Neutral Citation Number: [2019] EWCA Crim 351

Case No: 201802752 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT MANCHESTER
Mr Recorder Bromley-Davenport QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2019

Before :

LORD JUSTICE SINGH
MR JUSTICE SOOLE
and
HHJ MARK WALL QC (SITTING AS A JUDGE OF THE CACD)

- -

Between :

REGINA	**Appellant**
- and -	
PETER EDWIN MORRISON	**Respondent**

- -
- -

David McNeill (instructed by **Crown Prosecution Service**) for the **Appellant**
Joe Boyd (instructed by **Abby Solicitors**) for the **Respondent**

Hearing date: 20 February 2019

- -

Approved Judgment

Lord Justice Singh:

Introduction

1. This is an appeal, brought by the Prosecutor, with the permission of the Single Judge, against the confiscation order made by Mr Recorder Bromley-Davenport QC dated 5 June 2018. Under section 31(1) of the Proceeds of Crime Act 2002 ("the 2002 Act"), if the Crown Court makes a confiscation order the Prosecutor may appeal to the Court of Appeal in respect of the order. The Court of Appeal may confirm, quash or vary the confiscation order under section 32(1).

2. On 13 September 2017, in the Crown Court at Manchester the Respondent pleaded guilty to five offences, four of which were under the 2002 Act. On 2 October 2017, on each count he was given a concurrent sentence by Mr Recorder Potter of 12 months' imprisonment, suspended for 18 months. The Respondent's co-accused, Suzanne Collinge, was jointly charged on one count but no evidence was offered against her and a not guilty verdict was entered pursuant to section 17 of the Criminal Justice Act 1967.

3. On 5 June 2018, in confiscation proceedings under the 2002 Act, a confiscation order was made by Mr Recorder Bromley-Davenport QC in the sum of £1,923.63, to be paid within three months; with a sentence of three months' imprisonment set in default of payment.

The Facts

4. The Respondent pleaded guilty to four counts of money laundering arising from his failure to declare and pay income tax over a 10 year period. His income had been earned through cash-in-hand building and decorating work and income generated from two businesses he controlled. In addition to the monies he had earned, the Respondent received £9,000 in the form of a loan from his cousin in order to assist him in the purchase of a property (see the written basis of plea, as accepted by the prosecution for the purpose of sentencing).

5. In 2016, the Respondent's then partner and mother of his children, Suzanne Collinge, was living at a property owned by Manchester City Council. She had lived at that address for some 17 years. She was experiencing financial difficulties and was unable to pay her rent; as a result she faced the possibility of eviction. She discovered she was entitled to purchase the property at a substantial discount. The property was valued at £69,000; she was entitled to a discount of £31,740 by dint of her previous tenancy of the property and so the purchase price was £37,260.

6. The Respondent transferred £38,200 to Ms Collinge in order for her to purchase the property; the money consisted of £30,000 from the proceeds of his offending and the £9,000 loan from his cousin. On 21 June 2016, Ms Collinge duly transferred £37,849 into her solicitor's client account to effect the purchase. The property is owned by Ms Collinge mortgage-free.

7. The purchase agreement with Manchester City Council included a repayment clause in the event Ms Collinge sold the property. If she sold the property before the expiry of a 5-year period after her purchase, she would be required to repay a diminishing proportion of the discount she received; each year the repayment amount reduced by one fifth until the expiry of the 5-year period. If she were to sell the property in June 2018, she would be required to repay 60% of the discount, ie. £19,044. If the value of the property had not increased from the purchase price, this would result in her realising some £50,000 from a sale.

The Confiscation Proceedings

8. In the confiscation proceedings it was agreed between the parties that the benefit figure was the sum of £80,709.43. It was also accepted that the monies given by the Respondent to Ms Collinge for the purchase of the property constituted a "tainted gift."

9. The Respondent gave evidence that he had given the money to Ms Collinge as a gift in order for her to purchase the house for her and their two children. He had not given her money to pay her rent even though she was in significant arrears. In cross-examination he agreed that the arrears had been repaid before the purchase was made. He agreed there was nothing to stop her from now selling the house and keeping the money.

10. Suzanne Collinge gave evidence that she was in rent arrears of £2,500 when she purchased the property. She was aware of the repayment due in the event she sold the property within the first five years of ownership; she always intended to keep the house for her two children (aged 8 and 18 years). If the Respondent told her he required her to give him back the money he had gifted her, it would mean she would have to "take the roof from over [her] children's head to give it back". She had no other way of repaying the money he had given her. In cross-examination she agreed that after five years of ownership she could sell the property and do as she wished with the proceeds of sale.

11. The prosecution submitted before the Recorder that there was no reason why the house should not be sold. If the house was sold, Suzanne Collinge would be in no worse position than she would have been in July 2016. The authorities of *R v Box* [2018] EWCA Crim 542 and *R v Hulland* [2018] EWCA Crim 691 made clear that a tainted gift remained part of the property at a defendant's disposal.

