Neutral Citation Number: [2013] EWCA Crim 2042

Case No: 201002743B1; 201206926C4;
201207113B1; 201301387B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BIRMINGHAM
HHJ CARR
T20077580

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 14th November 2013

Before :

LORD JUSTICE DAVIS
MR JUSTICE SPENCER
and
HHJ ROOK QC
(SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

- - - - - - - - - - - - - - - - - - - -

Between :

(1) MICHAEL FIELDS
(2) MITESH SANGHANI
(3) KARAMJIT SAGOO
(4) WASIM RAJPUT — **Appellants**
- and -
THE CROWN — **Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

MR A BODNAR (instructed by **Morgan Rose Solicitors**) for the **First Appellant.**
MR N P RHODES QC (instructed by **Debello Law**) for the **Second Appellant**.
MR A BELL (instructed by **Beynon & Co**) for the **Third Appellant**.
MR C BAUR (instructed by **David Phillips & Co**) for the **Fourth Appellant.**
MR S FARRELL QC and **MR W HAYS** (instructed by **The Crown Prosecution Service**) for the **Respondent.**

Judgment
As Approved by the Court

Lord Justice Davis :

Introduction

1. These appeals raise a number of points. Two of them – common to the appeals of the appellants Fields, Sanghani and Sagoo – would, if the appellants' arguments are right, effect a profound change in the general understanding hitherto of the operation of the Proceeds of Crime Act 2002 ("the 2002 Act") with regard to confiscation orders. What is said is that such change is required in the light of the recent decision of the Supreme Court in the case of *Waya* [2013] 1 AC 294, [2013] UKSC 51.

2. These two points can be summarised in this way:

   i) Where two or more conspirators have been adjudged to have been co-principal conspirators who have jointly obtained the benefit of the proceeds of the conspiracy, is the benefit obtained by each of them, for the purposes of the 2002 Act, to be valued in a sum equalling the full amount of the proceeds of the conspiracy? Or – as the appellants argue – is the value of the benefit to be attributed to them in rateable shares?

   ii) Alternatively, if the benefit is properly assessed in the whole amount with regard to each of them, and assuming that each has realisable assets matching or exceeding the benefit, is – as the appellants argue – the amount of the confiscation order to be apportioned between them in each case rateably in order to avoid a disproportionate outcome?

Background facts

3. It is not necessary to set out the background facts in any great detail.

4. The conspiracy to defraud, as particularised in the indictment, ran between 1 January 2005 and 30 June 2005. It was said to involve the four appellants and three other men. Fields, Sanghani and Sagoo were convicted on 4 November 2008 after a lengthy trial in the Crown Court at Birmingham before HHJ Carr and a jury. Each was sentenced to five years' imprisonment (Sanghani also receiving an additional 3 months' imprisonment for contempt of court) and disqualification orders were also made. In his sentencing remarks the judge said that the three of them were "at the heart of the fraud". The appellant Rajput, whose position was accepted by the judge as different, was sentenced to 30 months' imprisonment and a disqualification order was made in his case also. Of the three co-accused, two were acquitted and the jury were unable to agree a verdict on the other.

5. The fraudulent conspiracy involved the use of a company called Mercury Distributions Limited, originally acquired by the appellant Sagoo in 1995. It involved what is sometimes known as a "long firm" fraud. In early 2005 false accounts for the preceding two years were lodged at Companies House. These, among other things, purported to show – falsely – that by 2004 the company had over £1m in fixed assets. It was appreciated that potential customers of the company would be likely to check the accounts before committing themselves to doing business with it and granting credit. Premises were also obtained in Birmingham in February 2005 by Sagoo, with false trade references provided.

6. From then on, the company engaged in fraudulent trading. It made applications to buy goods or obtain services on credit. Credit checks conducted by various agencies on behalf of the prospective customers indicated that the company was financially healthy: credit agreements were in consequence approved and goods and services variously supplied by some 35 businesses. But no payments were ever made and for the most part the goods disappeared.

7. Each of Sagoo and Sanghani (not always using their correct names) attended a number of meetings where goods or services were obtained on credit. Sagoo wrote out various company cheques in order to maintain its activities. There was evidence that Fields attended on a regular basis, sometimes posing as a retail consultant called Blake. His fingerprints were later found on a number of company documents. The conspiracy ended when the police intervened at the end of June 2005. At trial, evidence was also permitted to be adduced to the effect that there were other outstanding criminal proceedings against Fields for conspiracy to defraud and obtain services by deception and to the effect that a judgment had been entered against Sagoo for £19 million for unpaid VAT due on alcohol importations.

8. So far as the appellant Rajput was concerned, it was common ground that he was much less involved in the overall conspiracy. He – aside from sometimes providing a trade reference – lent himself to the acquisition of two very valuable cars (a Mercedes and a Porsche) and a quantity of alcohol. After they had been obtained, the goods were sold on. He himself, as was found, received £12,000 for his involvement.

9. The total benefit, in the form of goods and services supplied, arising from the conspiracy was calculated at £1,410,762.

10. In due course there were protracted confiscation proceedings.

The confiscation proceedings

11. Not only were the confiscation proceedings drawn out they also proceeded, to some extent, separately. In the case of Fields, the trial judge gave his (reserved) judgment on 27 February 2010 after a hearing at which Fields gave evidence. It had been conceded by counsel then appearing for Fields that his was a criminal lifestyle case by reason of s.75(2)(c) of the 2002 Act. It was held that the total benefit from his particular criminal conduct was £1,565,945 (taking the "base" figure as £1,410,762 and adjusting it to allow for changes in the value of money). Further, the criminal lifestyle provisions being applied and the judge having rejected Fields' evidence entirely, it was found that the benefit figure representing his general criminal conduct was £391,960.

12. The judge found as a fact that Fields, along with Sagoo and Sanghani, was "a principal conspirator" and that it was a "joint operation between them" (paragraph 17 of his judgment). He considered that the applicable principle, established by authority, was that where two or more defendants obtain property jointly each was to be regarded as obtaining the whole of it. The judge said: "I can see no reason to depart from that principle".

13. The judge then dealt with the question of the available amount. He recorded Fields' evidence of an extravagant lifestyle and his assertions that he had no hidden assets.

The judge had previously in his judgment noted the movement of large sums through Fields' bank account between 2002 and 2006. The judge, having cited from *R v Barwick* [2001] 1 CAR (S) 129, indicated that it was his approach that the benefit remained available until the defendant proved otherwise. In the present case, the judge's succinct conclusion, after summarising the evidence, was: "He has not".

14. He accordingly made a confiscation order in the amount (leaving out pence) of £1,957,905, with a default period of 7½ years.

15. The confiscation proceedings concerning Sanghani, Sagoo and Rajput became particularly protracted. (As Sagoo now seeks to renew an abuse of process argument, we will deal with the chronology in a little more detail later in this judgment.) On 25 October 2010 the judge had extended, by consent, the two year time limit under s.14(7) of the 2002 Act. He delivered his final judgment with regard to Sanghani and Sagoo, which was reserved, on 7 November 2012.

16. In that judgment, he first rejected an argument that there be a stay on the grounds of delay. He then turned to the substance of the confiscation proceedings. Sagoo and Rajput also had initially (in common with Fields) made concessions that the criminal lifestyle provisions applied to them. However the judge commendably, when he became aware of it, had drawn counsel's attention to the intervening decision of a constitution of this court in *Bajwa,* since reported at [2012] 1 CAR(S) 23. In the light of that, the concessions of Sagoo and Rajput were permitted to be withdrawn; and it was in due course found on the facts that the criminal lifestyle provisions did not apply to them or to Sanghani. It had not been established that they had been involved in the conspiracy for a sufficient period of time.

