver is only an interim receiver and that the order is intended to hold the ring until the question whether a recovery order should be made is resolved.

70. It may be noted that these powers are different both from the powers of a trustee appointed under a recovery order (see below) and the powers of a receiver appointed under section 48, which is in Part 2 of the 2002 Act and applies where the court makes a restraint order. Those powers are set out in section 49. By section 49(2)(d) the court may confer on such a receiver the power to realise so much of the property as is necessary to meet the receiver's remuneration and expenses. Moreover, by contrast with the position of an interim receiver set out in paragraph 5(2), as explained above, where the power to sell property is limited to perishable property or property of diminishing value, section 49(10) provides that the power of managing or otherwise dealing in property referred to in section 49(2)(b) includes selling the property or any part of it.

The investigation

71. The receiver's investigation took over three years, culminating in a final report of over 400 pages. That was at least in part because of the failure on the part of Mr Gale to co-operate with the receiver. Toulson LJ summarised the position at [2010] 1 WLR 2881, paras 90-92 as follows:

> "90. Obtaining the information ultimately set out in the receiver's report, which led to the judge making the recovery order, proved to be a lengthy, complicated and expensive process, because of the deliberately obscure way in which Mr Gale had conducted his financial affairs and his persistent and deliberate failure to cooperate with the receiver's investigation.
>
> 91. In his judgment the judge said, at paras 4 and 5:
>
> '4. … It is alleged that the overall evidence establishes that DG has been leading a life of serial drug trafficking, money-laundering

and tax evasion; it is alleged that he went to extreme lengths to avoid detection by using:

(i) a web of lies, false names, multiple passports, nominees and offshore corporate fronts;

(ii) at least 68 bank accounts both on and off-shore and in a number of different jurisdictions which together have received millions of pounds from unidentified sources;

(iii) needlessly complicated bank transfers and

(iv) fleeing his country of residence (from the United Kingdom to Spain, from Spain to the United States of America and from the United States of America to Portugal via the Bahamas) when he feared the authorities were or may be interested in his criminal activities…

5. It is alleged that the absence – in large part due to his deliberate failure to co-operate with the receiver's investigation – of any paper trail of records, financial documents, accounts, invoices, receipts, bank statements and tax returns and any details of business transactions, customers, suppliers and profits establishes that the millions of pounds he acquired could not have been acquired through a legitimate business or businesses.'

92. It is clear from the details set out in the judge's comprehensive judgment that he accepted the allegations that Mr Gale had gone to extreme lengths to avoid detection, by the methods identified by the receiver, and had deliberately failed to co-operate with the receiver's investigation. The material assembled by the receiver was therefore a painstaking task and one which was necessary in order for the agency to succeed in the civil recovery proceedings brought by it against Mr Gale."

72. SOCA has paid the interim receiver in respect of investigation costs said to have totalled some £1m. It seeks to recover those costs from the appellants.

The recovery order

73. As already stated, on 2 June 2009, the judge made a recovery order under section 266 of the 2002 Act against the appellants in respect of assets valued at some £2m. By the same order, Mr James Earp was appointed trustee for civil recovery pursuant to section 267(1) of the 2002 Act and the property was vested in him. The functions of the trustee for civil recovery are set out in section 267. They are of course much greater than the powers of an interim receiver because they extend to realising the value of the assets for the benefit of SOCA. Unlike an

interim receiving order, the purpose of a recovery order and the appointment of a trustee for civil recovery is not merely to hold the ring but to sell the assets and pay the proceeds of sale to SOCA.

Jurisdiction to award costs

74. The court's jurisdiction to award costs in civil proceedings is governed by section 51 of the SCA, which provides:

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in –
>
> (a) the civil division of the Court of Appeal,
> (b) the High Court and
> (c) any county court
>
> shall be in the discretion of the court.
>
> (2) Without prejudice to any general power to make rules of court, such rules may make provisions for regulating matters relating to the costs of those proceedings, including, in particular, prescribing scales of costs to be paid to legal or other representatives or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs.
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

75. As I read that section, costs are in principle recoverable if they are either costs of or incidental to the relevant proceedings. That is because both the costs of and incidental to the proceedings are in the discretion of the court. As stated by Aikens LJ at para 134 by reference to the judgment of Lord Goff in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, section 51 of the SCA 1981 confers a wide jurisdiction on the courts to make orders as to costs. That is so but, as Lord Goff also observed, at p 975, the exercise of this jurisdiction may be limited:

> "It is, I consider, important to remember that section 51(1) of the Act of 1981 is concerned with the jurisdiction of the court to make orders as to costs. Furthermore, it is not to be forgotten that the jurisdiction conferred by the subsection is expressed to be subject to rules of court, as was the power conferred by section 5 of the Act of 1890. It is therefore open to the rule-making authority (now the Supreme Court Rule Committee) to make rules which control the exercise of

> the court's jurisdiction under section 51(1). In these circumstances, it is not surprising to find the jurisdiction conferred under section 51(1), like its predecessors, to be expressed in wide terms. The subsection simply provides that "the court shall have full power to determine by *whom*…the costs are to be paid". Such a provision is consistent with a policy under which jurisdiction to exercise the relevant discretionary power is expressed in wide terms, thus ensuring that the court has, so far as possible, freedom of action, leaving it to the rule-making authority to control the exercise of discretion (if it thinks it right to do so) by the making of rules of court, and to the appellate courts to establish principles upon which the discretionary power may, within the framework of the statute and the applicable rules of court, be exercised."

76. It follows that, as Aikens LJ correctly stated at para 133, the legal framework yields two questions: first, are the expenses of the interim receiver "costs of and incidental to the civil recovery proceedings" so that they can be the subject of a costs order in the proceedings; and, secondly, if they are, is there any statutory rule or provision or authority that prevents the court from having jurisdiction to order that the appellants bear the costs of the receiver?

77. It is in my opinion appropriate to pose these two questions. It is important to note that the question in this appeal is not what powers an interim receiver has to charge for his services or how those powers may be enforced and against what or whom. The receiver's right to recover his remuneration is entirely contained in the order of the court and the MOU. He is entitled to recover his reasonable remuneration from SOCA. The question here is whether SOCA is in principle entitled to claim against the appellants by way of costs the reasonable sums it has paid or is liable to pay to the receiver in respect of his investigation carried out pursuant to the interim receiving order. It is therefore appropriate to consider first whether those costs are in principle costs of and incidental to the civil recovery proceedings within the meaning of section 51 of the SCA and, if so, whether there is a statutory rule or provision or authority that prevents the court from having jurisdiction.

Are the expenses of the interim receiver "costs of and incidental to" the civil recovery proceedings?