12. The Respondent submitted that**,** when considering proportionality, the Court could take into account the fact that the Respondent received a suspended sentence. There were no hidden assets; the house was the only asset involved. The case of *Box* could be distinguished as the Respondent had elected to give evidence and call evidence on his behalf and had no control over the asset. A number of the authorities referred to by the prosecution involved those with equitable interests in the property as co-habitees.

The decision of the Recorder

13. At para. 3 of his written decision the Recorder noted that Ms Collinge had lived with her children in a council house for about 17 years. In 2016 she was facing financial difficulties and as a result she was facing a real risk of eviction. She discovered that she was entitled to buy her council house at a substantial discount. The sum she required was £38,200 but she had no money. The Respondent agreed to give her £30,000, which he accepted was from the proceeds of his offending, and £9,000 which he said had been borrowed. The Recorder also observed that it was accepted by the prosecution that Ms Collinge had no idea that the money was the proceeds of crime and she was never charged in relation to these matters. In the Crown Court it was agreed by the parties that the amount of the tainted gift was £38,200 and that it should be increased to £39,485.93 to reflect the change in the value of money.

14. The Recorder noted that it was common ground that the gift was a tainted gift within the definition of section 77 of the 2002 Act. He also observed that the Act requires the Court to make an order which includes the tainted gift

> "but this requirement applies if, but only if, or to the extent that it would not be disproportionate to require the [Respondent] to pay." (para. 5)

15. At para. 6, the Recorder observed that it was clear from cases referred to during the hearing that a finding that an order is disproportionate

> "would be very unusual. That is not to say that such a finding can never be made; it is enshrined in statute and the legislation must be taken to envisage that circumstances do exist which would render it appropriate."

16. At paras. 7-9 the Recorder considered a number of earlier decisions of the courts including *Box*.

17. At para. 9 he observed that, in *Box*, neither the defendant nor any member of her family had given evidence, so there was no evidential basis to enable the court to conclude that the money would not be recovered. In contrast, at para. 10, he said that, in the present case, both the Respondent and Ms Collinge had given evidence. He continued:

> "There was clear and incontrovertible testimony from both of them that the [Respondent] had no interest in the property and would have no right or power to force a sale. Miss Collinge further gave evidence, which I accepted, that she was not in a position to sell the house as she would have to repay a substantial part of the deposit to the council and, if she did sell, her children would be homeless. The prosecution accepted that the [Respondent] had no interest in the property and it would

> not be possible for the Crown to recover it or any part of its value from Miss Collinge."

18. At para. 13, the Recorder said that he was fully satisfied that the Respondent and Ms Collinge were telling the truth and wholly accepted their evidence.

19. At para. 14, the Recorder said that, if the Respondent were ordered to pay the £39,485.93 claimed by the prosecution as a tainted gift, he would have no means of doing so

> "and the order would be tantamount to sending him to prison. In my judgement the Court would be setting up the [Respondent] to fail and the order would be wholly disproportionate."

20. For those reasons, at para. 15, the Recorder concluded that he would make no order in relation to the tainted gift. The only order which he would make was for payment of the agreed amount of £1,923.63, that being the value of a motorcycle and small sums in three bank accounts held by the Respondent.

21. At para. 16 the Recorder set a sum of three months imprisonment in default of payment of that sum within three months.

Grounds of Appeal

22. On behalf of the Prosecutor Mr McNeill submits that the Recorder erred in law in ruling that it would be disproportionate to include a tainted gift of £30,000 made by the Respondent to his girlfriend, Ms Collinge, in the confiscation order. In his written submissions he advanced six grounds of appeal:

    (1) The Recorder erred by deciding that the Respondent's legal inability to force the recovery of the tainted gift meant that it would be disproportionate to order him to pay the recoverable amount.

    (2) He erred by equating Ms Collinge's claim that she would refuse to sell the property with a certainty that a confiscation order including the tainted gift would not be satisfied.

    (3) He erred by not taking into account that it would have been possible for a receiver to have been appointed to recover the tainted gift.

    (4) He erred by deciding that because he could not identify any means by which the Respondent could pay the order including the tainted gift, that this was tantamount to being affirmatively satisfied that such an order would not be paid.

(5) If it played a part in his decision, the Recorder erred by taking any account of the Respondent's obligation to repay £9000 to his cousin.

(6) On the evidence before him, the Recorder could not reasonably have been affirmatively satisfied on the "clearest, most complete and unassailable evidence" that the order would not be paid.

Respondent's Grounds of Opposition

23. The Court has been assisted by both written and oral submissions made by Mr Boyd on behalf of the Respondent. His grounds of opposition are as follows:

(1) The Respondent was legally and practically unable to force the recovery of the tainted gift.