17. The judge went on to summarise the evidence given respectively by Sanghani and Sagoo. He rejected Sanghani's evidence that he had not received any money from the fraud. He considered that Sanghani "has been less than frank in these proceedings and has told several lies". The judge duly assessed the benefit (with a like base figure as £1,410,762, adjusted for changes in value of money) as £1,650,591. As to available amount, he flatly rejected the submission that it should be nil. He noted Sanghani's various financial dealings, both domestic and international, sometimes under a different name. The judge found that Sanghani was hoping to conceal his financial position. In conclusion the judge said this at paragraph 48:

> "I have borne in mind that even if a defendant is found to have been lying that should not automatically mean that he is bound to have 'hidden assets' – in essence I have given myself the *Lucas* direction. Having said that, I find the defendant's evidence incredible in the true sense of that word. The onus is on him to satisfy me that the available amount is nil (or less than the benefit figure). He has not done so."

He thus made a confiscation order in the sum of £1,650,591, with a default period of seven years.

18. In the case of Sagoo the judge found him also not worthy of belief. In his case too the judge found that he had not discharged the burden of proof as to the available amount

and accordingly made a confiscation order in the sum of the benefit (£1,650,591), with a default period of seven years.

19. In the last paragraph of his judgment, the judge re-affirmed his finding that each of Fields, Sagoo and Sanghani was a principal conspirator and that it was a joint operation. He re-affirmed and applied the approach he had adopted with regard to Fields and refused to apportion the confiscation amount. He said this:

> "56. I will finally deal with the question of apportionment. This defendant – along with Fields and Sanghani – was a principal conspirator, and it was a joint operation between them. It has been said that the consequences of the Act are draconian. Following the House of Lords judgments in *May* and *Green*, the Court of Appeal re-stated the principle in *R v Sivaraman* [2009] 1 Cr.App. R(S) 80 @ 449: 'Where two or more defendants obtain property jointly, each is to be regarded as obtaining the whole of it.' I can see no reason to depart from that principle. That is why in the cases of Sagoo and Sanghani I have made the confiscation orders for the full amount of the benefit I have declared."

20. In the case of Rajput, it was accepted that he had not been a principal conspirator. In his particular case, it had previously been agreed by counsel on his behalf that the benefit figure should be taken as £149,477. It was, however, subsequently argued on his behalf before the judge that what he had actually received was in fact £12,000 and that should be taken as the benefit. The judge, in his judgment delivered on 11 October 2012, rejected that. As he put it: "Benefit does not equate to profit". He thus assessed benefit at £167,414 (adjusting the figure of £149,477 to allow for changes in money values). The judge then assessed the evidence on available amount. He concluded, in Rajput's case, that he had discharged the burden placed on him and that the available amount was in fact nil. Accordingly he made a confiscation order in a nominal sum of £1.

21. One point may be noted at this stage. The confiscation order had been made against Fields applying his concession that the criminal lifestyle provisions were applicable. But, in the light of the subsequent decision in *Bajwa*, each of Sagoo and Rajput, as we have recorded, had (successfully) withdrawn a corresponding concession. The Crown's case had, in effect, been that this was a "closed" conspiracy and the judge found that, with regard to Sanghani, Sagoo and Rajput, involvement for a period of at least six months had not been established. It thus has to be asked whether, in fairness, Fields should have to face a confiscation order reflecting what can now be seen to have been a wrong concession, causing the order as against him to be made (in part) on a false basis. However, we need not spend time on this point: because Mr Farrell QC, appearing with Mr Hays for the Crown, has very fairly accepted, in the particular circumstances of this case, that it would not be right to hold Fields to his concession or to apply in his case the criminal lifestyle provisions. We agree with that. The confiscation order thus, in Fields' case, needs to be reduced to the sum of £1,565,945.

The statutory framework

22. These are cases, on the facts, of obtaining property. They are not cases of obtaining a pecuniary advantage and we are not directly concerned with cases of obtaining a pecuniary advantage.

23. The starting point, for present purposes, is s.6 of the 2002 Act. That, in the relevant respects, provides as follows:

> "6.
>
> …..
>
> (4) The court must proceed as follows—
>
> (a) it must decide whether the defendant has a criminal lifestyle;
>
> (b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;
>
> (c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.
>
> (5) If the court decides under subsection (4)(b) or (c) that the defendant has benefited from the conduct referred to it must—
>
> (a) decide the recoverable amount, and
>
> (b) make an order (a confiscation order) requiring him to pay that amount.
>
> (6) But the court must treat the duty in subsection (5) as a power if it believes that any victim of the conduct has at any time started or intends to start proceedings against the defendant in respect of loss, injury or damage sustained in connection with the conduct."

24. Sections 7, 8 and 9 – as is all too familiar – deal with the recoverable amount, the defendant's benefit and the available amount. It is, we add, plain (and well understood) that the available amount is not necessarily assessed simply by identifying what is left of the actual proceeds of the crime. Rather it is to be assessed by reference to the value of a defendant's free property and tainted gifts.

25. Section 76 is important for present purposes. It sets out what constitutes "criminal conduct". As to benefit, it provides:

> "(4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.
>
> …..
>
> (6) References to property or a pecuniary advantage obtained in connection with conduct include references to

property or a pecuniary advantage obtained both in that connection and some other.

(7) If a person benefits from conduct his benefit is the value of the property obtained."

26. Section 79 relates to the value of the property. Section 80 relates to the value of property obtained from conduct. They provide in the relevant respects as follows:

"79. Value: the basic rule

(1) This section applies for the purpose of deciding the value at any time of property then held by a person.

(2) Its value is the market value of the property at that time.

(3) But if at that time another person holds an interest in the property its value, in relation to the person mentioned in subsection (1), is the market value of his interest at that time, ignoring any charging order under a provision listed in subsection (4).

….

80. Value of property obtained from conduct

(1) This section applies for the purpose of deciding the value of property obtained by a person as a result of or in connection with his criminal conduct; and the material time is the time the court makes its decision.

(2) The value of the property at the material time is the greater of the following—

(a) the value of the property (at the time the person obtained it) adjusted to take account of later changes in the value of money;

(b) the value (at the material time) of the property found under subsection (3).

(3) The property found under this subsection is as follows—

(a) if the person holds the property obtained, the property found under this subsection is that property;

(b) if he holds no part of the property obtained, the property found under this subsection is any property which directly or indirectly represents it in his hands;

(c) if he holds part of the property obtained, the property found under this subsection is that part and any property which directly or indirectly represents the other part in his hands.

(4) The references in subsection (2)(a) and (b) to the value are to the value found in accordance with section 79."

27. Section 83 explains what realisable property is. Section 84 sets out general provisions as to property (giving "property" a very wide, albeit self-referential, definition). Section 84(2) includes, among others, the following rules:

> "(2) The following rules apply in relation to property—
>
> (a) property is held by a person if he holds an interest in it;
>
> (b) property is obtained by a person if he obtains an interest in it;
>
> …….
>
> (h) references to an interest, in relation to property other than land, include references to a right (including a right to possession)."

28. The overall scheme of the 2002 Act for the purposes of making a confiscation order, and the overall task for a judge requested to make a confiscation order, had been most helpfully addressed by Lord Bingham, giving the opinion of the committee of the House of Lords, in the case of *May* [2008] 1 AC 1028, [2008] UKHL 28. A three stage approach is required. As he said (at paragraph 8):

> "The first question is: has the defendant (D) benefited from the relevant criminal conduct? If the answer to that question is negative, the inquiry ends. If the answer is positive, the second question is: what is the value of the benefit D has so obtained? The third question is: what sum is recoverable from D? In some cases…. there may be no dispute how one or more of these questions should be answered, but the questions are distinct and the answer given to one does not determine the answer to be given to another. The questions and answers should not be elided."