78. SOCA submits that the investigation costs which it has reasonably paid to the receiver are part of the costs of or incidental to the civil recovery proceedings. The essence of its argument is that the investigatory work carried out by the receiver had to be done in order to bring the civil recovery claim and so the costs of the investigation are properly costs of or incidental to the civil recovery

proceedings. The appellants submit, by contrast, that the receiver's remuneration is an expense of the receivership and not a cost of or incidental to the proceedings in which he is appointed. In support of this submission they rely on the judgment of the Northern Ireland Court of Appeal in *SOCA v Wilson*, as well as the decisions in *Capewell v Revenue and Customs Comrs* [2007] UKHL 2, [2007] 1 WLR 386, *Boehm v Goodall* [1911] 1 Ch 155, *Hughes v Customs and Excise Comrs* [2002] EWCA Civ 734, [2003] 1 WLR 177, *In re Andrews* [1999] 1 WLR 1236 and *Evans v Clayhope Properties Ltd* [1988] 1 WLR 358.

79. Before discussing the cases, it is convenient to consider the position as a matter of principle without reference to the authorities. The statutory question is clearly identified. It is whether the particular costs claimed are costs of or incidental to the proceedings. In the case of the investigative costs incurred by the receiver and reimbursed by SOCA under the MOU (including the reasonable remuneration of the receiver) the answer to the question is in my opinion plainly in the affirmative. The position was succinctly put by Toulson LJ at para 93, after paras 90 to 92 quoted above. He said this:

> "Unless compelled by authority to hold otherwise, I would regard the costs incurred by the agency in paying the receiver to investigate Mr Gale's finances and assemble that material as costs of the litigation, which Mr Gale ought justly to pay, and I would not see such an order as inconsistent with the statutory scheme."

I entirely agree. I also agree with Aikens LJ's conclusion to much the same effect at para 134.

80. This can be seen clearly from both the powers and the duties of an interim receiver under the order. In particular, it can be seen from the duties of such a receiver set out above, namely (a) to consider the information and documents obtained by him under the order in order to establish whether or not the property in the schedule was recoverable property or associated property and (b) to take all reasonable and necessary steps to establish whether or not any other property was recoverable property (in relation to the same unlawful conduct) and, if so, who was holding it. His duty was then to report to both SOCA and the court. In order to bring a claim for civil recovery under Part 5 of the 2002 Act, SOCA had to obtain sufficient information to demonstrate that property in the hands of the appellants was recoverable property within the meaning of sections 304-310 of the 2002 Act. This required investigative work to be done. It was entirely reasonable to appoint an interim receiver in order to carry out the investigation and to hold the ring in the meantime. Indeed, it is difficult to see how SOCA could in practice proceed without the appointment of an interim receiver and, as stated above, section 246(7) provides that it could not nominate a member of its staff to be the interim receiver

appointed. In these circumstances, it seems to me that the investigation was an essential part of the civil recovery proceedings. I can see no reason in principle why these costs of the receivership cannot at the same time be costs of or incidental to the civil recovery proceedings.

Is there any statutory rule or provision or authority that prevents the court from having jurisdiction to order that the appellants bear the investigation costs?

81. This is the second question posed by Aikens LJ. There is to my mind no statutory rule or provision that leads to the conclusion that these costs are not costs of or incidental to the civil recovery proceedings. The powers of the receiver, which are contained in section 247 of and Schedule 6 to the 2002 Act, are described above. They do not include a lien on the property in respect of his fees and do not entitle him to sell the property or part of it in order to meet his fees. Nor does the order appointing the receiver in this case. As between SOCA and the receiver, the latter's right to remuneration is contained solely in the interim receiving order and the MOU.

82. Some reference was made to section 280(3) of the 2002 Act, which provides that SOCA may apply moneys received by it under a recovery order "in making payment of the remuneration and expenses of - (a) the trustee or (b) any interim receiver appointed in, or in anticipation of, the proceedings for the recovery order". That subsection must be set in its context. Section 266(2) provides that any recovery order made by the court must vest the recoverable property in the trustee for civil recovery. There is nothing to prevent the interim receiver being appointed also as trustee, as occurred in this case, but the powers and duties of a trustee are entirely distinct from those of an interim receiver and the fact that they were the same person is irrelevant for the purposes of the issues in this appeal. Section 267 states that in performing his functions the trustee acts on behalf of the enforcement authority and must comply with any direction given by the authority. The sums paid to SOCA by the trustee will be or include the net proceeds of sale of the appellants' property after the trustee has first made the payments identified by section 280(2).

83. I agree with the view expressed by Aikens LJ at para 135 that there is nothing in section 280(3), or any other provision of the 2002 Act, to prevent the cost to SOCA of paying an interim receiver from being part of the costs of or incidental to the civil recovery proceedings. As Aikens LJ put it, the subsection simply grants SOCA the power to pay the interim receiver out of sums it receives from the trustee for civil recovery, who is the person identified in the legislation who will give effect to a recovery order made by the court. The fact that SOCA has a discretion to use those sums to pay the interim receiver does not seem to me to be relevant to the question whether the costs were "costs of and incidental to the

proceedings". As I see it, the liability, if ordered, to pay the costs of the proceedings is distinct from, but ancillary to, the liability in the civil recovery order itself.

84. I also agree with Aikens LJ at para 136 that there is nothing in CPR Pt 44 or Pt 69 which precludes the court from making an order that a party to civil recovery proceedings must pay as costs the remuneration of a court appointed receiver. CPR Pt 44 contains general rules about costs. It is to be noted that by CPR r 44.4(1) costs will not be allowed "which have been unreasonably incurred or are unreasonable in amount". CPR Pt 69 contains general rules about the court's power to appoint a receiver.

85. CPR r 69.7 provides:

> "(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."

Under CPR r 69.7 the court has a discretion to specify who is to be responsible for paying the receiver appointed by court order. It does not follow from the terms of that provision, or by necessary implication, that the court may not make an order that a party to civil proceedings pay to the other party costs which include the remuneration of the interim receiver. CPR r 69.7 regulates the position as between the receiver and others, whereas section 51 of the SCA 1981 and CPR Pt 44 regulate the position as between the parties to the litigation.

86. What then of the authorities? First, there is no question but that costs incurred prior to proceedings, such as investigation costs, are capable in principle of being recoverable as costs of or incidental to proceedings. This principle was summarised by Lord Hanworth MR in *Société Anonyme Pêcheries Ostendaises v Merchants' Marine Insurance Co* [1928] 1 KB 750 at p 757:

> "There is power in the master to allow costs incurred before action brought, and … if the costs are in respect of materials ultimately proving of use and service in the action, the master has a discretion to allow these costs."