(2) Suzanne Collinge would be made homeless and would lose a significant amount of money if she sold the property; it was entirely unrealistic to expect her to do so. If she did not sell the property, there was no other way to satisfy the confiscation order requested by the prosecution.

(3) The prosecution did not raise the appointment of a receiver at the hearing before the Recorder. The Court would have had to consider third party interests when considering proportionality.

(4) The prosecution did not attempt to identify any means by which the Respondent would have been able to discharge the order, other than by selling the house.

(5) There is no suggestion in the judgment that the Recorder took into account the Respondent's obligation to repay his cousin £9,000. Neither side made representations in relation to that sum.

(6) The Recorder addressed the relevant authorities. He was obliged by section 10A of the 2002 Act to consider third party rights. Section 10A was not in force at the time of the authorities relied upon by the Prosecutor and so was not considered in them. Had the prosecution appointed a receiver, the third party rights of Ms Collinge would have been protected by section 51(8) of the 2002 Act.

Material Legislation

24. Section 6 of the 2002 Act (as originally enacted, which entered into force on 24 March 2003), so far as material, provided as follows.

25. Under subsection (4)(a) the court must decide whether the defendant has a criminal lifestyle. If it decides that he does have a criminal lifestyle, para. (b) provides that the court must decide whether he has benefitted from his general criminal conduct. If it decides that he does not have a criminal lifestyle, para. (c) provides that the court must decide whether he has benefitted from his particular criminal conduct.

26. At that time subsection (5) provided:

> "If the court decides under subsection (4)(b) or (c) that the defendant has benefitted 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."

It was that version of section 6(5) of the 2002 Act which was considered by the Supreme Court in *R v Waya* [2012] UKSC 51; [2013] 1 AC 294. In that case the Supreme Court held that that provision must be read and given effect, pursuant to the rule of construction required by section 3 of the Human Rights Act 1998 ("HRA"), in such a way as if there were inserted into para. (b) the qualification:

> "except in so far as such an order would be disproportionate and thus a breach of Article 1, Protocol 1 [to the European Convention on Human Rights or 'ECHR']."

27. Article 1 of Protocol 1, which is one of the Convention rights set out in Sch. 1 to the HRA, protects the right to peaceful enjoyment of possessions. Like most of the Convention rights it is not absolute but interferences with it must conform to the principle of proportionality.

28. In *Waya*, the judgment of the majority was given by Lord Walker JSC and Hughes LJ. At para. 21 they said that the "essence" of the 2002 Act "and its frequently declared purpose, is to remove from criminals the pecuniary proceeds of their crime."

29. At para. 22 they continued that a confiscation order must therefore bear a proportionate relationship to that statutory purpose. The purpose of the 2002 Act is not to impose a further punishment by way of a confiscation order nor that it should be a fine.

30. As is clear from paras. 82-84, the minority (Lord Phillips PSC and Lord Reed JSC) agreed with the majority on this point of principle and said that there was "unanimity as to the most important part of the judgment." At para. 84 they said:

> "… Where the POCA benefit exceeds the real benefit, he [the judge] must decide whether it is proportionate to base the confiscation order on the POCA benefit. If it is not, he must make an order that is proportionate in place of the order based on the POCA benefit."

31. Subsequently, Parliament amended section 6(5), in the Serious Crime Act 2015, with effect from 1 June 2015. Para. 19 of Sch. 4 to the 2015 Act inserted a new addition to subsection (5) as follows:

> "Paragraph (b) applies only if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount …"

32. However, it is important to appreciate that this has not acted to re-introduce a general discretion vested in the court nor a general provision to avoid hardship or injustice.

33. Moreover, in *Waya* the Supreme Court said that, when considering the *aim* to which the proportionality enquiry is directed, the aim that should be focused upon is the aim of the *legislation* (that is, the 2002 Act). At para. 20 the majority judgment said:

> "The difficult question is when a confiscation order sought may be disproportionate. The clear rule as set out in the Strasbourg jurisprudence *requires examination of the relationship between the aim of the legislation and the means employed to achieve it*. The first governs the second, but the second must be proportionate to the first. Likewise, the clear limitation on the domestic court's power to read and give effect to the statute in a manner which keeps it Convention-compliant is that the *interpretation must recognise and respect the essential purpose, or 'grain' of the statute*" (emphasis added).

34. What is the "legislative purpose" of the 2002 Act? At para. 2, Lord Walker and Hughes LJ said that:

> "POCA is concerned with the confiscation of the proceeds of crime. Its legislative purpose, like that of earlier enactments in this field, is to ensure that criminals (and especially professional criminals engaged in serious organised crime) do not profit from their crimes, and it sends a strong deterrent message to that effect."