We think it important that that approach be adopted in addressing the issues advanced in this case.

Ground 1 – Benefit

29. This staged approach, then, gives rise to the first issue of principle – common to each of the appellants Fields, Sanghani and Sagoo – on these appeals. What is the benefit, and the value of the benefit, in their cases? The arguments now advanced are not those before the single judge on which he gave leave. But those have (realistically in our view) not been pursued. This court had previously given leave to advance and pursue amended grounds.

30. The judge had of course found, with regard to Fields, Sanghani and Sagoo, that they were co-principals in a joint operation; and that this was a case, as regards the three of them, of joint benefit. It is to be emphasised that there is now no challenge to those findings of fact.

31. At first sight, therefore – indeed, at second sight – each of them having obtained that joint benefit, the benefit, for the purposes of a confiscation order, is to be determined

accordingly, by reference to s.76(4) and (7), s.80 and s.84. That would therefore be in the amount, in each case, of £1,410,762, adjusted as appropriate to represent changes in money values at the time of the respective confiscation orders.

32. But the appellants contend otherwise. They say that the total benefit should, as it were, be so attributed that the benefit figure is, in each case, one-third of the total joint benefit. They say that that is required by the scheme of the legislation, as now explained in the case of *Waya*.

33. In our judgment, however, this is not right. The argument is contrary to the scheme of the statute as explained in numerous authorities which have not in this respect been displaced by *Waya*. Furthermore, it is contrary to the factual findings of the judge.

34. The argument on the grounds common to these appellants was principally advanced – very skilfully and very ably – by Mr Bodnar on behalf of Fields. His arguments on these grounds were adopted by Mr Rhodes QC for Sanghani and by Mr Bell for Sagoo.

35. What the overall argument, under this head, came to was this. It was true that the judge had found that each of these appellants had jointly obtained the whole of the property. But each, it was said, had a "beneficial interest" in the whole to be assessed (by appropriately robust inference) in each case as one-third equal shares. In consequence, it was said, the true value to each appellant of the property obtained by him was, having regard in particular to the provisions of s.79(3) of the 2002 Act, the value of that "beneficial interest".

36. We would say at the outset that the argument has, as we see it, strong policy objections. It connotes, in effect, that the joint benefit of the property obtained was held – presumably by the three appellants – on trust for the three appellants in equal beneficial shares. Concepts of trust and concepts of contract are not, it may be observed, coterminous. But even if a court had some material to begin to make such an evaluation, why should a court be astute to construct, let alone recognise, a trust in these criminal circumstances? There is no reason why it should. Such an approach would tend to run entirely counter to the statutory aim. Mr Bodnar sought to say, however, that the illegality attending the obtaining of the joint benefit might well go to the court refusing any remedy in enforcing the alleged trust on equitable grounds; but it did not, he argued, displace the prior existence of the right. He observed that, at the end-note in paragraph 46 of the opinion in *May*, Lord Bingham had himself said that the exercise of the jurisdiction should involve no departure from familiar rules governing entitlement and ownership. (That is so: albeit, we note, Lord Bingham in that regard referred to the need to apply "ordinary common law principles" to the facts as found.) In our judgment, however, that argument is altogether too artificial. Section 79(3) of the 2002 Act is to be taken as, generally speaking, extending to making allowance for lawfully subsisting prior interests of other persons: not to the asserted "beneficial interests" of co-conspirators whose very criminality has caused the relevant property to be obtained jointly in the first place. We also note in this regard that Mr Bodnar himself, throughout his written argument, made reference to "beneficial interest" invariably using quotation marks. That is revealing of an appreciation of the realities.

37. Settled authority is, in any event, wholly against this proposition as contended for with regard to the determination of the benefit and its value.

38. The first – and indeed, as we see it, decisive – authority is *May* itself. In our view, that has not in this respect been displaced in any way by *Waya*. The court in *Waya* referred to *May* at length with no suggestion of disapproval and, on the contrary, with a description of Lord Bingham's speech in *May* as "seminal" (paragraph 20).

39. In *May*, the argument for the Crown had included the submission that Parliament envisaged that where property was obtained jointly by persons participating as principals in an acquisitive offence the benefit of each is the value of the property obtained: see at p.1031 F-G. That clearly was accepted. Thus, in dealing with the value of that benefit and in commenting on the decision of the Court of Appeal in *Porter* [1990] 1 WLR 1260, Lord Bingham said this at paragraph 27:

> "27. In *R v Porter* [1990] 1 WLR 1260 the defendant and a co-defendant pleaded guilty to drug offences. At a hearing to determine to what extent they had benefited from their drug trafficking the trial judge found as a fact that the two had jointly benefited in accordance with section 1(2) of the 1986 Act, that the extent of that benefit was £9,600 and that they should jointly and severally be ordered to pay that sum. The issue before the Court of Appeal (p 1262) was whether the confiscation order could properly be joint and several, or whether it should be several, with each of them being required to pay £4,800. It was held (p 1263) that the Act did not contemplate joint penalties, that the court must, as between co-defendants, determine their respective shares of any joint benefit that they might have received as a result of their drug trafficking, and that in the absence of any evidence the court was entitled to assume that they were sharing equally. So the orders were quashed and several orders for £4,800 substituted in each case. This might, as later authorities show, have been a proper disposal had there in fact been no evidence of the parties' shares in the proceeds. But the judge's finding, not challenged on appeal, was that the proceeds had been received jointly. That being so each had received a payment or other reward in the full sum of £9,600 and orders in that sum should have been made against each of them severally."

In the course of paragraph 28 Lord Bingham then also said (dealing with the provisions of the Criminal Justice Act 1988, but whose provisions in this regard do not materially differ from the 2002 Act):

> "…it is of course necessary that the defendant himself should have obtained property as a result of his offending, even if jointly or through a third party at his behest, and his benefit is the value of the property so obtained…."

The general approval of the Court of Appeal decision in *Chrastny (No 2)* [1991] 1 WLR 1385, recorded in paragraph 29 of the judgment, is to like effect.

40. These passages are flatly against Mr Bodnar's argument, as he realistically was prepared to acknowledge. Likewise, in the linked case of *R v Green* [2008] 1 AC 1053, [2008] UKHL 30, one of the arguments of the appellant defendant was that where property was obtained by a number of confederates the court must determine the extent to which individual defendants benefited from that property and in the absence of evidence to the contrary should infer that they shared equally: p.1054 G. But the House of Lords affirmed that where each confederate had obtained control of property jointly each had obtained the whole of it: see paragraph 15 of the opinion.

41. Thereafter that approach has consistently been affirmed by various decisions of various constitutions of the Court of Appeal. It is not necessary to refer to them here. They find their summation in the decision of the Court of Appeal in *Lambert & Walding* [2012] 2 CAR(S) 90, [2012] EWCA Crim 421.

42. In that case, two conspirators had, by way of joint enterprise, engaged in cannabis production. The benefit of the conspiracy had been found by the trial judge to have been obtained by them jointly: and the total value was found to be £107,860. Each defendant had realisable assets in excess of that figure. The judge accordingly made an order in the entire sum of £107,860 against each defendant and declined to apportion between the two. The argument on appeal was that he was wrong to do so. Much emphasis was placed on the potential for the amounts to be paid under the two orders to exceed the total benefit. This was, after a full review of the authorities, rejected by the Court of Appeal. Perhaps the key paragraphs are paragraphs 41 to 47 of the judgment. As said by Pill LJ in the course of paragraph 43:

> "The statutory language, as construed in the authorities, does require a defendant to be liable for the benefit he has obtained jointly with others. Statements in *May* and *Green* require this court to decline to order or permit apportionment in present circumstances."