It is on the basis of this general principle that costs of attending an inquest have been held to be recoverable as costs of related civil proceedings where evidence referable to attendance at the inquest was potentially relevant to those proceedings: see *Ross v Bowbelle (Owners) (Note)* [1997] 1 WLR 1159 and *Roach v Home Office* [2009] EWHC 312, [2010] QB 256.

87. It is commonplace for parties to proceedings to instruct experts of all kinds in connection with litigation. They include forensic accountants in a fraud case and consultants of all kinds in the investigation of, say, a maritime casualty or a death in a hospital. The reasonable amounts paid to such experts are treated as the costs of and incidental to the proceedings. In my opinion reasonable sums paid by SOCA to an interim receiver, at least in respect of his investigation should in principle be regarded in the same way.

88. The appellants rely upon the cases referred to in para 78 above as support for the general proposition that remuneration of a receiver is not a cost of or incidental to civil recovery proceedings. It is convenient to begin with the decision of the Northern Ireland Court of Appeal in *SOCA v Wilson*, which raised the very question arising in this appeal. As in the instant case, SOCA sought to recover expenses and remuneration paid to an interim receiver appointed under Part 5 of the 2002 Act as costs of the civil recovery proceedings. Girvan LJ, giving the judgment of the court, held that such expenses and remuneration were not costs of or relating to the civil recovery proceedings.

89. Girvan LJ began his analysis by observing at para 11, by reference to *Hopkins v Worcester and Birmingham Canal Proprietors* (1868) LR 6 Eq 437, that the equitable jurisdiction to appoint a receiver is of ancient origin. He stated the principle as being that the receiver, being appointed by the court, is an officer of the court, and his duty is to act impartially in administering the property to which the receivership extends and to do so under the direction and supervision of the court. He referred to the statement by Lord Walker in *Capewell v Revenue and Customs Comrs* [2007] UKHL 2, [2007] 1 WLR 386, at para 21 that 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. Lord Walker approved the principle stated by Warrington J in *Boehm v Goodall* [1911] 1 Ch 155 at 161 as follows:

> "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."

Lord Walker noted that some doubts had subsequently been expressed as to whether a receiver's remuneration could be recovered as litigation costs.

90. Lord Walker further approved the statement by Simon Brown LJ in *Hughes v Customs and Excise Comrs* [2003] 1 WLR 177 at para 50 that statutory receivers are to be treated precisely as their common law counterparts save to the extent that the legislation otherwise provides. At para 23 Lord Walker set out this passage from para 45 of the judgment of Simon Brown LJ, saying that it sets out the argument accepted by the Court of Appeal:

> "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?"

91. Girvan LJ regarded those principles as applicable here, that is under Part 5 of the 2002 Act. He noted at para 12 that, under Part 2 of the 2002 Act dealing with confiscation proceedings, management receivers may be appointed in England under section 48 and enforcement receivers under section 50 and that in Northern Ireland the equivalent provisions are sections 196 and 198. Similar provisions apply in Part 3 in relation to confiscation proceedings in Scotland, the

equivalent of a receiver there being called an administrator. Under the earlier confiscatory statutory provisions in the Criminal Justice Act 1988 ("the CJA 1988") and the Drug Trafficking Act 1994 statutory powers had also been introduced for the appointment of receivers. I return below to the question whether the principles in those cases apply to the investigation costs of an interim receiver.

92. Girvan LJ further referred to the decision in *In re Andrews* [1999] 1 WLR 1236. In that case the defendant was acquitted of the offence in respect of which a receivership order had been made. He was awarded his costs out of central funds but the taxing master held that these costs did not include the costs of the receivership proceedings. The receiver deducted her expenses out of the property released in consequence of the discharge of the order. The defendant applied for an order that the prosecution pay his costs of the receivership proceedings. The court concluded that the receiver was entitled to recover her remuneration and expenses from the assets under the court's control. A party seeking appointment of a receiver is not thereby liable for his remuneration. A receiver had a lien for his costs and remuneration against the assets which gave him a continuing right to possession of the assets even after discharge of the receivership order. The receiver's remuneration was an expense of the receivership and not a cost of or an incidental to the proceedings and thus not within the court's discretionary jurisdiction to award costs. As Aldous LJ put it succinctly at [1999] 1 WLR 1236, 1248F-G:

> "The remuneration of a receiver is an expense of the receivership, not costs incidental to the proceedings in which he is appointed."

93. Girvan LJ also relied upon the principle stated by Longmore LJ in *Sinclair v Glatt* [2009] EWCA Civ 176, [2009] 1 WLR 1845, at para 1:

> "It is now settled that such a receiver [appointed pursuant to section 77 of the Criminal Justice Act 1988], like a receiver at common law, is entitled to recover his remuneration, costs and expenses from the assets which he has been appointed to receive ('the receivership assets'). That is so whether or not he ought to have been appointed in the first place or the order appointing him has been discharged, see *Mellor v Mellor* [1992] 1 WLR 517. Even if the defendant, whose assets have been caught by the order appointing the receiver is subsequently acquitted or has his conviction quashed, the receivership assets must bear the costs of the receivership; this is also the position if, as in the present case, confiscation orders are made but subsequently quashed, *Hughes v Customs and Excise Comrs* ... Even if the receiver carries on his receivership unnecessarily and should have agreed that his receivership should

> have been discharged at a time before a court application is made to terminate his receivership, the receivership assets bear those costs reasonably incurred up to the date he is actually discharged: see *Capewell v Revenue and Customs Comrs* …"

94. Girvan LJ noted that in *In re Andrews* and *Sinclair v Glatt* the Court of Appeal held that the expense of a receiver appointed under the confiscatory regime in Part 6 of the CJA 1988 was an expense of the receivership which should be met out of the assets in the receivership. He rejected the submission made on behalf of SOCA that the position of interim receivers appointed under Part 5 of the 2002 Act could be distinguished from other statutory receivers on account of the wide-ranging investigatory powers given to interim receivers in Part 5 cases. He observed that receivers appointed by way of equitable relief or under confiscatory statutory provisions frequently have to carry out extensive investigations to enable them to get in and protect the assets and that it had never been suggested that such investigation costs fell to be treated differently from other management costs.

95. Girvan LJ further noted that Part 5 of the 2002 Act had been enacted following case law such as *In re Andrews*. In the light of that case law it was to be inferred that in England and Wales and Northern Ireland express provision for the costs of interim receivers was considered unnecessary because of the standard receivership lien on the assets for the receiver's costs. I respectfully disagree. In my opinion the regime set out in Part 5 of the 2002 Act is distinguishable in important respects from that in the other legislation discussed in the cases.