35. At para. 21 they said:

> "The purpose of the legislation is plainly, and has repeatedly been held to be, to impose upon convicted defendants a severe regime for removing from them their proceeds of crime. It is not to be doubted that this severe regime goes further than the schoolboy concept of confiscation, as Lord Bingham explained in *R v May* [2008] AC 1028. Nor is it to be doubted that the severity of the regime will have a deterrent effect on at least some would-be criminals. It does not, however, follow that its deterrent qualities represent the essence (or the 'grain') of the legislation. They are, no doubt, an incident of it, but they are not its essence. *Its essence, and its frequently declared purpose,*

> *is to remove from criminals the pecuniary proceeds of their crime*" (emphasis added).

36. At para. 22 they continued:

> "A confiscation order must therefore bear a proportionate relationship to this purpose. Lord Bingham recognised this in his seminal speech in *R v May*, in adding to his 'Endnote' or overview of the regime, at para. 48, two balancing propositions: 'The legislation … does not provide for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of fine.' "

37. Some important observations were made at para. 24:

> "For the reasons given above, it must clearly be understood that the judge's responsibility to refuse to make a confiscation order which, because disproportionate, would result in an infringement of the Convention right under A1P1 is not the same as the re-creation by another route of the general discretion once available to judges but deliberately removed. An order which the judge would not have made as a matter of discretion does not thereby ipso facto become disproportionate. So to treat the jurisdiction would be to ignore the rule that the parliamentary objective must, so long as proportionately applied, be respected."

38. They said at para. 27:

> "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."

39. The Court then gave some illustrative examples of the types of cases which might give rise to a finding of disproportionality.

40. The case of *R v Morgan* [2008] 4 All ER 890 was cited at para. 17, which is a case involving

> "consideration of the case of a class of defendant (such as Morgan) whose benefit was limited to loss occasioned to a single victim, who did not have a criminal lifestyle, and who either had repaid, or stood ready to repay, the victim in full. Such a defendant would not be able to invoke section 6(6) of POCA to ask the court to treat the statutory duty to make a confiscation order as a discretionary power, because the victim would have no occasion to bring or threaten legal proceedings to recover his loss."

41. The Court considered the *Morgan* case again at para. 28:

> "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."

42. They explained the *restorative* rather than *punitive* thrust of the legislation at para. 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. …"

43. Another case cited by way of example is *R v Shabir* [2009] 1 Cr App R (S) 84. This case

> "involved a defendant whose defalcations were accepted to amount to £464 but from whom the Crown sought a confiscation order of over £400,000 as a result of the manner in which he had obtained the money together with much larger sums to which he was agreed to be entitled and of the form of the charges of which he had been convicted… the better analysis of such situations is that orders such as those there considered ought to be refused by the judge on the grounds that they would be wholly disproportionate and a breach of A1P1": paras. 17-18.

44. At para. 34 the Court referred to possible examples of cases that might arise in the future where the proportionality exception might apply:

> "There may be other cases of disproportion analogous to that of goods or money entirely restored to the loser. That will have to be resolved case by case as the need arises. Such a case might include, for example, the defendant who, by deception, induces someone else to trade with him in a manner otherwise lawful, and who gives full value for goods or services obtained. He ought no doubt to be punished and, depending on the harm done and the culpability demonstrated, maybe severely, but whether a confiscation order is proportionate for any sum beyond profit made may need careful consideration. Counsel's submissions also touched very lightly on cases of employment obtained by deception, where it may well be that difficult questions of causation may arise, quite apart from any argument based upon disproportion. Those issues were not the subject of argument in this case and must await an appeal in which they directly arise."

45. Finally, it should be noted that an example of the proportionality exception in practice can be found in the facts of *Waya* itself. There, the loan obtained by the mortgage fraud was repaid because there was enough equity in the property which was purchased to do that. The Supreme Court reduced the confiscation order, finding that:

> "where the mortgage loan has been repaid or is bound to be repaid because it is amply secured, and absent other property obtained, a proportionate confiscation order is likely to be the benefit that the defendant has derived from his use of the loan, namely the increase in value of the property attributable to the loan": paras. 35, 78-81.

Subsequent authorities

46. The concept of disproportionality in the field of confiscation was further considered by the Supreme Court in *R v Harvey (Jack)* [2015] UKSC 73; [2017] AC 105. The Supreme Court held that a trader in a criminal lifestyle case had obtained the VAT element in the sums he had obtained by fraud even where he had accounted to HM Revenue and Customs for those sums. It would nevertheless be disproportionate to make an order in that sum and the VAT element should be stripped out from the amount to be paid. This was said to be "quite similar" to the *R v Waya* situation where the property which had been obtained had been restored to the loser by the offender, see para. 34.