This authority too – as Mr Bodnar accepted – is wholly against the appellants' present argument as to benefit.

43. In this regard, the appellants' present arguments did in some respects, it has to be said, on occasion shift away from focusing on the identification and valuation of the benefit obtained by reference to the alleged "interests" obtained towards an argument based on *apportionment* of the benefit obtained. Clearly there is some degree of overlap in the available arguments. That, nevertheless, as we see it, remains a different argument and is not to be elided with the assessment at the first and second stages. It more obviously should be said to arise for consideration in dealing not with the valuation of benefit but with the determination of the proper amount of the confiscation order: that is, at the final stage when the recoverable amount is assessed.

44. Overall we accept Mr Farrell's submission that there is no room for – and indeed no need for – the possibility of apportionment of *benefit* under the 2002 Act in cases of joint benefit such as the present. At this stage, the Court's task – consistently with the legislation – is simply to identify the benefit obtained and then to value that benefit. There is no authoritative statement in any of the cases countenancing the legality of apportioning the benefit where it has been jointly obtained, and there are authoritative

statements, including those in *May* and in *Lambert & Walding* itself, pronouncing against it.

45. It is true that in the Court of Appeal decision in *May*, Keene LJ had referred to the possibility in some circumstances of adopting an "apportionment approach" and that there might be cases where the defendants have substantial assets such that making orders for the full benefit in each case, leading to the Revenue recovering more than the conspiracy obtained, meant that "the court may be prepared to apportion the benefit": see [2005] 2 CAR(S) 67, [2005] EWCA Crim 97 at paragraph 41. Whether Keene LJ had in fact meant benefit in its strict sense in this last quoted remark may be queried. Be that as it may, when the House of Lords came to summarise the reasoning of the Court of Appeal, this was said by Lord Bingham in paragraph 45 of the opinion:

> "45. The Court of Appeal here attached importance (para 37) to the finding that the companies defrauding HM Customs and Excise of VAT were jointly controlled by a group of people including this appellant. Once the corporate veil was pierced, as it was accepted it could be (a step endorsed by the Court of Appeal in *R v Dimsey* [2000] QB 744) the property in question was to be regarded as the joint property of those controlling the company. It was analogous to the situation where conspirators had put the proceeds of the fraud straight into their joint bank account. Each is then entitled to the full amount in the account. Each individual, in the statutory language, "obtains" the property jointly held. The law was accurately summarised (para 38) in *Mitchell, Taylor & Talbot on Confiscation and the Proceeds of Crime,* vol 1, paras 5.026 - 5.027. Someone who has joint control of property has "obtained" that property within the meaning of section 71(4) (para 39), which bites when the property is obtained or the pecuniary advantage is derived. The court did not consider it more unjust (para 40) for the whole of property jointly controlled to be treated as the individual defendant's benefit than for money which had passed through a defendant's hands to be treated as his benefit, even though that money was a much greater amount than his personal profit. Yet the latter result was accepted as well-established by the authorities. There might be circumstances in which orders for the full amount against several defendants might be disproportionate and contrary to article 1 of the First Protocol, and in such cases an apportionment approach might be adopted, but that was not the situation here and the total of the confiscation orders made by the judge fell well below the sum of which the Revenue had been cheated. The judge's order against the appellant was accordingly upheld."

It is to be noted that in this paragraph Lord Bingham has translated the comments of Keene LJ as indicating the possible availability, on proportionality grounds, of an apportionment approach to *liability* in the full amount. But, by his summary from the

Court of Appeal decision, he lends no authoritative support to the suggested possibility of apportionment of *benefit*.

46. There is a yet further, and indeed fundamental, objection to these arguments with regard to benefit. As we have said, the judge's express finding was that this was a case of joint benefit obtained by these appellants as co-principals; and that finding is not challenged. We consider that the argument now advanced, however, in truth is actually seeking to go behind that finding. Thus in *May* itself, at paragraph 32 of the opinion, reference is made to the case of *Gibbons* [2003] 1 CAR(S) 169, [2002] EWCA Crim 1621. In that case the proceeds of the conspiracy had been apportioned between the four conspirators equally. That was held to be justified on the facts of that case. But, as Lord Bingham expressly pointed out in paragraph 32 of *May*, *Gibbons* was a case where, it seems, there was insufficient evidence for the trial judge to decide that the proceeds had been obtained jointly. That is to be contrasted with the present case where there was such evidence and there was such a finding. The present case cannot now, on appeal, be sought somehow to be converted into a *Gibbons* type of case.

47. The proposition that apportionment of benefit (at this stage of the three stage approach required) is entirely inapposite in a joint benefit case can perhaps be further illustrated by one particular example. Suppose a case where each of three principal co-conspirators has jointly obtained the benefit of the proceeds of the conspiracy. Suppose also that two of them have at the time of the confiscation order no available assets at all but one does have available assets sufficient to meet the whole amount of the benefit. In such circumstances it would seem to be entirely arbitrary and contrary to the object of the 2002 Act if that one conspirator nevertheless is to have the benefit apportioned equally: with the consequence that the ultimate total recoverable amount is necessarily limited, at the final stage, to one-third of the value of the joint benefit.

48. Is there anything in *Waya* itself to displace what has hitherto been settled law as to the ascertainment and valuation of benefit in cases where there has been a finding of joint benefit?

49. In our view, on this aspect of the appeal, there is nothing to be found in the decision in *Waya* to support Mr Bodnar's argument. As we have said, the Supreme Court in *Waya* referred at length to *May* without any indication of disapproval. It is true that there was significant emphasis placed by the majority in that case on s.79(3) of the 2002 Act and there was an elaborate analysis of the nature and valuation of the interest obtained. But that was in the particular circumstances of the case. *Waya* was not a case concerned with property jointly obtained. It was a case where the defendant (Waya) had acquired a property with the (partial) assistance of a loan, secured by charge, procured by fraudulent misrepresentation. That is a wholly different situation from the present case and necessitated close analysis of the interest acquired. *Waya* is certainly, by its general observations, potentially relevant on the third ground advanced with regard to the final amount which should be ordered to be paid: and to that we will come. But, in our respectful view, it does not have any bearing at all on the present question of attribution, or apportionment, of benefit as such. *Waya* requires no departure, in a joint benefit case, from the principles established in *May* and other such cases with regard to the valuation of benefit.

50. Accordingly, we conclude that authority binding this court – and consistently with the language and scheme of the 2002 Act – establishes that, where there has been a finding of jointly obtained benefit, that benefit is to be valued in the whole amount of the property so obtained in respect of each defendant. There is no room, in such a case of joint benefit, for the ascription of "beneficial [several] shares" to each of the defendants for the purpose of valuing their benefit: nor does any question of apportionment of benefit arise in such a case at this stage of the assessment. If apportionment is appropriate at all in such a case, then that can only be (on grounds of proportionality) at the final stage: the stage of determining the recoverable amount in which the confiscation order is to be made in each case.

Ground 2 – Available amount

51. The next ground advanced is by reference to the judge's findings as to the available assets of these three appellants. In essence, it is a challenge to his factual enquiry and conclusions and raises no wider grounds of principle at all. Nonetheless it is, of course, a matter of considerable importance to these appellants.