96. As paras 79 to 86 show, Carnwath LJ was initially inclined to follow the decision in *SOCA v Wilson*. However he was persuaded by the analysis of Toulson and Aikens LJJ that the cases relied upon by the appellants are distinguishable from this on the ground that the scheme under Part 5 is significantly different from those discussed in them. I am also persuaded by the reasoning of Toulson and Aikens LJJ for these short reasons.

97. The critical feature of the other cases is that the receiver was left to look for his indemnity to the assets in his hands which are under the control of the court, as it was put in *Boehm v Goodall* in the passage quoted in para 89 above. Then in the passage quoted at para 90 Simon Brown LJ described the receiver in *Hughes* as being the person appointed to conserve, manage and realise assets with the right to sell property. He asked why, unless the statute expressly so provides, the receiver should be denied the other ordinary consequences of his receivership, including the right (and requirement) to recover the costs of the receivership from the assets under his control. Similar principles were stated by Longmore LJ in *Sinclair v Glatt*.

98. The position of an interim receiver appointed under Part 5 of the 2002 Act is significantly different. He has no power to sell the assets unless they are perishable or diminishing in value and he has no lien on the assets. He is however entitled to recover his costs and remuneration from SOCA. The power to sell is vested in the trustee, not in the interim receiver, and then only once a civil recovery order has been made. Moreover the powers of the interim receiver are not merely to take possession of and to conserve the assets but to carry out an investigation into the question whether or not the assets are the proper subject of a recovery order. More generally, I agree with the analysis of Aikens LJ at paras 137 to 140.

99. It was further said in the passage from *Boehm v Goodall* that it would be a hardship for parties to be held liable for the remuneration of receivers over whom they have no control. However, that does not apply to these facts. There is a much closer relationship between the parties and an interim receiver appointed under Part 5 of the 2002 Act than there was in the cases referred to. The 2002 Act draws a clear distinction between a receiver appointed under Part 2, as for example under section 49 which, as already noted, by section 49(2)(d) expressly provides for payment of the costs of receivers appointed under Part 2 of the 2002 Act out of receivership assets and an interim receiver appointed under Part 5. I would infer that the draftsman made an express decision not so to provide in the case of interim receivers appointed under Part 5. I agree with Toulson LJ that, as he put it at para 104, there will be no "extreme hardship" if Mr Gale is ordered to pay the costs of investigating facts which he tried so hard to conceal and the costs of assembling the evidence which proved the case against him.

100. Although *In re Andrews* did involve a consideration of section 51 of the SCA, it was a very different case from this under a very different statute: see per Toulson LJ at paras 106 to 113. In particular, he quoted a passage from the judgment of Ward LJ in which he said that it appeared to him that the true position was that the investigation of whether or not the defendant has suffered loss by reason of the receivership is an investigation which should be and ordinarily would be conducted in deciding whether or not damages should be awarded against the claimant for breach of the usual undertaking as to damages he would normally be required to give. Under the Criminal Justice Act 1988 ("the CJA 1988"), compensation for loss resulting from a receivership was not to be ordered unless the court was satisfied that there had been some serious default on the part of a person concerned in the investigation or prosecution of the offence concerned. As Toulson LJ said at para 111, in those circumstances Ward LJ concluded, with reluctance, that the expenses of the receivership were not to be regarded as costs of and incidental to the proceedings within the meaning of section 51 of the SCA.

101. I should however refer to the statement of Aldous LJ in *In re Andrews* quoted in para 92 above that the remuneration of a receiver is an expense of the

receivership, not costs incidental to the proceedings in which he is appointed. Taken at face value, that might suggest that the remuneration of a receiver can never be recoverable as costs of or incidental to litigation under section 51 of the SCA. If Aldous LJ intended to state such a broad proposition, I respectfully differ from him. I do not however think that he did. As Toulson LJ observed at para 112, he was concerned with the problem which would result if the receiver's remuneration for running the company were to be treated as a cost of the proceedings recoverable by the successful appellant in circumstances where the company would not have traded as profitably as it did without the accountancy advice of the receiver. He considered (like Ward LJ) that the application was really a claim for compensation dressed up as an application for an award of costs, and it was therefore very significant that by section 89 of the CJA 1988 Parliament had laid down a carefully regulated code for such a claim. He concluded that section 89 was the proper avenue for a compensation claim of the kind being made by the appellant. That is not to say that a claim by a party to proceedings who has obtained an order for the appointment of a receiver in respect of costs or remuneration which he has paid to a receiver can never be recovered from the other party to the proceedings under section 51 of the SCA. All will depend upon the circumstances.

102. As Toulson LJ observed at para 113, this is a very different case from *In re Andrews* under a very different statutory scheme. By contrast with the position in *In re Andrews*, SOCA's claim is not a concealed claim for a form of compensation for which the statute provides a regulated code. It is a genuine claim for litigation costs and not a dressed up claim for something else. Moreover, SOCA is not seeking to recover that part of the receiver's costs or remuneration which relates to the costs of managing Mr Gale's assets. It only seeks the costs of the investigation. I agree with Toulson LJ that those costs would undoubtedly have been recoverable in principle as costs of the proceedings if the work had been done by anyone other than the receiver. I also agree with him that the costs in their essential nature were not merely incidental but integral to the prosecution of the claim made by the agency against the appellants. Finally, I agree with Aikens LJ's approach to *In re Andrews* at paras 141 to 144.

103. The decisions in *Hughes* and in *Capewell* are also distinguishable on much the same basis. Again I agree with the approach of Toulson LJ to both cases at paras 114 to 116 and 117 to 120 respectively and with the approach of Aikens LJ at para 146.

104. I note in passing that section 283 of the 2002 Act contains detailed provisions for compensation but there is, as I see it, no conflict between those provisions and the conclusion that the costs claimed here are within section 51 of the SCA.

105. Finally, I should refer to three further points made by Girvan LJ in *SOCA v Wilson.* First, he noted that section 284(1) of the 2002 Act provides that Scottish Ministers are to reimburse an interim administrator or trustee for civil recovery appointed under Part 5 of the 2002 Act. He expressed the view at para 17 that it is inherently unlikely that Parliament intended to confer protections on defendants in relation to administrator's fees and costs in Scotland and not in England and Wales and Northern Ireland in relation to receivers' fees and costs. The problem with this reasoning is that it ignores the clear differences between section 284(1), which makes special provision for Scotland in order to meet the requirements of the Scotland Act 1998, and section 280(3), which (as stated above) gives the enforcement authority in England and Wales the power to apply any sum received by it from the trustee for civil recovery to make payments of the remuneration and expenses of a interim receiver appointed in the proceedings for the recovery order. As Aikens LJ points out at para 147, neither provision prevents the enforcement authority from seeking to recover those sums as costs of and incidental to the recovery proceedings.