47. After the decision of the Supreme Court in *Waya* but before the 2015 Act the Court of Appeal (Criminal Division) decided the case of *R v Smith (Kim)* [2013] EWCA Crim 502; [2014] 1 WLR 898, in which the judgment of the Court was given by Keith J. At para. 14 he said:

> "… The whole point of including assets which a defendant has given away as one of the components in assessing the amount

> which a defendant has available was to prevent a defendant dissipating his assets by giving them away. If he is to be able to say that they are of no value because he cannot get them back, that would defeat what the inclusion of tainted gifts in section 9(1) of the 2002 Act was seeking to achieve. Since you cannot sue the recipient of a gift for its return, there may be many occasions when gifts cannot be recovered. It cannot have been intended for those gifts which the recipient can be prevailed on to return to be included as part of the offender's available assets, but not those which the recipient cannot be persuaded to give up."

48. In *R v Johnson (Beverley)* [2016] EWCA Crim 10; [2016] 4 WLR 57, at para. 26, Edis J (giving the judgment of the Court) said that *R v Smith (Kim)*

> "supports the proposition that this is the purpose of the tainted gift regime. The statutory policy is to apply pressure to those who have dissipated (or more usually laundered) their assets during a period when they were benefitting from crime. The aim is to coerce them into making good the losses they have caused by all means at their disposal. If they were always able to defeat confiscation proceedings by relying on gifts of assets which cannot be recovered this would undermine the efficacy of the scheme. The recovery of gifts by legal proceedings against the recipient is a matter which is unlikely to be capable of easy determination in confiscation proceedings and may raise complex issues of civil law. Legal proceedings against the recipient may only rarely actually be required if the offender faces a term of imprisonment unless the gift is returned by the recipient. The recipient will return the value of the 'gift'. Protestations about the difficulty of proceedings which will never happen should carry little weight. This is why the tainted gifts regime is as it is."

49. Earlier, at paras. 23-25, Edis J distinguished between the tainted gifts regime and the assumptions to be made in the case of a criminal lifestyle pursuant to section 10 of the 2002 Act. At para. 25 he said:

> "The difference between the two regimes is explicable by the statutory purpose. The tainted gift regime is designed to deprive offenders of the proceeds of crime which have been apparently given away so that they are apparently beyond the control of the offender and owned by an apparently innocent third party. Scepticism about arrangements of this kind underlies the statutory approach. Offenders do not commonly risk the commission of offences in order to give away the proceeds. It is far more likely that assets have been disposed of

> in order to shield them. The prison sentence in default exerts a pressure on the offender to recover the value of the 'gift' from its recipient. Parliament no doubt expected that there would be cases where that was not possible, either because the value of the gift had fallen before the date when the order was made or because the recipient refuses to co-operate and the defender has no right of action to recover the value of the gift. That will involve hardship if there is no other way of paying the confiscation order because the default term will be imposed."

50. At para. 28, Edis J described what the 2015 Act had done as "statutory codification" of the decision of the Supreme Court in *Waya*.

51. At para. 31, Edis J set out three questions which a judge should carefully consider "where an order is sought by the prosecution which seeks to recover the value of a tainted gift *which appears to be worthless* at the date of the order" (emphasis added). The words we have emphasised in that passage are important. What Edis J said needs to be read in its context: a case where a tainted gift appears to be worthless at the date of the order. That is not the present case.

52. The three issues raised by Edis J were:

    (1) The robustness of the evidence of the value of the tainted gift.

    (2) The proportionality of making an order in the sum sought. This requires the Court to appreciate the distinction between this exercise and the exercise of a general discretion to avoid hardship. (That was made clear, as Edis J says by citing *Waya*, from para. 24 in the judgment of Lord Walker.)

    (3) The appropriate term of imprisonment to be imposed in default.

53. At para. 35, Edis J said that it was not easy to identify any principle of general application from the decided cases such as *Waya*, *Harvey* and *R v Jawad* [2013] EWCA Crim 644; [2013] 1 WLR 3861. He continued that the cases do not seek to establish any rule for determining what is proportionate. He also said that the statutory aim is the recovery of the amount gained from the crime and the means used, a confiscation order calculated in accordance with the provisions of the 2002 Act, are proportionate to it.

54. At para. 36 Edis J made the important point that confiscation orders are not orders made against particular assets but are "*in personam* money orders against individuals."

55. The last case to which it is important to refer is the decision of the Court of Appeal in *R v Box (Linda)* [2018] EWCA Crim 542; [2018] 4 WLR 134, in which the judgment of the Court was again given by Edis J.

56. At para. 12 Edis J said, contrasting the provisions of section 10(6) that, whereas the court has a duty not to make an assumption if it is shown to be incorrect or if it would

create a serious risk of injustice, there is no such duty or power in respect of tainted gifts. He continued:

> "… They must be included in the available amount and at a value which may be higher than the value of any identifiable property held by the recipient to which the person against whom the order is made may have access. The requirement in section 6(5) that the result must not be disproportionate is not the same as a provision that the result should not follow if there would be a serious risk of injustice. … It is plainly an even more limited restriction on the decision-making process of the Court than a general duty to avoid a serious risk of injustice."

