Neutral Citation Number: [2021] EWCA Crim 242

Case No: 201902099 C4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LINCOLN
HHJ EASTEAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 February 2021

Before:

THE RT. HON. LORD JUSTICE FULFORD, VICE PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
THE HON. MR JUSTICE SWEENEY
and
THE HON. MR JUSTICE LINDEN

- -

Between:

REGINA	**Prosecution**
- and -	
IAN ROBERT COURT	**Appellant**

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- -

Martin Evans QC and Amy Earnshaw (instructed by **CPS**) for the **Prosecution**
Christopher Jeyes for the **Appellant**

Hearing date: 16 June 2020

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Approved Judgment

Covid-19 protocol: This judgment will be handed down by the Judge remotely, by circulation to the parties' representatives by email and, if appropriate, by publishing on www.judiciary.uk and/or release to Bailii. The date and time for hand down will be deemed to be 26 February 2021 at 9:45 am. The Court Order will be provided to Lincoln Crown Court for entry onto the record.

The Honourable Mr Justice Sweeney:

Introduction

1. On 16 January 2020 the full Court (Males LJ, May & Saini JJ) granted the renewed application of Ian Court ("the Appellant") for leave to appeal against a confiscation order in the sum of £166,232.93 that had been imposed upon him by HHJ Easteal in the Crown Court at Lincoln on 10 May 2019. Leave was limited to Ground (iv)(c) – in which it was asserted that the judge had erred in finding that a small parcel of land to the west of Silt Pit Lane in Wyberton, near Boston in Lincolnshire, which was worth £62,000, and which the Appellant had acquired in the spring of 2013 via a Mortgage Works (UK) plc (part of the Nationwide Building Society) interest only "Buy to Let" mortgage on a house at 64 Norfolk Street in Boston (of which he had been the sole registered owner since 2008), was (applying the property held assumption) part of the Appellant's benefit from his criminal lifestyle. Immediately thereafter, and without inviting the attendance of the Prosecution, who had not been notified of the hearing of the renewed application, the Court proceeded to allow the appeal on that Ground, and thus reduced the amount of the confiscation order by £62,000 to £104,232.93 – see [2020] EWCA Crim 18.

2. Pursuant to Part 36.15 of the Criminal Procedure Rules 2015 (as amended), and by reliance upon the inherent discretion of the Court of Appeal (Criminal Division) to re-open its decisions if it is necessary to do so, in exceptional circumstances, to avoid real injustice (as identified and delineated in cases such as *R v Yasain* [2016] Q.B. 146, *R v Gohil* [2018} 1 W.L.R. 3697 and *R v Cunningham, R v Di Stefano* [2020] 1 W.L.R. 1203) the Prosecution apply to re-open the determination of the appeal and for the original confiscation order to be upheld. The Prosecution contend that there is no alternative effective remedy available to them, and that:

    (1) Having granted leave to appeal on Ground (iv)(c), the Court erred in hearing and determining the appeal without giving the Prosecution an opportunity to attend or respond. The more so as , in the Respondent's Notice, which was before the Court, the Prosecution had stated in a recital at the outset that: "*This document contains a summary of the Prosecution submissions in response to the lengthy and numerous Grounds. If not every single point taken by the Appellant is dealt with, no concession is thereby intended. In the event that leave is granted, the Prosecution will respond in detail…*". There was thus a serious procedural defect with the result that a re-consideration is necessary.

    (2) In any event, the Court erred in its decision to allow the appeal and to substitute a confiscation order in a lesser sum, as the reduction of the confiscation order by £62,000 was wholly unjustified.

3. On behalf of the Appellant, it is variously argued that the Court acted appropriately in allowing the appeal; that the purported injustice relied upon by the Respondent is not beyond dispute and is certainly not manifest; that the case does not reach the threshold of exceptionality required; that the judgment on appeal was correct; and that the principle of finality applies.

The offences

4. In the summer of 2016, when the Appellant (who is now in his mid-50s) was living with his wife and two children on the small parcel of land to the west of Silt Pit Lane, the police searched an adjacent outbuilding and found a lighting and watering system for growing cannabis (which was powered via a bypass of the mains electricity supply) along with a mother plant, 12 mature plants, 32 seedlings, a frozen 1.5kg block of cannabis in a freezer, and £8245 in cash in a safe.

5. On 16 November 2016, the Appellant pleaded guilty before Magistrates to the production of cannabis and abstracting electricity, and was committed to the Crown Court at Lincoln for sentence. There, on 27 September 2017, having in the meanwhile been acquitted by a jury of possession of the 1.5kg block of cannabis with intent to supply, the Appellant was sentenced by Mr Recorder King QC to concurrent 12 month Community Orders.

The confiscation proceedings

6. Against the background that, under Schedule 2 of the Proceeds of Crime Act 2002 ("POCA"), production of cannabis is a criminal lifestyle offence, confiscation proceedings were commenced. Neither the five statements of information made by PC Roberts on behalf of the Prosecution under s.16 of POCA, nor the Appellant's formal responses under s.17 of POCA, were before this Court in January 2020. We have been supplied with copies of them, and summarise them below – limited to their content in relation to the house at 64 Norfolk Street, the mortgage on that house, and the small parcel of land to the west of Silt Pit Lane.

7. In his first statement of information, which was dated 8 December 2017, PC Roberts variously referred to the following matters:

    (1) The Nationwide Building Society mortgage.

    (2) The fact that the appellant had not lodged either self-assessment records or PAYE employment records with HMRC for the tax years 2010/2011 through to 2015/2016.

    (3) In the spring of 2013, and using monies from the Nationwide mortgage, the Appellant had bought the parcel of land to the west of Silt Pit Lane from his neighbour and friend Stacey Ruck.

    (4) Records showed that, at the time of both his arrest and his conviction, the Appellant was still the owner of the parcel of land.

    (5) The title deeds in relation to the parcel of land showed that on 6 December 2016 (some three weeks after the Appellant had pleaded guilty to the production of cannabis and abstracting electricity) Mr Ruck had paid £62,500 to buy the land back, but that analysis of the Appellant's bank accounts did not show the receipt of any such funds.

8. In his first formal, but undated, response the Appellant variously asserted that:

    (1) At the time of his purchase of the parcel of land to the west of Silt Pit Lane from Mr Ruck, the latter's marriage had broken down and he was in need of cash to assist with his divorce and the separation of assets, and the Appellant had agreed to buy the land off him so as to provide him with the cash that he required.