52. Reference was made by counsel to the decision of a constitution of this court in *McIntosh & Marsden* [2012] 1 CAR(S) 60; [2011] EWCA Crim 1501. In the course of giving the judgment of the court, Moses LJ, after referring to *May* and to *Glaves v Crown Prosecution Service* [2011] EWCA Civ 69, said this at paragraph 15:

> "15. In the light of *Glaves* and *May* there is no principle that a court is bound to reject a defendant's case that his current realisable assets are less than the full amount of the benefit, merely because it concludes that the defendant has not revealed their true extent or value, or has not participated in any revelation at all. The court must answer the statutory question in s.7 in a just and proportionate way. The court may conclude that a defendant's realisable assets are less than the full value of the benefit on the basis of the facts as a whole. A defendant who is found not to have told the truth or who has declined to give truthful disclosure will inevitably find it difficult to discharge the burden imposed upon him. But it may not be impossible for him to do so. Other sources of evidence, apart from the defendant himself, and a view of the case as a whole, may persuade a court that the assets available to the defendant are less than the full value of the benefit."

The submission is that, having rejected each appellant's evidence that he had no assets or at least that he had assets less than the amount of the benefit, the judge had inadvertently fallen into the error of concluding that he thereby must have sufficient realisable assets. It is said that it is crucial to bear in mind that the scheme of the 2002 Act is, in cases of this kind, only to permit a confiscation order up to the amount of the available assets: and the court must be alert to avoid "the risk of serious injustice" – to use a phrase deployed in some of the cases – of ordering a defendant to pay more than in truth he is able to pay: particularly where a default period of imprisonment will then apply.

53. It is also a fair point made on behalf of the appellants that, at *this* stage of the inquiry, regard indeed may properly be had not just to what a defendant has obtained (benefit) but also to what he has actually himself received and retained: because that can be relevant to assessing the available amount.

54. However, in the circumstances of these cases we can see no basis for interfering with the judge's conclusions on the evidence. We deal with each in turn.

(a) Fields

55. It was, rightly, accepted that the burden of proof was on Fields to show that he did not have assets available to meet the amount of the benefit: s.7(2) of the 2002 Act.

56. Mr Bodnar submitted that there was no reason to conclude that, in terms of actual receipt, Fields had received anything more than, at most, one-third of the proceeds of the conspiracy (some of which, in any case, related to services): realistically, he would not have received or retained for himself the whole. Further, while the judge had focused on the evidence of large sums passing through Fields' bank accounts in preceding years and on his business dealings, on analysis the expenditure was not consistent with his having concealed assets of £1.5 million, and in any case the indications were that all such sums were gone. Further, there was evidence of Fields living an extravagantly reckless lifestyle. Overall, it is said, a conclusion that Fields had assets available to the tune of in excess of £1.5 million was wholly unrealistic.

57. In our view, there is no proper basis for challenging the judge's conclusion on the facts. He had considered for himself the extensive movements through Fields' bank accounts. He had rejected Fields' evidence as to his assets as not credible. He had also noted the extensive dealings and other business interests on the part of Fields. He had expressly considered the "risk of serious injustice" point. His conclusion was that Fields had not discharged the burden of proof on him. There is nothing to indicate that the judge, in so concluding, had fallen into the error of the kind identified in *McIntosh & Marsden*. Moreover, Moses LJ had in that case in terms pointed out that a defendant who was found not to have told the truth and had declined to give truthful disclosure would inevitably find it difficult to discharge the burden on him.

58. This challenge fails.

(b) Sanghani

59. Similar arguments were advanced in the case of Sanghani.

60. In his evidence Sanghani had claimed that he personally did not receive any money from the fraud of which he was convicted. The judge rejected that. As he said: "People do not become part of a fraud unless they expect to gain something from it".

61. The judge noted that Sanghani had held a number of bank accounts under another name. There had been deliberate concealment of bank accounts: and inquiry had revealed very significant financial dealings in at least one overseas bank account, including sizeable payments both in and out. The judge found that this appellant had been less than frank and had not given truthful evidence. He found there had been a

lack of disclosure. We have already referred to the judge's conclusions set out in paragraph 48 of his judgment, handed down on 7 November 2012.

62. Mr Rhodes submitted, nevertheless, that the evidence was that Sanghani's role in the conspiracy was "compartmentalised" and had in effect been restricted to that part of the conspiracy involving the acquisition of alcohol. He also said that in paragraph 48 of his judgment the judge had misdirected himself in law and fallen into the error of the kind identified in *McIntosh & Marsden*. He further said that, even allowing for the various identified dealings of this appellant (sometimes under an alias), the amounts of his dealings thereby indicated fell a long way short of suggesting an available amount of over £1.5 million.

63. The judge had conducted the trial. He was well able to assess Sanghani's role. He found this appellant's evidence in the confiscation proceedings "incredible". In our view the judge did not misdirect himself in paragraph 48. On the contrary, he thereby made clear he had in mind the kind of risk adverted to in *McIntosh & Marsden*. He was, in our view, entitled to conclude that Sanghani had not discharged the burden of proof.

(c) Sagoo

64. The judge also found Sagoo's evidence "not worthy of belief". Sago had continued to deny receiving anything from the fraud. He had claimed, moreover, in his evidence that the judgment obtained by the Revenue against him for £19 million was "false". The prosecution statement had identified a number of properties and bank accounts, with extensive financial movements, relating to Sagoo.

65. In the course of his evidence, Sagoo had in fact claimed that he had not acquired any property or had any bank accounts outside the United Kingdom (albeit he had identified in his s.18 statement properties in Turkey). It was then put to him that he had acquired four apartments in Turkey. He said: "That slipped my mind". There were other matters referred to by the judge as casting doubt on the veracity of his evidence. It is true that forensic accountants instructed by Sagoo had apparently identified no hidden assets – but that was on the basis of the information given to them.

66. In such circumstances, the judge concluded on the evidence in Sagoo's case that he had not discharged the burden on him. There is, in our view, no basis now for setting aside that conclusion of the judge, reached on the evidence.

67. It was also objected by Mr Bell that the judge had failed to have any, or any sufficient, regard to the fact that Sagoo had been made bankrupt prior to the confiscation order and had also previously been the subject of a restraining order. In our view, those matters did not disentitle the judge from drawing the conclusion he did. We refer to s.84(2)(d) of the 2002 Act. Moreover in the case of *Shahid* [2009] 2 CAR(S) 105, [2009] EWCA Crim 831, it was expressly held by a constitution of this court that, as a matter of principle, the fact that a bankrupt's assets are in the hands of his trustee in bankruptcy does not affect the position at all with regard to a confiscation order. (It was there pointed out, however, that such matter may be relevant at the stage of enforcement.) That is authority binding this court. The

bankruptcy of Sagoo did not disentitle the judge from assessing the available amount as he did, or from thereafter imposing a commensurate default term.

Rajput – Benefit

68. We turn to the argument advanced on behalf of Rajput. Mr Baur contended that the judge had been wrong to find the benefit in his case to be £167,414.58 (£149,477 adjusted to reflect changes in money values). Although this particular challenge is to the finding as to benefit, not available amount, it is convenient to deal with the point here.

69. Both at the time of sentencing, and thereafter, it had been expressly conceded on behalf of Rajput that his benefit was indeed in that amount. There was clear evidence to support it. But very late in the day it had been sought to be argued before the judge that his "true" benefit was only £12,000, which represented the profit he had received (essentially with regard to the two valuable cars). It is said the judge was wrong to reject that. It is also said that the judge wrongly overstated Rajput's role in the conspiracy.

70. In our view, the judge was plainly entitled to reject these points. As the statute makes clear, benefit is assessed by reference to what has been obtained: not by reference to what has been retained. As the judge crisply put it: "Benefit does not equate to profit". There are numerous authorities, including *May* itself, confirming the correctness of that proposition. As to the assessment of Rajput's role, the judge (having had the conduct of the trial) was well placed to make the assessment he did.