57. At paras. 19-21 Edis J sought to explain what the Court had said in *R v Johnson (Beverley)*. He emphasised that that was a case where there was negative equity. The consequence was that the "gift" was the only amount available and the order therefore required payment of that sum, £20,000, when there was nothing else with which it could be paid and that £20,000 no longer existed.

58. Edis J emphasised "an important sentence" at the end of para. 35 of *Johnson*:

> "The statutory aim is the recovery of [the amount which the defendant had obtained from crime] and the means used, a confiscation order calculated in accordance with the provisions of the 2002 Act, are proportionate to it."

59. At para. 21 Edis J emphasised that citations from *Waya* expressly say that the exercise under section 6(5) is not the same exercise as the general discretion to avoid hardship. The word "disproportionate", used by Parliament in the amendment to section 6(5) of the 2002 Act, has in UK domestic law "a particular meaning." He continued:

> "In this context it means that the order must be proportionate to the achievement of the statutory aim … in almost all cases an order made in accordance with the provisions of the Act will satisfy that test. In some entirely different situations identified in the authorities cited in *R v Johnson (Beverley)* that may produce disproportionality. In the type of case considered in *R v Johnson (Beverley)* at para. 31 we would accept that there may be some exceptional cases where the Court is affirmatively satisfied on evidence which it is able to accept that making such an order will not recover the proceeds of crime and will simply lead to a sentence of imprisonment being served which the defendant in question can do nothing about. The limit on the utility of a certificate of inadequacy under section 23 of the 2002 Act … is relevant here, but it must be recalled that that limit reflects the will of Parliament and there is no warrant for creating a discretion to abrogate it. In such a case, the order

> may on those grounds be held to be disproportionate. *R v Johnson (Beverley)* itself was not such a case. A court making a confiscation order will treat protestations that the case before it is such a case with scepticism and will require the clearest, most complete and unassailable evidence before avoiding the usual statutory order on this ground. This is because, necessarily, the court is dealing with criminals whose mere assertion is unlikely to carry much weight. The ease with which criminal property may be concealed by being passed to others was emphasised in the judgment of the Court in *R v Johnson (Beverley)* and requires such an approach to the facts."

60. At para. 22 Edis J emphasised that "all cases are different and this is a fact specific area where generalisations are to be avoided …"

61. Finally, at para. 24, Edis J said:

> "For all the reasons explained in *R v Johnson (Beverley)* … the tainted gifts regime operates by the imposition of an order on the convicted person as an incentive for her to recover the proceeds of her crime from persons to whom she has passed them by whatever means are available to her. What those persons have done with them, or whether they received them knowing of their criminal origin, are likely to be largely irrelevant factors. What matters is whether the court is satisfied that the resulting order is disproportionate in the sense which we have explained above. If not, then the order must be made in the full value of the tainted gifts."

Summary of the principles

62. We hope that it will be helpful if we summarise here the principles which can be derived from the authorities.

63. First, section 6(5)(b) was amended in 2015 so as to provide a statutory codification of what had already been held to be its proper interpretation (in accordance with section 3 of the Human Rights Act) by the Supreme Court in *Waya*.

64. Secondly, *Waya* held that the court must ask itself whether a confiscation order is a proportionate means of achieving the statutory aim of the 2002 Act.

65. Thirdly, the aim of the 2002 Act is the removal from criminals of the proceeds of their crime. Its purpose is restorative and not punitive.

66. Fourthly, criminals must not be able to defeat confiscation proceedings by making gifts of assets which cannot be recovered, as this would undermine the efficacy of the scheme. That is why Parliament has included the tainted gifts regime in the 2002 Act. That regime is deliberately severe.

67. Fifthly, the exception concerning proportionality in section 6(5)(b) is not to be equated with a general discretion in the court; nor even with a provision requiring or permitting the court to avoid the risk of serious injustice. It does not call for nor does it permit a general balancing exercise, in which various interests are weighed on each side of a balance, including the potential hardship or injustice which may be caused to third parties by the making of an order which includes a tainted gift. The proportionality exception in section 6(5)(b), although important, has a more limited scope.

68. Sixthly, it is neither appropriate nor helpful to seek to set out an exhaustive list of circumstances in which the proportionality exception may be satisfied. This is because the enquiry which must be undertaken is highly fact-specific. Nevertheless, examples of situations in which the inclusion of a tainted gift might be disproportionate are provided by the facts of *Waya* itself and some other cases which have been decided by the courts (see above).

Application of the principles to this case

69. At the hearing before this Court Mr McNeill, who appeared on behalf of the Prosecutor, submitted that, while he had put forward six different grounds of appeal in writing, in essence they raise two main points:

(1) The Recorder erred in his application of the concept of proportionality. In particular, submits Mr McNeill, he confused it with wider notions of potential hardship or injustice, for example to third parties. Furthermore, submits Mr McNeill, the Recorder fundamentally confused the question of whether property *could* be sold to release the proceeds with the question whether it *would* be sold. The evidence before the Recorder established at most that it would not be sold. It did not establish that it could not be sold.