    (2) Thus, the Appellant had taken out an interest only mortgage on his mother's house at 64 Norfolk Street, with the intention that Mr Ruck would buy the land back from him in due course

    (3) Ultimately, Mr Ruck had not been able to obtain a mortgage so as to be able to repay the money that the Appellant had paid him, but the Appellant had nevertheless transferred the land back to Mr Ruck so that Mr Ruck's property interests would be increased, and so that he (Ruck) would thus be able to obtain a mortgage in a sufficient amount to be able to pay the Appellant back.

    (4) The Prosecution appeared to accept that the land had been purchased by the Appellant using a legitimately obtained mortgage taken out against the property at 64 Norfolk Street. Thus, the land was clearly not purchased with the proceeds of criminal activity, and should not be included in the benefit figure said to have accrued from a criminal lifestyle.

    (5) In addition, and in any event, the equitable interest in the land could not really be said to belong to the Appellant, and for that reason again should not be included in any benefit from any criminal lifestyle of his.

    (6) In like manner, nor could the value of the land be said to belong to the Appellant – as it had been purchased with a mortgage raised on his mother's property on the understanding that the monies provided were in the form of a loan to the Appellant from his mother in a temporary situation. In any event, the land was no longer owned by him, and nor did he have the monies available from its sale.

9. In his second statement of information, dated 21 February 2018, PC Roberts indicated that:

    (1) The Appellant's acquisition of the mortgage funds did not appear to be legitimate given his repeated assertion that he was not the owner of 64 Norfolk Street, and the fact that a banking establishment would not give a mortgage to someone on a property that was not their asset.

    (2) Further investigation was needed into the potential mortgage fraud.

10. In his second formal response, served towards the end of March 2018, the Appellant variously asserted that:

    (1) He had not committed a mortgage fraud - because the house at 64 Norfolk Street was in his name, having been transferred into his name to avoid his mother's will being contested by his estranged sister Colleen Court.

(2) The house was still owned by his mother, and it was her who had control over it and its contents, and the fact that it was let out.

(3) Before he took out the mortgage, his mother had given him permission to do so.

(4) The mortgage company had only required his signature because the property was registered in his name.

(5) His mother had made a s.9 witness statement which supported his account.

11. In his third statement of information, dated 18 June 2018, PC Roberts stated that:

(1) The Appellant had provided no evidence to counter an allegation of mortgage fraud.

(2) The fact that the Appellant's mother had provided a statement agreeing that she was aware of, and had agreed to, the mortgage did not negate the fact that the mortgage lender was not aware of the Appellant not actually owning the property.

(3) Enquiries had been made of the mortgage lender company which had stated that it was a "Buy to Let" mortgage and that it was noted on their system that the mortgage had been obtained to "buy another Buy to Let property".

(4) However, as the Appellant himself had stated, he had not used the funds to purchase a "Buy to Let" property, but instead had used them to buy a parcel of land from his criminal associate, and had said that he had "no plans to use the land for anything else".

(5) The Appellant's explanation for his dealings with Mr Ruck in relation to the land, in support of which he had provided no documentary evidence, made no sense.

(6) Not only had the Appellant taken out the mortgage when he was on income support / benefits, but it was suggested that he was also making the mortgage payments himself to pay off a debt to Ruck. However, there was no evidence to support the existence of the alleged debt.

12. The Appellant made no reference to the mortgage in his third formal response, which was dated 3 July 2018.

13. At a hearing on 18 July 2018, a preliminary issue, raised on the Appellant's behalf, that the confiscation proceedings were disproportionate, was rejected by HHJ Hirst.

14. In his fourth statement of information, dated 9 October 2018, PC Roberts stated that:

(1) The value of the parcel of land was included as part of the Appellant's benefit under the property held assumption; and also because the actual purchase of

the land was via a mortgage on 64 Norfolk Street (which both the Appellant and his mother were asserting was not owned by him); and because the Appellant had told the lender that the mortgage was to enable him to purchase a Buy to Let property, which he had not done; and that therefore (on those bases) the mortgage had been granted based on fabricated information.

(2) In any event, the Prosecution maintained its position that the Appellant was the sole legal owner of the house at 64 Norfolk Street.

(3) The sale of the parcel of land back to Mr Ruck was a tainted gift, and Mr Ruck had produced no documentary evidence in support of his assertions that it was not a tainted gift.

15. In an undated response, the Appellant said that:

(1) He did not accept that the parcel of land should be included in his benefit figure, as it was obtained with funds from a legitimate source, namely the mortgage on 64 Norfolk Street - about which he had taken advice from an independent mortgage adviser before proceeding.

(2) It would therefore be unjust of the Court to find that he had committed mortgage fraud as part of his general criminal conduct.

(3) The house at 64 Norfolk Street had been purchased by his mother and she had retained all beneficial interest in it. The Appellant had the legal interest only and was not able to dispose of it, other than via the consent of his mother.

(4) The mortgage obtained to enable the purchase of the parcel of land was no more, in effect, than a loan from his mother, and it would have been redeemed upon payment being received by him from Mr Ruck.

(5) The mortgage had been properly obtained and secured against the rental property at 64 Norfolk Street. There was no requirement for the funds from such a mortgage to be used in relation to that property, and it was commonplace for rental property businesses to obtain funds against one property and to use them to purchase or refurbish another.

16. The confiscation hearing before HHJ Easteal began on 12 November 2018. On that date the Appellant produced (for the first time) his application for the Mortgage Works (UK) plc "Buy to Let" mortgage in relation to 64 Norfolk Street. It was in the form of a print from a computer system which recorded answers given by the Appellant to his mortgage broker, Thea Cox – including, amongst other things, that he had asserted that he was in permanent employment, that he had no previous convictions, and that the information that he had provided to his mortgage broker was true.

17. On 13 November 2018, a witness statement was obtained from Mr Keith Rolfe, Senior Governance Consultant at the Nationwide Building Society in which he stated that; "*This is a "Buy to Let" mortgage subject to a satisfactory tenancy agreement with affordability determined by rental cover ratio*".

18. Thereafter, the confiscation hearing was adjourned while a transcript of the Appellant's evidence at trial (in relation to the allegation of possession with intent to supply) was obtained.