71. The judge's finding as to benefit is therefore unassailable on his assessment of the evidence. There is, of course, no challenge as to the recoverable amount: it will be recalled that the judge found in favour of Rajput on this, concluding that the available amount in his case was nil.

Ground 3 – Apportionment of recoverable amount

72. This leads to the final, and perhaps most significant, ground common to the appellants Fields, Sagoo and Sanghani. The argument is that it is disproportionate to order each of these appellants to pay by way of recoverable amount – the appellants' property rights being, it can be accepted, at that stage engaged – the total amount of the benefit (on the footing that each had failed to disprove that he had available assets sufficient to discharge payment in that amount). It is said that to do so could in effect give rise to treble recovery and would amount to an unjustified "fine" on these appellants.

73. This very argument had – as we have already noted – been advanced in *Lambert & Walding*, as recorded in paragraph 41 of the judgment. It was rejected. It is worth reverting to the judgment. The full text of paragraphs 42 and 43 is as follows:

> "42. In our judgment the statements of principle in *May* and *Green* are, and are intended to be, of general application and defeat the claim to apportionment. In *May*, the Committee stated, at paragraph 46, that apportionment between parties jointly liable would be "contrary to principle and unauthorised by statute". It was held that the statutory questions must be

> answered by "applying the statutory language, shorn of judicial glosses and paraphrases". That approach applies to the calculation of a defendant's "benefit" under section 4 of the 2002 Act, the calculation of "recoverable amount" under section 7, and to the duty on the court under section 6(5) to make a confiscation order.
>
> 43. On an application of the statutory language, it is not disproportionate to make an order "depriving a defendant of a benefit which he has in fact and in law obtained, within the limits of his realisable assets" (*Green*, paragraph 16). The statutory language, as construed in the authorities, does require a defendant to be liable for the benefit he has obtained jointly with others. Statements in *May* and *Green* require this court to decline to order or permit apportionment in present circumstances."

74. Moreover, after a further review of certain of the relevant authorities in the succeeding paragraphs, it was stated by Pill LJ that it was "legitimate" that the entire realisable assets of a person who embarks on a drug dealing joint venture "should be put at risk, up to the sum of the joint benefit obtained… While the present statutory scheme is in place, the refusal to apportion is a legitimate part of it" (paragraph 47). This is, on the face of it, directly against the appellants' argument. But Mr Bodnar is in a position to seek to argue that *Lambert & Walding* is no longer binding on this court in that respect. For it was there held that the statutory provisions, including s.6(5) as to the making of a confiscation order, were to be read "shorn of judicial glosses and paraphrases". But that no longer, as a general proposition, represents the law. For in *Waya*, of course, it has been held that – in order to achieve compliance with Article 1 of the First Protocol (A1P1) – s.6(5) is to be "read down" or qualified so as to include the words "except in so far as such an order would be disproportionate and thus a breach of A1P1".

75. But, accepting that *Waya* has now authoritatively established that proportionality may be taken into account in making an order under s.6(5), we still have to ask ourselves what *Waya* actually does decide, or at any rate indicate, with regard to the point now arising in the present case and to what extent it impacts on the past authorities on this particular point.

76. It is true that in paragraph 45 of *May* Lord Bingham had expressly said:

> "There might be circumstances in which orders for the full amount against several defendants might be disproportionate and contrary to article 1 of the First Protocol, and in such cases an apportionment approach might be adopted, but that was not the situation here and the total of the confiscation orders made by the judge fell well below the sum of which the revenue had been cheated."

First, then, that passage serves to acknowledge that circumstances "might" exist, in cases involving several defendants, where an order for the full amount might be disproportionate and an apportionment approach appropriate; second, it seems to have

been envisaged that the fact that the total of the confiscation orders fell "well below" the sum of which the revenue had been cheated could be relevant in this regard. But those remarks are expressed tentatively in the course of a recital of the reasoning of the Court of Appeal; and, moreover, with respect, they do not fit very well, in joint benefit cases, with the previous remarks of the House of Lords expressed in *May* (as referred to above), and particularly with the treatment of the cases of *Porter, Chrastny* and *Gibbons*. Further, in paragraph 46 of *May*, Lord Bingham immediately went on to say:

> "The sum, which the appellant, jointly with others, was found to have fraudulently obtained from HM Customs & Excise was, in law, as much his as if he had acted alone…. The order made was less than his realisable assets. It is entirely consistent with the legitimate objects of the legislation, and it requires, that he be ordered to pay such sum, which involves no injustice or lack of proportionality…."

It is to be borne in mind that this was said in a case where the appellant's counsel likewise had expressly argued that an assessment leading to the possibility of multiple recovery was disproportionate (p.1031D). In paragraph 45 of *Lambert & Walding*, the Court of Appeal plainly had regarded the suggestion of Keene LJ in *May* as to apportionment in a joint benefit case as, in effect, heretical and as implicitly (if not explicitly) rejected by the House of Lords in *May*.

77. In *Jennings v Crown Prosecution Service* [2008] 1 AC 1046, [2008] UKHL 29, a case linked to *May*, the House of Lords was again dealing with the question of benefit and the value of the property obtained for the purposes of the Criminal Justice Act 1988. In the course of the judgment this was said at paragraph 13:

> "The rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent. He cannot, and should not, be deprived of what he has never obtained or its equivalent, because that is a fine. This must ordinarily mean that he has obtained property so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else."

This is entirely consistent with *May*. If that still represents the law, the obvious point therefore remains that, in a case of joint benefit such as this, each defendant has obtained the joint benefit in the whole; and therefore by the making of a confiscation order against each of them in the whole amount, each is being deprived of what he has gained and is not being deprived of what he has never obtained (and so is not being subjected to a fine).

78. That also seems to us to be the conclusion to be drawn from *Green*. There – just as in *May* – objection had been taken by counsel for the appellant defendant to the prospect of multiple recovery. That objection seems not to have impressed the House of Lords in that case (see paragraph 15). Moreover, while that case was primarily concerned with the issue of the value of the benefit obtained, the House of Lords did go on (in

paragraph 16 of the opinion) to deal with the confiscation order itself and, furthermore, it did so in the language of proportionality:

> "The committee cannot, however, regard it as disproportionate to make an order depriving a defendant of a benefit which he has in fact and in law obtained, within the limits of his realisable assets…."

Mr Farrell would say: precisely so. We agree. In the present case each of these three appellants obtained, in law and in fact, the joint benefit of the proceeds of the conspiracy: the judge had expressly so found. In such circumstances, it must be strongly queried how it can ever be disproportionate, in a joint benefit case such as this, to make against each of several defendants a confiscation order (where there are sufficient available assets) which is for no more than the correctly assessed joint benefit.

79. *Waya* certainly makes it now legally possible, in principle, for a confiscation order proposed to be made under s.6(5) to be qualified by the application of principles of proportionality. The crucial parts of the reasoning in this respect are contained in paragraphs 10 to 35 of the majority opinion delivered by Lord Walker and Hughes LJ and with which all the members (including the minority who dissented in the result) of the Supreme Court agreed. Such paragraphs are, it is to be borne in mind, to be read as a whole.