106. Secondly, Girvan LJ states, at para 18, that the policy behind civil recovery proceedings is to strip the defendant of criminal assets. He points out that this objective is achieved by the recovery order even if part of the defendants' assets go to the receiver. Requiring them to meet the costs of the interim receiver's investigation work would strip them of further assets and clear statutory wording would be needed to establish the state's right to do so. It is correct that clear statutory language is needed in order to require a party to meet such costs, but, in my opinion, for the reasons given above, such language is found in section 51 of the SCA 1981.

107. Thirdly, Girvan LJ makes the point that the costs and fees of the interim receiver cannot sensibly be considered as costs of SOCA since the interim receiver is independent and separate from SOCA so that his costs cannot be considered as costs incurred by SOCA as part of its costs of and incidental to the proceedings. I respectfully disagree. On the facts here SOCA had to bear the costs of the interim receiver in order to pursue the civil recovery proceedings and in order to obtain a recovery order. In these circumstances, as I said earlier, they seem to me to be costs borne by SOCA in much the same way as other costs of instructing an expert would be.

108. Finally, it is important to note that this appeal is only concerned with the recovery by way of costs of investigation costs incurred by SOCA as a result of liability to the interim receiver. It is not concerned with management costs. I would leave open the question whether management costs could be treated as costs of or incidental to civil recovery proceedings until it arises for decision in a particular case.

CONCLUSION

109. For these reasons, which are largely the reasons they gave, I agree with Toulson and Aikens LJJ that the Court of Appeal in Northern Ireland reached the wrong conclusion in *SOCA v Wilson.* The costs which SOCA was or is liable to pay to the receiver in respect of his investigation were costs of or incidental to the civil recovery proceedings and are in principle recoverable from the appellants. I would therefore dismiss the appeal on this issue. I would only add that by CPR r 44.4(1) costs will not be allowed "which have been unreasonably incurred or are unreasonable in amount". It follows that whether a particular item of costs claimed is recoverable in whole or in part will of course be a matter for the costs judge.

LORD BROWN

110. I too would dismiss both limbs of this appeal for the reasons given respectively by Lord Phillips and Lord Clarke with whose judgments I agree.

111. As will readily be appreciated, the conclusion arrived at by Lord Phillips on the standard of proof issue is in no way dependent on the view one takes with regard to the *Sekanina v Austria* (1993) 17 EHRR 221/ *Ringvold v Norway* (Application No 34964/97) (unreported) 11 February 2003) line of Strasbourg authority. As Lord Phillips observes (para 35): "On no view does this jurisprudence support Mr Mitchell's submission that the appellant's acquittal in Portugal precludes the English court in proceedings under POCA from considering the evidence that formed the basis of the charges in Portugal."

112. None the less however, it has been necessary to consider this jurisprudence in some detail and there appears to be some difference of opinion between us as to how logical and satisfactory it is. Lord Phillips in the *Discussion* section of his judgment (para 32) "find[s] unconvincing the attempts of the Strasbourg Court to distinguish between claims for compensation by an acquitted defendant and claims for compensation by a third party against an acquitted defendant" and concludes that: "this confusing area of Strasbourg law would benefit from consideration by the Grand Chamber."

113. Lord Dyson by contrast (para 131) "would be less critical of the Strasbourg jurisprudence" – although he does not indicate whether he would exempt it from all criticism and, if not, what concerns he has about it.

114. I have to say that for my part I share Lord Phillips' views on this matter. Of course, as Lord Dyson more than once points out, judgments which determine an acquitted defendant's entitlement to costs and/or compensation for detention on remand are in one sense closely linked to the criminal trial itself: but for the defendant's acquittal these issues as to costs and compensation would simply not arise. But it by no means follows from this that the criminal standard of proof (presumably with the burden still on the state) should apply equally to these linked claims, "consequential and concomitant" though clearly they can be characterised. Lord Dyson suggests (para 132): "If the outcome of the criminal proceedings is decisive for the 'civil' proceedings, then there is a sufficiently close connection for article 6(2) to apply." That assertion, however, to my mind begs the very question it purports to answer. As already explained, the outcome of the criminal proceedings is only "decisive" for the civil proceedings in the sense that, but for the acquittal, these civil proceedings would not arise. Unless, however, Strasbourg is really saying that a state has no option but to compensate an acquitted defendant for his costs incurred in securing his acquittal and his detention in custody meantime – for which article 6 appears to me to provide no warrant whatsoever – I cannot for the life of me see why the state should not decline to reimburse legal costs and withhold compensation for detention on remand unless the defendant can show on the balance of probabilities that he was in fact innocent. Take a case where, following a defendant's acquittal for rape, at one and the same time he is seeking compensation for his detention on remand and his victim is seeking compensation for his violation of her. Is it really to be said that his claim falls to be determined on the criminal standard of proof (and must, therefore, be met); hers on the civil standard (and so may also be found established)? That seems to me nonsensical.

115. Obviously, in all proceedings following an acquittal the court should be astute to ensure that nothing that it says or decides is calculated to cast the least doubt upon the correctness of the acquittal. But the point to be emphasised is that the acquittal is correct because, and only because, the prosecution failed in the criminal proceedings to establish beyond reasonable doubt that the defendant was guilty. Not having been proved guilty to the criminal standard, the defendant is not thereafter to be branded a criminal and no criminal penalty can properly be exacted from him. But, contrary to widespread popular misconception, acquittal does not prove the defendant innocent.

116. In the result, I too incline to the view expressed by Lord Phillips (para 34) that perhaps the only logical explanation of the Strasbourg case law is that applicants are being compensated for reputational damage when by a court's judgments or statements subsequent to an acquittal it appears nevertheless to be suggesting that the defendant should after all have been found guilty to the criminal standard.

117. I repeat, however, that what surely is now required is an authoritative Grand Chamber decision clarifying and rationalising this whole confusing area of the Court's jurisprudence.

LORD DYSON

118. The Proceeds of Crime Act 2002 ("POCA") provides for two distinct mechanisms for the recovery of proceeds of crime: (i) confiscation by the Crown Court following conviction (Part 2); and (ii) civil recovery proceedings in the High Court, which may be instituted by the "enforcement authority" (The Serious Organised Crime Agency) to recover property which "is, or represents, property obtained through unlawful conduct" (recoverable property) (Part 5). Section 241(1) provides that "conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part". Section 241(3)(a) provides that the court must decide "on a balance of probabilities" whether it is proved "that any matters alleged to constitute unlawful conduct have occurred".