19. In a further response, dated 21 January 2019, the Appellant contended that:

    (1) He had provided documentation showing that the intent for the use of the mortgage to purchase the parcel of land was always declared. The mortgage had not been obtained fraudulently as the "Buy to Let" aspect of it related to the fact that there was a source of income from a let property (64 Norfolk Street itself).

    (2) In response to the suggestion that he had lied on the mortgage application by indicating that he had no previous convictions, he had not been obliged to indicate that he had – given that his convictions (the most recent of which was in 1993) were spent under the Rehabilitation of Offenders Act 1974.

20. In his fifth statement of information, dated 18 February 2019, PC Roberts underlined that:

    (1) The Appellant was asserting that (as the sole title holder) he had obtained a legitimate mortgage on 64 Norfolk Street.

    (2) However, he was also asserting that he was not the true owner of the property and was merely holding it in trust for his mother – who held the beneficial interest in the property, was the sole recipient of the rental income from the property, and had given permission for the mortgage to be taken out.

    (3) The mortgage company had not been made aware of the trust, nor of any third party's interest.

    (4) Given that ownership of a property was pivotal to a mortgage company when granting a "Buy to Let" mortgage, the circumstances outlined on behalf of the Appellant indicated that he had dishonestly misrepresented the facts to suit his own ends in fraudulently securing the mortgage – which was a criminal offence in its own right, and which (if continued on the Appellant's behalf) could warrant further investigation.

    (5) The Prosecution's position remained unchanged.

21. The confiscation hearing resumed before HHJ Easteal on 20 March 2019, and took seven working days to complete. The Appellant gave evidence and called Mr Ruck and a man called Carl Boland.

22. The Closing Submissions drafted by Ms Earnshaw (on behalf of the Prosecution) and by Mr Jeyes (appearing then as now on behalf of the Appellant) show that:

    (1) In relation to their case that the mortgage on 64 Norfolk Street had been obtained fraudulently, the Prosecution relied, amongst other things, upon the

allegation that the Appellant had asserted in the application that he was in permanent employment, when he was not.

(2) The Appellant's case included that it was a "Buy to Let" mortgage, the purpose of which had been clear and disclosed. It was further asserted that the Appellant's employment status was irrelevant since the mortgage had been based on the rental value of the property, and (in any event) it was likely that the Appellant had been in employment of one kind or another at the time of the mortgage application – as the application pre-dated his benefit claim.

23. Against that background, and pulling together the strings of all the materials that are now before us, it is clear that, ultimately, the Prosecution case as to benefit in relation to the land to the west of Silt Pit Lane was that:

(1) Given the Appellant's criminal lifestyle, the property held assumption (under s.10(3) of POCA) applied. Thus, the judge was required to assume that the land to the west of Silt Pit Lane had been obtained by the Appellant as a result of his general criminal conduct, and at the earliest time that he appeared to have held it, unless the assumption was shown to have been incorrect, or there would be a serious risk of injustice if the assumption were made.

(2) The Appellant had been the sole owner of 64 Norfolk Street since 2008, when ownership had been formally transferred to him by his mother, Sylvia Court – albeit that the transfer was for no consideration; that it was not disputed that the house had been rented out; that the rent had been paid to the Appellant's mother; and that she had paid for the maintenance of the property and the management fee.

(3) The Appellant had obtained the mortgage on 64 Norfolk Street (the funds from which had been used to purchase the land to the west of Silt Pit Lane) fraudulently, and thus the property held assumption in relation to the land was not rebutted, because:

(a) It was a "Buy to Let" mortgage and, contrary to what had been asserted in the mortgage application, the monies had been used to purchase land that was not let out, and/or

(b) It had been falsely represented in the mortgage application that the appellant was in permanent employment when he was actually unemployed, and/or

(c) He had failed to mention in the mortgage application that there were constraints on his ownership in that:

(i) His mother received all the rental income from 64 Norfolk Street.

(ii) He had an arrangement with Mr Ruck that the land to the west of Silt Pit Lane would not be sold, but retained until Mr Ruck was in a position to buy it back (having had to

raise money in connection with his divorce proceedings), and/or

(d) He had failed to disclose the fact that he had previous convictions, and/or

(e) In the ultimate alternative, and if he was not the sole owner of 64 Norfolk Street (because his mother had retained the beneficial interest), he had fraudulently represented that he was the sole owner.

(4) It was accepted that the Appellant had paid all the instalments on the mortgage.

24. Equally, ultimately, the Appellant's case in relation to these issues was that:

(1) He was the legal, albeit not the sole, owner of 64 Norfolk Street and had thus been entitled to obtain the mortgage – against the background that his mother had transferred the legal title to him in 2008 in order to avoid probate issues with his (the Appellant's) sister, but had otherwise retained the beneficial interest in the house – as demonstrated by the fact that she dealt with the letting of the house, that she received the net income from it, and that she had given her permission for him to take out the mortgage.

(2) Given that 64 Norfolk Street was let out and provided an income (albeit to his mother) there was no fraud in the fact that the mortgage money was used to buy the land (which was not let out, but rather used by him as part of his arrangement with Mr Ruck).

(3) It was likely that he had been in permanent employment at the time of the application, and thus the assertion in that regard in the mortgage application had not been fraudulent.

(4) His failures to mention the arrangements with his mother and Mr Ruck were not material and did not amount to a fraud.

(5) Given that his previous convictions were spent, under the provisions of the Rehabilitation of Offenders Act 1974, he had been entitled not to disclose the fact that he had previous convictions.

(6) It was not material that he had failed to mention his mother's beneficial interest in 64 Norfolk Street.