80. In the course of those paragraphs it was emphasised (at paragraph 20) that a confiscation order must bear a proportionate relationship to the legislative aim: viz to remove from criminals the proceeds of their crime. Perhaps, however, for present purposes, paragraphs 26 to 29 are the most important:

> "26. It is apparent from the decision in *May* that a legitimate, and proportionate, confiscation order may have one or more of three effects: (a) it may require the defendant to pay the whole of a sum which he has obtained jointly with others; (b) similarly it may require several defendants each to pay a sum which has been obtained, successively, by each of them, as where one defendant pays another for criminal property; (c) it may require a defendant to pay the whole of a sum which he has obtained by crime without enabling him to set off expenses of the crime. These propositions are not difficult to understand. To embark upon an accounting exercise in which the defendant is entitled to set off the cost of committing his crime would be to treat his criminal enterprise as if it were a legitimate business and confiscation a form of business taxation. To treat (for example) a bribe paid to an official to look the other way, whether at home or abroad, as reducing the proceeds of crime would be offensive, as well as frequently impossible of accurate determination. To attempt to enquire into the financial dealings of criminals as between themselves would usually be equally impracticable and would lay the process of confiscation wide open to simple avoidance. Although these propositions involve the possibility

of removing from the defendant by way of confiscation order a sum larger than may in fact represent his net proceeds of crime, they are consistent with the statute's objective and represent proportionate means of achieving it. Nor, with great respect to the minority judgment, does the application of A1P1 amount to creating a new governing concept of 'real benefit'.

27. Similarly, it can be accepted that the scheme of the Act, and of previous confiscation legislation, is to focus on the value of the defendant's obtained proceeds of crime, whether retained or not. It is an important part of the scheme that even if the proceeds have been spent, a confiscation order up to the value of the proceeds will follow against legitimately acquired assets to the extent that they are available for realisation.

28. The case of a defendant such as was considered in *Morgan* and *Bygrave* is, however, a different one. To make a confiscation order in his case, when he has restored to the loser any proceeds of crime which he had ever had, is disproportionate. It would not achieve the statutory objective of removing his proceeds of crime but would simply be an additional financial penalty. That it is consistent with the statutory purpose so to hold is moreover demonstrated by the presence of section 6(6). This subsection removes the duty to make a confiscation order, and converts it into a discretionary power, wherever the loser whose property represents the defendant's proceeds of crime either has brought, or proposes to bring, civil proceedings to recover his loss. It may be that the presence of section 6(6) is capable of explanation simply as a means of avoiding any obstacle to a civil action brought by the loser, which risk would not arise if repayment has already been made. But it would be unfair and capricious, and thus disproportionate, to distinguish between a defendant whose victim was about to sue him and a defendant who had already repaid. If anything, an order that the same sum be paid again by way of confiscation is more disproportionate in the second case than in the first. Unlike the first defendant, the second has not forced his victim to resort to litigation.

29. The principle considered above ought to apply equally to other cases where the benefit obtained by the defendant has been wholly restored to the loser. In such a case a confiscation order which requires him to pay the same sum again does not achieve the object of the legislation of removing from the defendant his proceeds of crime, but amounts simply to a further pecuniary penalty – in any ordinary language a fine. It is for that reason disproportionate.

> If he obtained other benefit, then an order confiscating that is a different matter."

Paragraph 32 is to like effect.

81. In our view, the opening parts of paragraph 26 – in particular, what is said not only in (a) but also in (b) – lend strong support to the Crown's argument in the present case. (The word "similarly" in (b) is, we think, of some note.) Moreover that paragraph talks not only in terms of the legitimacy but also in terms of the proportionality of an order requiring a defendant to pay the whole of a sum which he has obtained jointly with others. But we have to say that – perhaps tantalisingly – that passage falls short of being conclusive on the point now argued (which was of course not a point falling for decision in *Waya*). For paragraph 26(a) talks only in terms of "the defendant" paying the whole of the sum jointly obtained. It does not, ostensibly, specifically address the situation where there are *several* defendants and *each* is being required to pay the whole of the sum jointly obtained – the case before us. Perhaps it was for this reason that, in the commentary to the report of the decision in *Waya* at [2013] CrimLR 256 at p.261, Dr David Thomas QC (whose commentaries henceforth will be sadly missed) says:

> "The judgment recognises that an order requiring the defendant to pay the whole of a sum which he has obtained jointly with others is not disproportionate, presumably even if the others are also ordered to pay the same sum."

The appellants, of course, would submit that no such thing is to be presumed.

82. Nevertheless, we think that is the right conclusion to be drawn in a joint benefit case. Our reasons, in sum, are as follows:

i) First, and reflecting what we have previously said, since each defendant has been found to have obtained the joint benefit, he will not be required by such a confiscation order to disgorge any benefit which he has not obtained. On the contrary, he is being required to disgorge the benefit representing his proceeds of crime. That is not the imposition of an additional financial penalty or fine. (Moreover, as the Supreme Court re-affirmed at paragraph 26 of *Waya*, an order is not to be regarded as disproportionate simply because it removes from a defendant more than may in fact represent his net profits from the crime.)

ii) Second, such a conclusion would be entirely consistent with the tenor of the various observations made in cases such as *May, Green, Jennings* and *Lambert & Walding*, to which we have referred above; as well as *Waya* itself at paragraph 26, and in particular paragraph 26(a) and (b) taken together. Those, overall, indicate that a confiscation order made in an amount matching the correctly assessed benefit is not to be classified as disproportionate.

iii) Third, there remains the point that if a confiscation order is apportioned at this stage, as the appellants argue, there is a real risk that ultimately the order will not be satisfied in full. Experience tells one that it is only too common for defendants to fail to make the payment ordered under a confiscation order. It would be unsatisfactory – and an effective negation of the finding of joint

benefit – for one defendant (who is able to pay the whole in full) to have avoided paying up to the full amount of the proceeds obtained simply by reason of the other defendants thereafter failing to make any payment. Apportionment of the confiscation order at this stage would carry that risk. Mr Bodnar submitted that at least – in contrast with the position arising at the prior stage of assessing the benefit – the situation only could arise at this stage where each such defendant has first been, in effect, adjudged in fact to have the necessary available assets: so there should be no presumption, as it were, of subsequent default in payment. That, we can see, has some purist force as a point. But regrettably the reality in practice as to outcome is frequently different.

iv) Fourth, to embrace concepts of apportionment – at any stage – in such cases would, as the Supreme Court pointed out in paragraph 26 of *Waya*, potentially involve impracticable inquiries into financial dealings between criminals and could lead to evasion, manoeuvring and chicanery on the part of defendants.

83. At the heart of the appellants' objections, nevertheless, remains the submission that such an order against each such defendant could or would amount to multiple recovery (reflecting arguments previously unsuccessfully advanced in *May, Green* and *Lambert & Walding*) and so would be disproportionate. In our view, however, the object of the 2002 Act as to the making of confiscation orders is not solely geared to recouping the loss of the "loser" (if a "loser" can be identified). Rather the legislative aim is geared to removing from criminals the proceeds of their crimes. In *Waya* itself, in fact, the original lender – to whom the fraudulent misrepresentation inducing the loan had been made – had been fully recouped. But that did not mean that Mr Waya had no further liability for confiscation. He did: because the focus was on depriving him of the benefit flowing from his crime.

84. Thus Fields, for example, could have no complaint at being held liable (having sufficient available assets) in the full amount of the benefit in circumstances where, say, confiscation orders were not made against Sanghani and Sagoo because they were found to have established that they had no available assets (*May*; paragraph 26 of *Waya*). It is very difficult to see how Fields can somehow acquire such a complaint, on grounds of proportionality, simply because Sanghani and Sagoo are also held liable themselves in the full amount of the benefit. In either situation, Fields is being required to pay what he has obtained and no more.