119. I substantially agree with the reasons given by Lord Phillips (as well as those given by the Court of Appeal) for deciding the first issue in favour of SOCA and concluding that article 6(2) of the European Convention on Human Rights ("the Convention") does not apply to civil recovery proceedings under Part 5 of POCA. Because of the general importance of the issue, I wish to say in my own words why I have reached this conclusion.

120. Article 6(2) provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". The question raised by the first issue is whether proving unlawful conduct in civil recovery proceedings amounts to the bringing of a criminal charge so as to engage article 6(2).

121. The criminal procedural guarantees in article 6 apply to proceedings in which a person is, within the autonomous ECHR meaning, "charged with a criminal offence". Three criteria are taken into account when deciding whether a person is charged with a criminal offence, namely (i) the classification of the proceedings under national law, (ii) their essential nature and (iii) the type and severity of penalty to which the person is potentially exposed (see *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647 at para 82) as applied in many decisions of the ECtHR such as, for example, *Ringvold v Norway* (Application No 34964/97) (unreported) 11 February 2003, at para 36. These criteria are not hermetically sealed from each other. As is made clear at para 82 of *Engel*, the classification

under national law is only a starting point and the essential nature of the proceedings is of greater importance.

Application of the Engel criteria

122. There can be no doubt that, on the basis of an application of these three criteria, recovery proceedings under Part 5 of POCA are properly to be characterised as civil for article 6 purposes. They are classified as civil under our domestic law: section 240(1)(a) of POCA provides that Part 5 has effect for the purposes of "enabling the enforcement authority to recover, *in civil proceedings* … property which is, or represents, property obtained through unlawful conduct" (emphasis added).

123. The essential nature of the proceedings is civil. The respondent to the proceedings is not charged with any offence. He does not acquire a criminal conviction if he is required to deliver up property at the conclusion of the Part 5 proceedings. None of the domestic criminal processes are in play. On the contrary, as Kerr LCJ put it in *Walsh v Director of the Assets Recovery Agency* [2005] NICA 6, [2005] NI 383, at para 23: "all the trappings of the proceedings are those normally associated with a civil claim". These include the express provision that the standard of proof is on the balance of probabilities. The nature of the proceedings is essentially different from that of criminal proceedings. The claim can be brought whether a respondent has been convicted or acquitted, and irrespective of whether any criminal proceedings have been brought at all. This was a factor which weighed with the ECtHR in *Ringvold v Norway* at para 38 when the court was considering whether article 6(2) applied to a claim for compensation by the alleged victim of a sexual offence against the alleged perpetrator. The purpose of Part 5 proceedings is not to determine or punish for any particular offence. Rather it is to ensure that property derived from criminal conduct is taken out of circulation. It is also of importance that Part 5 proceedings operate *in rem*. The governing concept is that of "recoverable property" which represents both property obtained directly by unlawful conduct and also property which represents the original property.

124. But the fact that, on an application of the *Engel* criteria, it is plain beyond argument that Part 5 proceedings are properly to be characterised as civil proceedings for the purposes of article 6 is not determinative of the question whether article 6(2) applies. There is a line of Strasbourg decisions which show that, even if proceedings are properly characterised as civil on the basis of the *Engel* criteria, article 6(2) may nevertheless apply if the links between the proceedings and criminal proceedings are sufficiently close.

Sufficiently close link between criminal proceedings and civil proceedings to engage article 6(2).

125. It is explained in *Ringvold* at para 36 and the cases cited there that, in certain circumstances article 6(2) may apply to proceedings instituted after the discontinuation of criminal proceedings or following an acquittal, even if on an application of the *Engel* criteria those proceedings would be characterised as civil. As the court said: "Those judgments concerned proceedings relating to such matters as an accused's obligation to bear court costs and prosecution expenses, a claim for reimbursement of his (or his heirs') necessary costs, or compensation for detention on remand, matters which were found to constitute a consequence and the concomitant of the criminal proceedings". The focus of the inquiry is on whether the proceedings were the "direct sequel" or "a consequence and the concomitant" of the criminal proceedings (ibid at para 41). Claims by an accused person following a discontinuation or acquittal for costs incurred as a result of the criminal proceedings and claims for compensation for detention are paradigm examples of such proceedings. The link between such claims and the criminal proceedings is so close that article 6(2) applies to both of them. The claims for compensation flow from the criminal proceedings. But for these proceedings, there would be no claims. As will become clear, the link was absent in *Ringvold* because, despite the applicant's acquittal, the victim's claim for compensation could succeed. The compensation case was, therefore, not a direct sequel of the criminal proceedings. Put another way, the outcome of the criminal proceedings was not "decisive for the compensation case" (*Ringvold* para 38).

126. There are several reported decisions of the ECtHR where an applicant, acquitted of a criminal charge offence, complained that his claim for compensation for detention and reimbursement of costs had been rejected in violation of article 6(2). In *Sekanina v Austria* (1993) 17 EHRR 221, the relevant legislation gave a right to compensation to a person who (i) had been remanded in custody or placed in detention on suspicion of having committed a criminal offence and (ii) was subsequently acquitted or otherwise freed from prosecution, where (iii) the suspicion that he had committed the offence was dispelled or prosecution was excluded on other grounds. It was held by the ECtHR that the relevant Austrian legislation and practice linked the question of the accused's criminal responsibility and the right to compensation "to such a degree that the decision on the latter issue can be regarded as a consequence and, to some extent, the concomitant of the decision on the former" (para 22). Accordingly, article 6(2) applied to the compensation proceedings.

127. As regards the question whether there had been a breach of article 6(2), the Austrian court rejected the applicant's claim for compensation saying that, in acquitting him, the jury took the view that the suspicion was not sufficient to reach a guilty verdict, but "there was, however, no question of that suspicion's being

dispelled" (para 29). The ECtHR said at para 30 that this left open a doubt as to the correctness of the acquittal and:

> "The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final. Consequently, the reasoning of the Linz Regional Court and the Linz Court of Appeal is incompatible with the presumption of innocence."

128. Accordingly, there had been a violation of article 6(2). The same approach to the application and violation of article 6(2) was taken in the similar case of *Rushiti v Austria* (2000) 33 EHRR 1331. The rationale for these decisions appears to be that voicing any suspicions of guilt in proceedings following an acquittal is incompatible with the presumption of innocence. The general aim of the presumption of innocence is "to protect the accused against any judicial decision or other statements by state officials amounting to an assessment of the applicant's guilt without him having previously been proved guilty according to law" (para 31). The same reasoning was adopted, with the same result, in *Hammern v Norway* (Application No 30287/96) (unreported) 11 February 2003, paras 47 to 49.