25. As indicated above, HHJ Easteal gave judgment on 10 May 2019.

26. When dealing with whether cash deposits (totalling £36,431.15) which had been made to the Appellant's bank accounts (and were said by the Appellant to be the product of various sources of legitimate income - including buying and selling cars, work done for his friend Mr Ruck, and gifts from his mother) were the product of the Appellant's general criminal conduct (which included consideration of whether the Appellant had

been in permanent employment at the time of the mortgage application) the judge concluded (Transcript p.3D-G):

> "*In my judgment the evidence relied upon by Mr Court to account for the cash credits was flawed, inconsistent and in places wholly unbelievable. It is said that the defendant was earning monies during the relevant period through the buying and selling of cars, as well as work done for his friend Stacey Ruck who was called to give evidence by Mr Court.*
>
> *Between them, neither Mr Court nor Mr Ruck was able to produce any accounts, receipts, tax returns, or other documentation to give any substance to the assertions that the cash deposits in issue may have had a legitimate origin. Neither Mr Ruck nor Mr Court seemed to be able to say with any certainty when Mr Court had worked for Mr Ruck, what he had been paid, his employment status, or how much any such payments correlated with the indisputable evidence of the cash deposits that were made into Mr Court's bank accounts.*
>
> *Although it was also submitted that some of the deposits may have been the product of cash sums given to Mr Court by his mother, Sylvia, even Mr Court himself was unable to offer any evidence as to which they were or might be, nor was he able to suggest the amounts he was given by her. The assumptions must stand therefore, and the benefit in relation to the unidentified cash deposits is £36,431.15.*

27. Thus, when dealing with cash deposits, the judge comprehensively rejected the Appellant's evidence that he had been in permanent employment at the material time (which, as already indicated, included the time of the mortgage application).

28. The judge turned next (Transcript p.4A-G) to the land to the west of Silt Pit Lane, and concluded that:

> "*This property was bought from Stacey Ruck by way of a mortgage for £59,500 taken out in respect of 64 Norfolk Street, which in turn is said by Mr Court to have been gifted to him by his mother Sylvia on the understanding that it would continue to be rented out, and that the rental income would be entirely her own, until her death.*
>
> *It is further said that there was a mutual understanding between the Defendant and Mr Ruck that the land would not be sold but retained until Mr Ruck was in a position to buy it back, having had to raise a sum of money in connection with his divorce proceedings.*
>
> *The application completed by Mr Court gives no indication of any constraints of Mr Court's rights over the land. It does not disclose the purported ongoing beneficial interest of Sylvia Court in the mortgaged property and confirms that Mr Court has no previous convictions.*
>
> *The defence argues however that the application should not be treated as fraudulent, and contends that any fault lies with the deficiencies of the*

> *application form and the unlawfulness of the question regarding whether the applicant has any previous convictions, relying on the provisions of the Rehabilitation of Offenders Act, and the proposition that the existence of spent convictions would not justify a potential lender from refusing an application.*
>
> *In my judgment, the failure to disclose the information referred to clearly constitutes a fraud on the lender, who was plainly misled in respect of these highly material issues. With regards to the lawfulness of the question about any previous convictions, the argument fails to legitimise the dishonest answer given by Mr Court. On the basis of that argument, the only permissible honest answers were; yes, or to decline to answer on the basis that the lender was not entitled to ask for such information insofar as it did or may relate to convictions that were now spent. The proposition that the enquiry was wrong at law would not, and did not, give Mr Court licence to enter a plainly dishonest and misleading response. The assumptions must stand therefore, and the benefit in respect of Silt Pitt Lane is £59,500*" (sic - later amended to £62,000).

29. Thus, the judge did not, in giving his reasons in relation to benefit in respect of the land to the west of Silt Pit Lane, address in terms the Prosecution contentions (see [23(3)(a) & (b)] above) that, contrary to what had been asserted in the mortgage application, the mortgage money had been used to buy land that was not let (which was not disputed by the Appellant, but said not to be material), and that the Appellant had not been in permanent employment (on which issue the judge had already found against the Appellant when dealing with cash deposits), but did address the other matters on which the Prosecution had relied (see [23(3)(c)-(e)] above), including the ultimate alternative assertion that if the Appellant's mother was the beneficial owner of 64 Norfolk Street the mortgage had been fraudulently obtained because that had not been disclosed.

30. When dealing (Transcript p.7A-8G/H) with whether 64 Norfolk Street and the land to the west of Silt Pit Lane were available assets, the judge said this:

> *"I turn then to the question of Mr Court's available assets, starting with the equity at 64 Norfolk Street. Mr Court is the registered legal owner of this property, and used that status to secure a mortgage, the funds of which were used by him to purchase the land at Silt Pit Lane.*
>
> *The Crown submits that as a result, all the equity that exists in the property belongs to Mr Court.*
>
> *The legal title in the property was transferred to Mr Court from his mother Sylvia without consideration in 2008. Thereafter, Mrs Court retained all the responsibilities for its upkeep and management as landlord, and received the entirety of the income from the property generated by rental payments.*
>
> *The defence therefore contends that despite the absence of any paperwork, despite Mr Court appearing to have no real comprehension of what a trust is, and despite the jeopardy to his Mother's beneficial interest brought about by the property being mortgaged by her son, an inter vivo trust came*

into effect upon transfer in 2008 for so long as Sylvia Court remained alive.

In turn, it is submitted that Mr Court holds no beneficial interest in the property and the equity that exists belongs entirely to Sylvia Court. Although Sylvia Court has not given evidence, it seems clear that she was to all intents and purposes the landlord of 64 Norfolk Street. That being said, the self-evident implausibility of Mr Court's case in this respect is made greater still by two further limbs of evidence, both of which were given and accepted by Mr Court.

Firstly, Mr Court transferred ownership of Silt Pit Lane back to Mr Ruck without any form of payment or retained equitable interest in that land being made in return, effectively surrendering the value of the mortgage he had taken out, without any reference to or measures to protect Sylvia Court's purported beneficial interest in 64 Norfolk Street.

And Mr Court also gave evidence that much of his Mother's money was kept in the safe referred to above and that he was allowed to help himself to it without consulting her nor with any expectation of, or arrangement for, its repayment. This evidence plainly goes some way to undermine the defendant's own claim that his Mother's purported retained beneficial interest is evidenced in part by the fact that rental payments accrued exclusively to her.

Accordingly, in my judgment, such equity as there is or may be in 64 Norfolk Street is wholly to be treated as an available asset.

Silt Pit Lane, the defence contends that the value of this land belongs to Stacey Ruck, and has done so all along. It is said that the property was bought by Mr Court only as a temporary measure in order that his friend Mr Ruck could proceed with his divorce by reducing his personal levels of borrowing. It is also claimed that there were several understandings in place which effectively amounted to trusts, these being firstly, Mr Court would not and could not sell Silt Pit Lane, but would instead retain it until such time as Mr Ruck could buy it back from him.