85. Mr Bodnar nevertheless put this example. Suppose Fields had prior to the confiscation proceedings paid compensation in full to every person who had been the victims of the conspiracy. It would, he submitted, be unthinkable, in the light of *Waya*, that a confiscation order would thereafter be made. But, with respect, that simply assumes an answer to what is very much in issue. It may be granted on such a scenario that – in the light of *Waya* – no confiscation order would subsequently be made *against Fields*. But that is because *he* has restored the full amount of *his* benefit. He thus should not be required to pay twice over. But it does not follow at all that no such order should thereafter be made against Sagoo or Sanghani. On the contrary, it would have an appearance of arbitrariness if they were not to be subject to a confiscation order simply because another co-principal conspirator had made restitution to the victims in full. If such a result were to be permitted then (on the

example given) it would mean that Sagoo and Sanghani would not themselves have had to disgorge any of the proceeds of their crime.

86. A further example can be given. Suppose three conspirators are each adjudged in due course to have joint liability for benefit jointly obtained. Suppose two of them have fled the jurisdiction. The third is tried, convicted and made subject to a confiscation order which he (having available assets) discharges in full. Suppose the other two are thereafter extradited back to the UK, tried and convicted. The logic of Mr Bodnar's argument again would connote that neither could at that stage be made subject to a confiscation order: just because there has been prior "restitution" in full by the one who had not fled and who had been the first to be convicted. That is, as we see it, also arbitrary and contrary to the legislative aim.

87. All this, we consider, illustrates the flaw in the appellants' argument. If a prospective confiscation order is to be adjudged disproportionate under s.6(5) of the 2002 Act (having regard to *Waya*) it is to be (1) because it is disproportionate with regard to *that* defendant who is to be made, prospectively, subject to the confiscation order and (2) because it is disproportionate having regard to the scheme and objective of the 2002 Act. In our judgment, lack of proportionality for these purposes is not to be assessed simply by focusing on orders also made against others or of payments made by others, or by focusing on the potential "profit" (in the language of the appellants' argument) accruing to the Crown by reason of prospective multiple recovery. On the contrary, such an approach as argued for by the appellants detracts from the scheme and objective of the 2002 Act: which requires the focus of attention to be on depriving *each* defendant of the proceeds of *his* crime.

88. Moreover, if the argument of the appellants is right, that would seem to lend itself to a potential argument that, on grounds of proportionality, a confiscation order ought to be pro tanto reduced where there has been *partial* prior restitution. But the Supreme Court in *Waya* was careful only to indicate that the principle identified in paragraph 28 of the judgment was applicable where the benefit obtained has been "wholly restored to the loser". It has since been decided by a constitution of this court in *Harvey* [2013] EWCA Crim 1104, where various relevant cases are helpfully reviewed by Jackson LJ, that subsequent partial restoration will not suffice. In such circumstances, it was decided, a confiscation order in the entire amount based upon the original value of the property, without any deduction, would not be disproportionate. That is authority binding on this court. A comparable approach was indicated in the case of *Jawad* [2013] EWCA Crim 644, a case involving consideration of the relationship between confiscation and compensation. (It may, in passing, be noted that at paragraph 5 of the judgment in *Jawad*, Hughes LJ – who was of course party to the majority decision in *Waya* – observed that there "could be" no challenge in that case to the trial judge's rejection of the apportionment argument there advanced.)

89. Mr Bodnar powerfully submitted that this is an emerging and developing area of the law. But as we see it the previous authorities, albeit now to be read in the light of *Waya*, are directly against the appellants' current proposition: and *Waya* itself, properly read and analysed, in our view simply does not provide authoritative support for the current proposition. If this argument is to succeed, it will need to do so by further decision of a higher court than this one.

90. In this regard, we should refer to the case of *Ahmad* [2012] 1 WLR 2335, [2012] EWCA Crim 391. We gather that case is currently subject to an appeal to the Supreme Court, albeit not on the point originally certified, and that the appeal is likely to cover at least the points addressed to us on ground 3. The hearing is, we were told, scheduled for February 2014. We record that the parties before us opposed any adjournment of these appeals pending the hearing and delivery of the judgments of the Supreme Court in *Ahmad*. All were understandably concerned at the delay that has already occurred and did not wish there to be any further delay. We acceded to that and the hearing before us proceeded accordingly.

Ground 4 – Stay of proceedings

91. Finally, we should deal with the renewed application on behalf of Sagoo challenging the judge's decision to refuse to order a stay on the ground of delay. We do so last even though we appreciate that, logically, it is his first point.

92. As we have said, the confiscation proceedings became very drawn out; a particular point of concern, given the time limits ordinarily applicable to confiscation proceedings as required by the 2002 Act.

93. The chronology of events shows throughout 2009 exchanges of reports and various requests for access to materials. By early 2010 the defence were approaching a firm of forensic accountants and thereafter there were delays in obtaining the necessary funding. The judge himself towards the end of 2010 had listing commitments, the two year period being due to expire on 11 November 2010. On 25 October 2010 the judge – having invited representations – decided that there were exceptional circumstances and extended the period. It is to be emphasised that no representations to the contrary had been made to the judge. He then gave directions for hearing the matter on 14 March 2011.

94. There was then an adjournment at Sanghani's request and thereafter, in May 2011, Sagoo sent a quantity of papers directly to the judge. The case of *Bajwa* was then noted by the judge. In the light of that, the judge very fairly circulated a preliminary judgment dealing with that point on 4 August 2011. There was then a hearing on 29 November 2011 and further directions given as to written submissions on the criminal lifestyle provisions. There was then a significant delay, in part because the judge had listing commitments. There was a further hearing on 1 June 2012 when evidence was given. On 11 October 2012 the matter was listed for judgment: but Sagoo and also Sanghani – although not Rajput – then raised an argument as to abuse of process, by reason of delay; and directions for further argument in consequence were then given. Final judgment was handed down in the case of Sanghani and Sagoo on 7 November 2012: that is to say, very nearly four years after the date of conviction.

95. All this was most unfortunate. Confiscation proceedings – even complex ones such as these – are not designed or expected to be so protracted. This is so even where (as here) there were ongoing investigations and procedural delays and where there were great difficulties in the judge's listing commitments.

96. The point remains that it is clearly established by authority that – even where a trial may not have taken place within a reasonable time – a stay ordinarily will not be ordered unless the court is satisfied the defendant cannot have a fair trial (or if it

would be otherwise unfair for him to be tried): see *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72, [2004] UKHL 68. In the present case Mr Bell could point to no particular prejudice caused to Sagoo by reason of the delay: indeed, he had benefited in the interim from the judge's raising the intervening case of *Bajwa*. Moreover, as the timetable shows, the application for a stay was made on behalf of Sagoo at a very late stage and when to a significant extent intervening periods of delay (taken individually) either had an explanation or had been to the advantage of various defendants. At all events there was here, in our judgment, no sufficiently exceptional case justifying an order for a stay: and the judge was fully entitled, in his discretion, so to conclude.

97. This ground therefore has no arguable basis. The application for permission on this ground is refused.

Conclusion

98. On the principal grounds raised before us, therefore, our conclusion in summary is as follows:

i) In a case of co-principal conspirators adjudged to have obtained the benefit jointly, there can be no apportionment as between them of that benefit: and the value of the benefit is to be assessed as the whole amount with regard to each.

ii) On the facts of the present cases, the judge was entitled to conclude that the benefit in the case of Rajput was as found; and the judge was entitled to conclude that Fields, Sanghani and Sagoo respectively had not discharged the burden of proof with regard to the recoverable amounts.

iii) Each of Fields, Sanghani and Sagoo was properly adjudged as liable to a confiscation order in the full amount of the joint benefit, without any apportionment or deduction being allowed on grounds of proportionality.

99. By reason of the withdrawal of the concession on the part of Fields, which the Crown and this Court have accepted, the appeal of Fields is allowed to the extent that a confiscation order in the sum of £1,565,945 is substituted; and the default period will in consequence be adjusted to one of seven years' imprisonment. Subject to that, in all other respects the grounds of appeal fail and the appeals are dismissed.