(2) The Recorder made an error in not appreciating that it would be possible in the future for the Prosecutor to apply for an enforcement receiver to be appointed. If that were done, the enforcement receiver would be able to apply to a court for the property to be sold.

70. On the first main issue, Mr Boyd submits for the Respondent that the insertion of a new section 10A in the 2002 Act (introduced in 2015 and therefore a provision which post-dates many of the authorities which have been cited before us) is highly material. He submits that it provides for third party rights to be taken into account at the making of the confiscation order, not later, at the time of possible enforcement.

71. Mr McNeill submits, contrary to Mr Boyd's submissions on behalf of the Respondent, that section 10A is not to the point. Mr McNeill submits that this is because in the present case there is no dispute as to who has both the legal and equitable interests in the property.

72. As to the second main issue, Mr Boyd accepts that, as a matter of law, an enforcement receiver could be appointed. However, he submits that this point should have been raised before the Recorder and the "goalposts" should not be changed on appeal.

The first main issue: the approach to proportionality

73. Mr Boyd submits that the Recorder heard live evidence from the Respondent and Ms Collinge and was entitled to make the findings which he did on the basis of that evidence. He submits that it was clear from the evidence that Ms Collinge would not sell her property and so in reality the Respondent would be sent to prison in default of payment, if the tainted gift were included in the confiscation order.

74. Fundamentally, Mr Boyd submits that the test is whether the property would be sold, not whether it could be sold. We reject that submission. We accept Mr McNeill's submissions on behalf of the Prosecutor. This lies at the heart of the error which, in our judgement, was committed by the Recorder in this case.

75. It is of crucial importance to appreciate, as earlier decisions cited above have made clear, that there is a distinction between the concept of proportionality in section 6(5)(b) and wider questions of potential hardship or injustice, including the rights of third parties.

76. The point can be tested by reference to a hypothetical example which was the subject of some discussion during the course of argument at the hearing before this Court, particularly as a result of questions from Soole J. Suppose there is a wealthy donee, a multi-millionaire indeed, who is given a tainted gift of £10,000. Objectively it may not matter much to that rich person whether the gift has to be restored or not. Suppose, however, it is clear on evidence, which is accepted by the judge, that the donee is unwilling to restore the property and that it will not be restored. On Mr Boyd's submission it would not be possible for the tainted gift to be included in a confiscation order, although he appeared to be reluctant to accept this. In our view, that cannot be right.

77. What this hypothetical example illustrates is that, ultimately, Mr Boyd is driven to base his submissions upon the possibility of hardship or injustice to a third party. That, as the authorities cited earlier make clear, is not the relevant test under section 6(5)(b). This illustrates the fundamental error into which the Recorder fell.

78. We turn to consider the submissions made by Mr Boyd based on the introduction of section 10A of the 2002 Act. Section 10A, so far as material, provides:

> "(1) Where it appears to a court making a confiscation order that –
>
> (a) there is property held by the defendant that is likely to be realised or otherwise used to satisfy the order, and
>
> (b) a person other than the defendant holds, or may hold, an interest in the property, the court may, if it thinks it appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant's interest in the property.

> (2) The court must not exercise the power conferred by subsection (1) unless it gives to anyone who the court thinks is or maybe a person holding an interest in the property a reasonable opportunity to make representations to it. …"

79. This provision was inserted with effect from 1 June 2015 by the Serious Crime Act 2015.

80. We would first observe that the reasoning of the Recorder in his written decision did not turn upon section 10A at all. It turned exclusively on section 6(5)(b).

81. Furthermore, in our judgement, section 10A has no material bearing on the issues which arise on the present appeal. It is concerned with a different question, namely the extent to which, at the time of the confiscation order, the defendant has a relevant interest in a piece of property. In the present case, as Mr McNeill has submitted, it is not in dispute that the Respondent had no interest in the property concerned, either legal or equitable.

82. In our judgement, section 10A is not, even on its face, a general provision permitting the Court to act in a way to avoid hardship or injustice to a third party.

83. Both parties referred us to the case of *R v Ahmed and Qureshi* [2004] EWCA Crim 2599; [2005] 1 WLR 122, which was decided by a Court presided over by Latham LJ. In giving the judgment of the Court, Latham LJ noted the potential relevance of Article 8 of the ECHR, in particular the rights of innocent members of a person's family such as his wife and children: see para. 8. However he concluded, at para. 12, that, if the debt created by a confiscation order is not met and the prosecution seek to take enforcement action, for example by obtaining an order for a receiver, it is at that stage that a third party's rights can not only be taken into account but resolved. He continued:

> "If the court is asked at that stage to make an order for the sale of the matrimonial home, Article 8 rights are clearly engaged. It would be at that stage that the court will have to consider whether or not it would be proportionate to make an order selling the home in the circumstances of the particular case. That is a decision which can only be made on the facts at the time. The court would undoubtedly be concerned to ensure that proper weight is given to the public policy objective behind the making of confiscation orders, which is to ensure that criminals do not profit from their crimes. And the court will have a range of enforcement options available with which to take account of the rights of third parties such as other members of the … family."