Second, at such time as Mr Ruck repurchased Silt Pit Lane, Mr Court would pay off the mortgage taken out against 64 Norfolk Street with the funds paid to him, as the beneficial interest in that property rested with his mother Sylvia and not with Mr Court. And until such time as Silt Pit Lane was bought back my Mr Ruck, Sylvia Court's beneficial interest in 65 Norfolk Street was effectively charged against the value of Silt Pit Lane.

The ownership of Silt Pit Lane was transferred back to Mr Ruck after Mr Court's arrest. No payment whatsoever was or has been made in consideration of that transfer. The prosecution contends that the transfer constitutes a tainted gift, and that the value of the land should be treated as an available asset. Once again there is no documentation which exists, or ever did exist, to in any way formalise or even corroborate the existence of

any trusts or such other arrangements as would lend any veracity to the scenario upon which the defence bases its arguments.

Moreover, Mr Court, having transferred ownership of the land back to Mr Ruck continues to make the mortgage repayments himself, with absolutely no contribution by Mr Ruck and no consultation with Sylvia Court. The patent unfairness of this, were the defence narrative to be believed, appeared to come as a complete surprise to Mr Ruck when his attention was drawn to it during the course of his evidence to the court.

Having acknowledged there was no reason why this burden should be borne by his close friend Mr Court, Mr Ruck also acknowledged that he thought he owed monies to Mr Court which he had not yet repaid, and which neither man had taken into account at any stage whilst these arrangements were made and actioned.

The defence case in relation to Silt Pit Lane is in my judgment utterly implausible. The transfer of ownership was, as the Crown argue, a tainted gift intended to evade the inclusion of the land in the calculation of Mr Court's available assets, and accordingly must be included in that calculation."

31. Thus, the judge concluded that the Appellant was the sole owner of the equity in 64 Norfolk Street, and of the equity in the land to the west of Silt Pit Lane, and that the "repurchase" by Mr Ruck of the land to the west of Silt Pit Lane was a tainted gift, and that therefore the full equity in both properties were available assets. The total value of the available assets was £270,895 - hence the judge made a confiscation order in the total sum of the Appellant's benefit, namely £166,232.93.

The appeal

32. In a 32-page document, dated 5 June 2019, Mr Jeyes set out some 11 Grounds of Appeal on the Appellant's behalf (variously relating to proportionality, hearsay evidence from Mrs Court, and the judge's findings in relation to the benefit amounts and the available assets) and a summary of his arguments in support of them.

33. In Ground (iv)(c) it was asserted that:

"*In respect of the benefit amount, the learned Judge:*
……

(c) Wrongly characterised a mortgage application made by the Applicant in respect of the property at 64 Norfolk Street as indicating that he had a beneficial interest in the property, and further wrongly held that the Applicant had acted fraudulently when declaring that he had no previous convictions even though he was entitled to so answer under the Rehabilitation of Offenders Act 1974 (the Judge failed to deal with the legal submissions made in this regard)".

34. In Grounds (v)(a) & (b) it was asserted that the judge had wrongly decided that Sylvia Court had no beneficial interest in 64 Norfolk Street and that the judge had wrongly rejected the submission that there was a trust in favour of Sylvia Court in respect of the land at Silt Pit Lane.

35. At the direction of the Registrar, the Prosecution lodged a Respondent's Notice - in the form of a 16-page document entitled "Prosecution Response to Grounds of Appeal" which was dated 12 August 2019. As recorded in [2(1)] above, the Response began with a recital in the following terms:

> "*This document contains a summary of the Prosecution submissions in response to the lengthy and numerous Grounds. If not every single point taken by the Appellant is dealt with, no concession is thereby intended. In the event that leave is granted, the Prosecution will respond in detail…*".

36. At its conclusion, the Response asserted that none of the Grounds, individually or cumulatively, demonstrated that the approach taken by the Judge was wrong in law. As to the Judge's findings of fact it was asserted that it was not the task of this Court to substitute its own view of the evidence, and that having heard evidence over a prolonged period the Judge was in the best position to determine matters.

37. In relation to Ground iv(c) (referred to in the Response as Ground 5) the Prosecution set out the Judge's ruling (Transcript p.4A-G – see [28] above), and the undisputed chronology in relation Silt Pit Lane. The Prosecution then underlined the fact that consideration of benefit in relation to the land at Salt Pit Lane fell to be determined under the property held assumption, and asserted that since the land had been acquired by a fraudulently obtained mortgage, the judge had been wholly justified in treating it as benefit.

38. The Prosecution also argued, in relation to Grounds (v)(a) & (b), that the Judge's findings that 64 Norfolk Street and the land to the west of Silt Pit Lane were available assets were both right.

39. The Single Judge refused leave on 30 September 2019.

40. As indicated above, the Prosecution were not informed of the hearing of the Appellant's renewed application for leave to appeal on 16 January 2020, and thus did not attend. At the hearing Mr Jeyes relied, as his principal point, on Ground iv(c).

41. The Court retired to consider the submissions made by Mr Jeyes. Thereafter, Males LJ gave the judgment of the Court, which concluded as follows:

> "*15. The principal point relied on by Mr Jeyes relates to the Judge's finding on benefit, relating to the land adjacent Silt Pit Lane, where the benefit found was £62,000. This was land purchased with a mortgage on Norfolk Street, as to which the Judge's conclusion was that the mortgage application was fraudulent in two respects. First, he found that the application failed to disclose that the beneficial interest in the property being mortgaged was the*

applicant's mother, rather than the applicant himself. That was indeed the applicant's case – namely, that his mother had the relevant beneficial interest – although, in fact, the judge did not accept that case. If that is so, there is perhaps an element of inconsistency in saying that the mortgage application was fraudulent for failure to declare a beneficial interest which, in the event, the judge was not persuaded did exist. The judge also found that the application was fraudulent because the applicant failed to answer truthfully a question on the application form about any previous criminal convictions. He answered that he did not have such convictions, when in fact he did, although they were spent. The judge said that the only permissible, honest answer would either have been 'Yes', or else to decline to answer, on the basis that the lender was not entitled to ask for such information insofar as it might relate to convictions that were now spent. We accept that the judge was wrong in that respect. The applicant was entitled to answer 'No' to that question, because his convictions were, in fact, spent.