129. In *Hammern*, an acquitted person brought proceedings for compensation for damage suffered as a result of the prosecution. The relevant legislation provided for compensation where a person had been acquitted if it was shown to be probable that he did not carry out the act that formed the basis for the charge. The link between the compensation proceedings and the prosecution was sufficiently strong for article 6(2) to apply. The ECtHR emphasised the following points: (a) the decisions on compensation were taken under domestic criminal law provisions pursuant to which a person who had been charged could seek compensation with respect to matters directly linked to the criminal proceedings against him; (b) time limits for bringing the claim were directly linked to the conclusion of the criminal proceedings; (c) if possible the composition of the court had to be the same; (d) the damage engaged the responsibility of the state, not of a private party; (e) the outcome of the criminal proceedings was a "decisive factor, it being a prerequisite that the person charged had been acquitted..."; and (f) there was a "very large extent" of overlap between the issues in the criminal trial and those in the compensation proceedings, the latter being "determined on the basis of the evidence from the [criminal] trial."

130. On the other hand, in *Ringvold* the applicant faced a criminal charge of a sexual offence against a young person (G) and a claim for compensation by G. Both proceedings were heard before the same jury at the same time. The jury

acquitted the applicant of the offence and rejected G's claim for compensation. The Supreme Court allowed G's appeal and awarded her compensation. The ECtHR decided that article 6(2) did not apply to the compensation proceedings. The court held (para 38) that the second and third of the *Engel* criteria did not point to the compensation proceedings being a "criminal charge". In particular, the civil claim was to be determined on the basis of principles that were proper to the civil law of tort. The outcome of the criminal proceedings was not "decisive for the compensation case". The victim had a right to claim compensation regardless of whether the defendant was convicted or acquitted and the compensation issue was to be the subject of a separate legal assessment based on criteria and evidentiary standards which in several important respects differed from those that applied to criminal liability. At para 41, the court dealt explicitly with the question whether the links between the criminal proceedings and the compensation proceedings were sufficient to justify extending article 6(2) to apply to the latter. It concluded that the compensation case was not a direct sequel to the criminal proceedings because it was "legally feasible" to award G compensation despite the applicant's acquittal.

131. Lord Phillips says at para 32 that the distinction between claims for compensation by an acquitted defendant and claims for compensation by an alleged victim of an acquitted defendant is unconvincing and that it is not credible to say that the claim for compensation by the acquitted defendant is "consequential and concomitant" to the criminal proceedings but the claim by the victim is not. I would be less critical of the Strasbourg jurisprudence.

132. In the view of the ECtHR, the crucial question is whether the subject-matter of the civil proceedings is so closely connected with some criminal proceedings that the Convention protections available in the criminal proceedings should also be available in the civil proceedings. If the outcome of the criminal proceedings is decisive for the "civil" proceedings, then there is a sufficiently close connection for article 6(2) to apply. This will occur, for example, where an acquitted defendant claims compensation for his detention on remand and the costs he incurred in the criminal proceedings. The defendant would not have been detained or incurred the costs which he claims in the civil proceedings but for the criminal proceedings. The position of the person who claims damages as the victim of the defendant is different. As was said in *Ringvold*, the victim of the alleged crime has a right to claim damages regardless of whether the defendant has been convicted or acquitted. The victim's claim is not even dependent on the defendant being prosecuted at all. There is, therefore, no link between the civil proceedings and any criminal proceedings that may have been instituted. The court held that the fact that an act may give rise to a civil claim in damages and also constitute a crime is not sufficient. There is also the point that, as was pointed out by the court in *Ringvold*, if the position were otherwise, article 6(2) would have "the undesirable effect of pre-empting the victim's possibilities of claiming compensation under the

civil law of tort, entailing an arbitrary and disproportionate limitation on his or her right of access to a court under article 6(1) of the Convention." This is a further indication that there is a real distinction between claims for compensation by an acquitted defendant and claims by an alleged victim of an acquitted defendant.

133. To return to the present case and applying the Strasbourg jurisprudence, I would hold that there is no sufficient link between civil recovery proceedings under Part 5 of SOCA and any criminal proceedings to justify the application of article 6(2) to the Part 5 proceedings. Indeed, there is no link at all. The Part 5 proceedings are not a "direct sequel" or "a consequence and the concomitant" of any criminal proceedings. They are free-standing proceedings instituted whether or not there have been criminal proceedings against the respondent or indeed anyone at all.

The link with criminal proceedings is created by language used by the court in the civil proceedings

134. But the Strasbourg jurisprudence shows that there may be a yet further route by which article 6(2) may apply to proceedings which (i) are not civil on an application of the *Engel* criteria and (ii) do not objectively have the necessary close link with criminal proceedings. There is a principle that, if in the civil proceedings, the court's decision "contains a statement imputing the criminal liability of the [applicant]", that *of itself* will be sufficient to *create* the necessary link for article 6(2) to apply in those proceedings. The clearest statement of this principle is to be found in *Y v Norway* (2005) 41 EHRR 87. The applicant was convicted of sexual assault and homicide. In linked civil proceedings he was ordered to pay compensation to the victim's parents. On appeal, he was acquitted of the criminal charges, but the lower court's compensation order was upheld. His appeal against the compensation order was dismissed by the Supreme Court. Before the ECtHR, he complained that the award of compensation, despite the acquittal, violated article 6(2). Applying the approach to which I have referred at para 132 above, the court held that the acquittal did not in principle preclude the establishment of civil liability to pay compensation arising out of the same set of facts on the basis of a less strict standard of proof. If, however the national decision on compensation "contains a statement imputing the criminal liability of the respondent party, this could raise an issue falling within the ambit of article 6(2) of the Convention" (para 42). The court continued:

> "43. The Court will therefore examine the question whether the domestic courts acted in such a way or used such language in their reasoning as to *create* a clear link between the criminal case and the ensuing compensation proceedings as to justify extending the scope of the application of article 6(2) to the latter (emphasis added).

44. The Court notes that the High Court opened its judgment with the following finding:

> 'Considering the evidence adduced in the case as a whole, the High Court *finds it clearly probable that [the applicant] has committed the offences against Ms T* with which he was charged and that an award of compensation to her parents should be made under article 3-5 (2) of the Damage Compensation Act….(emphasis added)

45. This judgment was upheld by the majority of the Supreme Court, albeit using more careful language. However, that judgment, by not quashing the former, did not rectify the issue which in the Court's opinion thereby arises.

46. The Court is mindful of the fact that the domestic courts took note that the applicant had been acquitted of the criminal charges. However, in seeking to protect the legitimate interests of the purported victim, the Court considers that the language employed by the High Court, upheld by the Supreme Court, overstepped the bounds of the civil forum, thereby casting doubt on the correctness of that acquittal. Accordingly, there was a sufficient link to the earlier criminal proceedings which was incompatible with the presumption of innocence.