84. We respectfully agree. In our view, nothing in that analysis has been altered by the enactment of section 10A in 2015. As we have said, all that provision does is to raise the issue of the extent to which the defendant has an interest in the relevant property at the time of the making of the confiscation order. To that extent it is true such issues are brought forward from the time of potential enforcement action. Fundamentally, however, what this does not lead to is what Mr Boyd needs to establish, which is that section 6(5)(b) enables the Crown Court to carry out a general balancing exercise as between the statutory aim of the 2002 Act and other interests, for example the potential hardship or injustice to third parties. If that is to be taken into account at all, in our view, it remains the case (in accordance with the decision in *Ahmed and Qureshi*) that that must await the stage of potential enforcement action.

85. We are reinforced in this view by the consideration (which we have mentioned above) that a confiscation order is made *in personam*. It is not an order made in respect of any particular assets. It is an order made against the defendant in the proceedings. There are many ways in which a defendant can in principle meet the terms of the order and thereby avoid the default sentence of imprisonment. In principle, he could raise a loan either from a commercial lender or from a friend or member of his family. Furthermore, a person could earn income by doing some work and pay off the required amount from such income. That is a matter for him.

86. Of fundamental importance in the present case is that, in our judgement, the Recorder fell into error in applying the concept of proportionality in section 6(5)(b).

The second main issue: the possibility of the appointment of an enforcement receiver

87. Section 50(1) of the 2002 Act provides that the section applies if (a) a confiscation order is made, (b) it is not satisfied, and (c) it is not subject to appeal. In those circumstances, subsection (2) provides that, on the application of the Prosecutor, the Crown Court may by order appoint a receiver in respect of realisable property.

88. Section 51 provides that the court may by order confer various powers on the receiver: see subsection (2). The powers include (a) the power to take possession of the property; (b) power to manage or otherwise deal with the property; and (c) power to realise the property, in such manner as the court may specify.

89. Subsection (10)(a) makes it clear that "managing or otherwise dealing with property" includes selling the property or any part of it or interest in it.

90. Subsection (5) provides that the court may order any person who has possession of realisable property to give possession of it to the receiver.

91. Subsection (6) provides:

> "The court –
>
> > (a) may order a person holding an interest in realisable property to make to the receiver such payment as the court specifies in respect of a beneficial

> interest held by the defendant or the recipient of a tainted gift;
>
> (b) may (on the payment being made) by order transfer, grant or extinguish any interest in the property."

92. Subsection (8) provides:

> "The court must not –
>
> (a) confer the power mentioned in subsection (2)(b) or (c) in respect of property or
>
> (b) exercise the power conferred on it by subsection (6) in respect of property, unless it gives persons holding interests in the property a reasonable opportunity to make representations to it."

93. In our view, it is clear, as a matter of law, that an enforcement receiver could be appointed in this case. So much is conceded now on behalf of the Respondent. It is unfortunate that this was not pointed out to the Recorder by either party before him. It is even more unfortunate that the Prosecutor left him with the impression that an enforcement receiver could not be appointed.

94. However, none of that can affect the fact that an error of law was made by the Recorder in this regard. Furthermore, the reasoning of the Recorder under section 6(5)(b) of the 2002 Act was influenced, and therefore tainted, by that error of law. Accordingly, we would allow the appeal on this ground too.

95. In those circumstances, since we accept the two main submissions advanced on behalf of the Prosecutor, it is unnecessary to address the other specific grounds of appeal which were set out in writing, especially in view of how the case was presented by Mr McNeill at the hearing before us.

Conclusion

96. For the above reasons we have come to the conclusion that this appeal by the Prosecutor must be allowed.

97. Using this Court's powers under section 32(1) of the 2002 Act, we will vary the terms of the confiscation order made by the Crown Court in this case so as to include the tainted gift. As we have mentioned earlier, in the Crown Court the parties were agreed that the amount of the tainted gift was £38,200 and that that figure had to be increased to £39,485.93 to reflect the change in the value of money. Before this Court

the parties are agreed that the sum required to be paid by the order should therefore be increased to £41,409.56.

98. The period of payment will be three months from the date of the order of this Court.

99. The sentence in default of payment will remain as it was, three months' imprisonment. The length of the term to be served in default was not the subject of separate submissions at the hearing before us and, in all the circumstances of this case, the Court has come to the conclusion that the term should remain as it was fixed by the Crown Court.