16. Although the Judge's reasoning therefore, in relation to this aspect of the benefit is, in our judgment, open to those criticisms, we are not persuaded that the consequence is that the assumptions were rebutted. On the facts found by the judge, the mortgage funds were raised through a mortgage on the Norfolk Street property, in relation to which the judge also found that the assumptions were not rebutted, and therefore the Norfolk Street property had to be treated as part of the relevant property. A mortgage raised on that property, which is then used to buy adjacent property, would still be subject to the same considerations, meaning that the assumptions were not rebutted. Plainly, overall, the judge was not persuaded by the applicant's evidence in relation to the properties in which he claimed that his mother had beneficial interests, and that affected the whole approach to these properties and the judge's conclusion that the relevant assumptions were not rebutted.

17. That was identified by Mr Jeyes as his strongest point, and we have rejected it. It is sufficient to say in relation to the other points (this being an application for leave and not a full appeal), that we have considered carefully what is said on each side and we find that the arguments in the Respondent's Notice persuasive in relation to the benefit figures.

……..

19. For these reasons, the order made by the judge must stand, and the renewed application for leave to appeal against the confiscation order is refused"

42. In immediate response, Mr Jeyes said this:

"I am grateful, my Lord. I rise with some diffidence and with more than a little trepidation. I hope that my Lords and my Lady will understand it my professional duty to say something…. The determination of the court appears to be that the mortgage was not fraudulent for the reasons set out by the learned judge in his

judgment. In my submission, if the mortgage was not fraudulent for those reasons, then the assumption as to the source of those funds would have been rebutted. The learned judge did not rehearse any other reason for those funds, which clearly emanated from the bank, being considered to be fraudulent and therefore the source or the product of criminal conduct".

43. Mr Jeyes then developed that submission by arguing that:

(1) There was no doubt how the Appellant had come to be the legal owner of 64 Norfolk Street, and although the judge had determined that the Appellant's mother must also have assigned the beneficial interest to him, she had nevertheless remained, essentially, the landlord of the property.

(2) The Appellant had then mortgaged the legal interest, which the Court had just indicated he would have been entitled to do, and on the judge's findings would have been entitled to do.

(3) The Judge had determined that the application was fraudulent for two reasons (a failure by the Appellant to declare that his mother had a beneficial interest, and his answer in relation to his convictions) both of which, it appeared, the Court had decided were flawed.

(4) If the reasons for which the judge thought that the mortgage was fraudulent were flawed, then (against the background of the Judge's finding that the full equity in 64 Norfolk Street was available to the Appellant and that it could not be fraudulent not to declare something that did not exist) the assumption in relation to the land at Silt Pit Lane was rebutted.

44. The Court retired to further confer, after which Males LJ continued:

"*Mr Jeyes, you have a point. When I gave judgment earlier, that was on the basis, I think, of a misunderstanding as to what comprised the benefit figures. It is, in fact, apparent that the Norfolk Street property is not part of the judge's findings on benefit. That was owned by the mother, and the consequence is that what I said in the judgment earlier was on a mistaken basis, and that once the judges reasoning as to the two reasons which he gave is found to be incorrect, as we did find, then the benefit ought to be reduced by the £62,000.*

So, we are grateful to you for pointing that out. You were right to stand and raise it, even with trepidation, and the consequence is that I will correct the judgment when it comes for approval. I hope that this is being recorded, so that I can see what the reasoning was. The consequence, therefore, will be that we give leave, limited to this particular point, and allow the appeal by reducing the benefit figure and thus the confiscation figure by £62000, so that the figure will now be £104,232.93.

MR JEYES; I am very grateful.

LORD JUSTICE MALES; Alright.

MR JEYES; So, my Lord has determined the appeal itself?

LORD JUSTICE MALES; Yes, we have determined the appeal itself, which is the normal practice, and on that basis, you should have a representation order."

45. In the formal Order on the Application it was recorded that the Court had:

> "*1. Granted leave to appeal against sentence on Ground 5 only and, without adjournment, treated the hearing of the application as the hearing of the appeal;*
>
> *2. Allowed the appeal and varied the amount of the confiscation order imposed in the Court below, having determined that the Applicant does not have any beneficial interest in the property at 64 Norfolk Street.*
> *……"*

46. We observe that it had not been suggested in the confiscation hearing that 64 Norfolk Street was part of the Appellant's benefit; that the Appellant's mother was the previous owner of 64 Norfolk Street, and that HHJ Easteal had found that the Appellant was the sole owner of the house at the material time; that (in the part of his ruling relating to benefit and the land to the west of Silt Pit Lane) the judge had ruled there were three relevant deficiencies (not two) in the mortgage application in relation to 64 Norfolk Street; that, in any event, when dealing with cash deposits, the judge had ruled in favour of the Prosecution on one of the other alleged deficiencies in relation to the mortgage application; that there was another alleged deficiency in relation to the land not being let (which was not disputed but said not to be material); that (as asserted by the Prosecution – see below) it is not the normal practice in confiscation cases to determine appeals without giving the Prosecution an opportunity to be heard (rather, the reverse is the well-established practice); and that the Court had not determined that the Appellant did not have any beneficial interest in 64 Norfolk Street.

47. In the subsequent Approved Judgment, paragraph 15 remained the same as in the *ex tempore* judgment, but the remainder was amended, as follows:

> *"16. The Judge's reasoning in relation to this aspect of the benefit, that is to say the land adjacent to Silt Pit Lane, is in our judgment flawed for those reasons.*
> *17. This was identified by Mr Jeyes as his strongest point, and we agree with it.*
>
> *…..*

19. For these reasons, the Judge's order must be adjusted to exclude from the benefit figure the value of the land adjacent to Silt Pit Lane which was purchased with funds raised by a mortgage on the Norfolk Street property which did not form part of the applicant's benefit. To that extent, therefore, he has rebutted the statutory presumptions.

20. The consequence, therefore, will be that we give leave, limited to this particular point, and allow the appeal by reducing the benefit figure and thus the confiscation figure, by £62,000, so that the figure will now be £104,232,93. In all other respects the application for permission to appeal is refused. We make a representation order."