47. In the light of these considerations, the Court concludes that article 6(2) was applicable to the proceedings relating to the compensation claim against the present applicant and that this provision was violated in the instant case."

135. Thus, the court has held that the necessary link between the criminal case and the civil proceedings can be *created* by the language in which the decision in the civil proceedings is expressed. In *Y v Norway*, the ECtHR held that the court had "overstepped the bounds of the civil forum" by deciding that the applicant had committed the criminal offences. It is worth considering two cases where this principle was applied to reach the opposite conclusion. The first is *Moullet v France* (Application No 27521/04) (unreported) 13 September 2007. The applicant was a former manager of the transport, workshop and warehouse department of Marseilles. He was charged with accepting bribes and aiding and abetting fraud. He was discharged by the criminal court and the proceedings terminated on the grounds that they were time-barred. The Mayor of Marseilles then ordered the

applicant's compulsory retirement on the grounds that the evidence showed that the applicant had received bribes and that, although the criminal court had found the proceedings to be time-barred, disciplinary action by the local authority was not subject to any time limitation. The Mayor's decision was the subject of challenge in administrative court proceedings. The Conseil d'Etat upheld the Mayor's decision on the grounds that the disciplinary board and the disciplinary appeals board had based their findings on "accurate facts" and the reasoning behind the impugned sanction was not faulty and the reasons on which the decision was based were not "materially or factually incorrect".

136. The applicant complained to the ECtHR that there had been a violation of the presumption of innocence in breach of article 6(2). He contended that the Conseil d'Etat should not have relied on the facts which formed the basis of the criminal charges. The court considered whether the Conseil d'Etat "used such language in its reasoning as to create a clear link between the criminal case and the ensuing administrative proceedings and thus to justify extending the scope of article 6(2) to cover the latter". The court noted that the applicant was not "formally declared guilty of the criminal offence of accepting bribes by the Conseil d'Etat". The Conseil d'Etat had confined itself to determining the facts "without suggesting any criminal characterisation whatsoever". It had confined itself to assessing

> "the impact of the alleged facts on the duties and obligations of probity incumbent on all local and regional government staff....In other words, the domestic authorities managed in the instant case to keep their decision within a purely administrative sphere, where the presumption of innocence the applicant relied on did not obtain."

137. The second example is *Ringvold* where the ECtHR said at para 38 that the impugned national ruling awarding compensation to the alleged victim of sexual abuse following the defendant's acquittal "did not state, either expressly or in substance, that all the conditions were fulfilled for holding the applicant criminally liable with respect to the charges of which he had been acquitted". The Supreme Court acknowledged that the standard of proof was stricter than the balance of probabilities, but less strict than that applied to establish criminal liability. It emphasised that its decision was taken independently of the decision in the criminal case and did not undermine the acquittal.

138. It seems, therefore, that the necessary link can be created by this route only if the court in the civil proceedings bases its decision adverse to the defendant using language which casts doubt on the correctness of an acquittal. The rationale must be that in such a case the court has chosen to reach its decision by explicitly finding that a criminal charge has been committed. If it chooses to reach its

decision in that way, then the protections afforded by article 6(2) should be available as if the civil proceedings were criminal proceedings. But if the decision in the civil proceedings is based on reasoning and language which goes no further than is necessary for the purpose of determining the issue before that court and without making imputations of criminal liability, then the necessary link will not have been created. The distinction can be illustrated by reference to the common example of the case where A is acquitted of assaulting B, but B brings a claim for damages in tort. The ECtHR recognises in principle that article 6(2) does not apply to the claim for damages: see, for example, *Ringvold* para 38. Thus the acquittal ought to stand in the compensation proceedings, but it does not "preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof". The fact that the findings of fact in the compensation proceedings may implicitly cast doubt on the acquittal is not enough to import article 6(2). What is required is that the decision in the compensation proceedings contains a "*statement* imputing criminal liability" (emphasis added) (*Y v Norway* para 42) for article 6(2) to be imported.

139. The idea seems to be that article 6(2) applies if the court treats the compensation proceedings as if they are proceedings in which the issue of criminal liability falls to be determined. The most obvious way of doing this is to state expressly or, perhaps by necessary implication, that the defendant was wrongly acquitted. There is, of course, no need for the court to create the link with the criminal proceedings in this way because, as the ECtHR explains in *Ringvold,* the compensation proceedings are not directly concerned with the outcome of the criminal proceedings.

140. It will be seen that the circumstances in which the necessary link can be created when otherwise it would not exist echo the circumstances in which article 6(2) may be violated where the link is otherwise sufficiently close. In practice, therefore, if the court imputes criminal liability to an individual, article 6(2) will apply whether or not the link between the two proceedings is otherwise sufficiently close. But the analysis adopted by the ECtHR suggests that the issue should be addressed sequentially in the way that I have described.

141. I can now turn to consider whether Griffith Williams J did impute criminal liability to the appellants or cast doubt on their acquittal. SOCA's case is that the wealth of Mr and Mrs Gale has been acquired through money laundering and tax evasion in the United Kingdom, Spain, Portugal and elsewhere. Criminal proceedings for drug trafficking offences were started against Mr Gale in Spain, but these were discontinued because the relevant time limits had been exceeded. He was acquitted of drug trafficking offences in Portugal after a trial.

142. At para 18 of his judgment, Griffith Willams J said that what was in issue before him was not "the commission of the specific offences alleged against DG in Portugal" but whether on all the evidence (including but not limited to the evidence considered by the Portuguese Court and that which was available to the Spanish Courts) SOCA had proved that the wealth of Mr and Mrs Gale had been obtained through unlawful conduct. Nowhere in his judgment does the judge depart from this view of the case. I accept the submission of Mr Peto QC that none of the judge's findings specifically calls into question the correctness of Mr Gale's acquittal in Portugal. As for the drug trafficking proceedings in Spain, these were discontinued. Even if (contrary to my view) the judge had made specific findings that Mr Gale was guilty of the Spanish offences, these findings could not be relied on by Mr Mitchell QC. That is because article 6(2) would only apply if there had been an acquittal on the merits and not one solely based on a time-bar (as the discontinuance in the Spanish proceedings was): see *Leutscher v The Netherlands* (1996) 24 EHRR 181 and *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1 para 10.

143. For these reasons, I would dismiss the appeal on the first issue. I should add that I do not find it necessary to express any view on the application of *Geerings v The Netherlands* (2007) 46 EHRR 1222 or *R v Briggs-Price* [2009] AC 1026 to the present case. On the second issue, I agree with the judgment of Lord Clarke.