Legal framework

48. The overriding objective, and the application of it by the Court, are set out in Parts 1.1 & 1.3 of the Criminal Procedure Rules, as follows:

"**R1.1 The overriding objective**

1.1 (1) The overriding objective of this procedural code is the criminal cases be dealt with justly.
(2) Dealing with a criminal case justly includes–
(a) acquitting the innocent and convicting the guilty;
(b) dealing with the prosecution and the defence fairly;
(c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
(d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
(e) dealing with the case efficiently and expeditiously
(f) ensuring that appropriate information is available to the court when bail and sentence are considered; and
(g) dealing with the case in ways that take into account–
(i) the gravity of the offence alleged,
(ii) the complexity of what is in issue,
(iii) the severity of the consequences for the defendant and others affected, and
(iv) the needs of other cases.

……

The application by the court of the overriding objective

1.3 The court must further the overriding objective in particular when–
(a) exercising any power given to it by legislation (including these Rules);
(b) applying any practice direction;
(c) or interpreting any rule or practice direction".

49. As to Respondent's Notices, Part 39.6 of the Criminal Procedure Rules provides that:

> **"R39.6 Respondent's notice**
> (1) The Registrar–
> (a) may serve an appeal notice on any party directly affected by the appeal; and
> (b) must do so if the Criminal Case Review Commission refers a conviction, verdict, finding or sentence to the court.
> (2) Such a party may serve a respondent's notice, and must do so if–
> (a) that party wants to make representations to the court; or
> (b) the court or the Registrar so directs.
>
> ……
>
> (5) The respondent's notice must be in the form set out in the Practice Direction.
> (6) The respondent's notice must–
> (a) give the date on which the respondent was served with the appeal notice;
> (b) identify each ground of opposition on which the respondent relies, numbering them consecutively (if there is more than one), concisely outlining each argument in support and identifying the ground of appeal to which each relates;
> (c) identify the relevant sentencing powers of the Crown Court, if the sentence is in issue;
> (d) summarise any relevant facts not already summarised in the appeal notice;
> (e) identify any relevant authorities;
> (f) include or attach any application for the following, with reasons–
> (i) an extension of time within which to serve the respondent's notice,
> (ii) bail pending appeal,
> (iii) a direction to attend in person a hearing that the respondent could attend by live link, if the respondent is in custody,
> (iv) the introduction of evidence, including hearsay evidence and evidence of bad character,
> (v) an order requiring a witness to attend court, or
> (vi) a direction for special measures for a witness; and
> (g) identify any other document or thing that the respondent thinks the court will need to decide the appeal.

50. As to parties being given notice of hearings and decisions, Part 36.7(1) of the Criminal Procedure Rules provides that:

> "*The Registrar must give as much notice as reasonably practicable of every hearing to:*
> *(a) the parties;*
> *……."*

51. In *R v Daniel* [1977] QB 364, a renewed application was listed, heard and dismissed without notice to the applicant's lawyers, although the error was not such as to render the proceedings a nullity. Lawton LJ (giving the judgment) considered whether this Court had jurisdiction in a case where the applicant had been deprived of his right to be represented by counsel. He concluded:

> "*This court clearly has jurisdiction within the ambit of the Criminal Appeal Act 1968 and the Rules of 1968 to see that no injustice is done to any defendant in the course of any application or appeal. If in any particular case, because of the failure of the court to follow the rules or the well-established practice, there is a likelihood that injustice may have been done, then it seems to us right, despite the generality of what was said in R v Cross (Patrick), that a case should be relisted for hearing. It is pertinent to point out that in R v Cross (Patrick) the court had heard arguments by counsel on the merits before any question arose about rehearing the appeal, for such it was. The kind of problem which has arisen in this case was never considered. It follows that this court acted per incuriam in adjudging, on 14 September 1976, that it had no jurisdiction to consider the defendant's application. The court had such jurisdiction. Before leaving this subject, the court would stress that save in cases in which what has happened is a nullity, the jurisdiction to relist depends on the likelihood of an injustice being done. That is for the court itself to decide. There may not be a likelihood of injustice if, from the written grounds of appeal and any supporting documents, it is clear beyond argument that the application cannot succeed."*

52. In *Yasain* (above), the Court identified three sets of circumstances in which the Court of Appeal (Criminal Division) may re-open its decisions, namely where:

> (1) The order of the Court has not yet been entered onto the record, that being the record sheet of the relevant Crown Court.
>
> (2) The order of the Court is *ultra vires* and a nullity.
>
> (3) It is necessary to avoid real injustice in exceptional circumstances, which might be when there had been a failure in the Court's administration - as in *R v Daniel* (above).

53. In *R v Cunningham, R v Di Stefano* (above) the Court (presided over by Lord Burnett CJ) quoted, with approval, from the judgment of Gross LJ in *Gohil* (also above), as follows:

> "*31. In Gohil the Court comprehensively summarised the ambit of this jurisdiction in the CACD, so as significantly to reduce the need in this judgment to rehearse the various authorities in which this issue has been considered. Gross LJ set out:*
>
> *'(viii) Pulling the threads together.*

129. We venture to pull the threads together, as follows:

i) the CACD has jurisdiction to re-open concluded proceedings in two situations. First, in cases of nullity, strictly so-called and distinguished from "mere" irregularities. Secondly, where the principles of Taylor v Lawrence, as adopted in Yasain are applicable, thus where the necessary conditions are satisfied. For ease of reference, though not to be interpreted as a statute, the necessary conditions are: the necessity to avoid real injustice; exceptional circumstances which make it appropriate to re-open the appeal; and the absence of any alternative effective remedy. It is to be emphasised to be almost invariably cumulative requirements – though not necessarily sufficient for the exercise of the jurisdiction, in that the court retains a residual discretion to decline to re-open concluded proceedings even where the necessary conditions are satisfied;

ii) though the principles in Taylor v Lawrence apply in both the Court of Appeal (Civil Division) and the CACD, as underlined in Yasain the jurisdiction need not necessarily be exercised in the same way, bearing in mind both the triangulation of interests in criminal proceedings (the state, the defendant and the complainant/victim) and the general availability of the CCRC to remedy the injustice of wrongful convictions;

iii) in exercising the jurisdiction to re-open concluded proceedings, the test applied by the CACD will be the same, regardless of whether the application is made by the Crown or on behalf of the defendant;

iv) we respectfully agree with the observation of the court in Yasain that the jurisdiction of the CACD to re-open concluded proceedings is probably best confined to "procedural errors". Indeed, at least generally, we see the Yasain jurisdiction as directed towards exceptional circumstances involving (as submitted by the Amicus) the correction of clear and undisputed procedural errors "where it is simpler and more expedient for the court itself to re-open the appeal and correct a manifest injustice without the need for further litigation". Such an approach is healthy as it does not altogether exclude room for pragmatism in practice, while confining its scope to appropriately very limited circumstances, where, even if recourse to the CCRC was otherwise available, it would be a wholly unnecessary exercise. As it seems to us, fashioning the jurisdiction in this manner accords with authority, principle, practicality and policy – not least the great importance of finality in criminal proceedings;

v) […]

vi) […]'

32. We entirely agree with the approach of this court in Yasain and Gohil that, save for decisions that are a nullity, the usual exercise of

this jurisdiction is to be confined to correcting "procedural errors" that are clear and undisputed, and when there is no alternative effective remedy (albeit we do not wish to close the door entirely on exceptional circumstances, when the lack of an alternative effective remedy or some other reason, may lead the court to re-open a decision in order to avoid a manifest injustice). As Gross LJ observed in Gohil, although the jurisdiction to re-open concluded proceedings has not been removed by the availability of recourse to the CCRC, that will almost invariably be the proper route ([128])."

54. The procedure for seeking to reopen the determination of an appeal is set out in Part 36.15 of Criminal Procedure Rules, which provides that:

"Reopening the determination of an appeal

36.15

(1) This rule applies where-

(a) a party wants the court to reopen a decision which determines an appeal or reference to which this Part applies (including a decision on an application for permission to appeal or refer);

(b)the Registrar refers such a decision to the court for the court to consider reopening it.

(2) Such a party must-

(a) apply in writing for permission to reopen that decision, as soon as practicable after becoming aware of the grounds for doing so; and

(b)serve the application on the Registrar.

(3) The application must-

(a)specify the decision which the applicant wants the court to reopen; and

(b)explain-

(i) why it is necessary for the court to reopen that decision in order to avoid real injustice,

(ii) how the circumstances are exceptional and make it appropriate to reopen the decision notwithstanding the rights and interests of other participants and the importance of finality,

(iii) why there is no alternative effective remedy among any potentially available, and

(iv)any delay in making the application.

(4) The Registrar

(a) may invite a party's representations on-

(i) an application to reopen a decision, or

(ii) a decision that the Registrar has referred, or intends to refer, to the court; and

(b) must do so if the court so directs.

(5) A party invited to make representations must serve them on the Registrar within such period as the Registrar directs.

(6) The court must not reopen a decision to which this rule applies unless each other party has had the opportunity to make representations.

[Note. The Court of Appeal has power only in exceptional circumstances to reopen a decision to which this rule applies.]"

55. In *R v Cunningham, R v Di Stefano* (above) the Court gave guidance as to the operation of Part 36.15, which has been complied with in this case. In particular, when given notice of what had happened at the hearing on 16 January 2020, the Prosecution immediately began the steps which resulted in this application.

Submissions

56. On behalf of the Prosecution Mr Martin Evans QC (who did not appear below) accepted that there was a burden on the Prosecution to show that there was a real requirement for the Court to exercise its discretion to re-open the determination of the appeal, and to uphold the original confiscation order. He variously submitted that:

(1) It was not suggested that the proceedings in this Court on 16 January 2020 were a nullity.

(2) When a Defendant has a criminal lifestyle there is a substantial public interest that any property held by them, and in relation to which the relevant assumption is not rebutted, is included in their benefit - as "crime should not pay".

(3) Against the background that the property held assumption applied to consideration of benefit in relation to the land to the west of Silt Pit Lane, the Prosecution case was that the mortgage funds in relation to 64 Norfolk Street that were used by the Appellant to purchase the land had been fraudulently obtained.

(4) As summarised in [23(3)] above, the Prosecution case that the mortgage funds had been fraudulently obtained was based on four alleged deficiencies in the mortgage application, namely:

(a) It was a "Buy to Let" mortgage and, contrary to what had been asserted in the mortgage application, the monies had been used to purchase land that was not let out, and/or

(b) It had been falsely represented in the mortgage application that the appellant was in permanent employment when he was actually unemployed, and/or

(c) The Appellant had failed to mention in the mortgage application that there were constraints on his ownership in that:

(i) His mother received all the rental income from 64 Norfolk Street.
(ii) He had an arrangement with Mr Ruck that the land to the west of Silt Pit Lane would not be sold, but retained until Mr Ruck was in a position to buy it back (having had to raise money in connection with his divorce proceedings, and/or

(d) He had failed to disclose the fact that he had previous convictions.

(5) In the ultimate alternative, and if the Appellant was not the sole owner of 64 Norfolk Street (because his mother had retained the beneficial interest), it was the Prosecution case that he had fraudulently represented that he was the sole owner.

(6) In the part of his ruling dealing with benefit and Silt Pit Lane, HHJ Easteal had identified 3 deficiencies in the mortgage application, namely that the Appellant had failed to disclose:

(a) The purported beneficial interest of his mother in 64 Norfolk Street.
(b) His previous convictions.
(c) The constraints on his ownership of the house and the land.

(7) It was accepted, given the judge's subsequent finding (in relation to available assets) that the Appellant was the sole owner of the equity in 64 Norfolk Street, that there was no deficiency in the Appellant failing to disclose an interest that his mother did not have.

(8) It was further accepted that, as a matter of law, the Appellant had not been required to disclose his previous convictions, as they were spent.

(9) Nevertheless, the judge had been entitled to conclude that the failure to mention the constraints was a material failure.

(10) In any event, it was not disputed that the Appellant had used the land to the west of Silt Pit Lane for his own purposes rather than letting it out and that, whilst dealing with cash deposits, the Judge had found (in the clearest terms) that at the material time the Appellant had not been in permanent, or any, legitimate employment.

(11) Thus, three of the deficiencies relied upon by the Prosecution had been made out, such that, whether viewed individually or cumulatively, and in the light of the judge's various findings as to the Appellant's lack of veracity, the property held assumption in relation to the land to the west of Silt Pit Lane had not been displaced – rather the reverse. Therefore, the Appellant had failed to discharge the burden on him to rebut the property held assumption, and the only possible conclusion to which the Judge could have come was that the land was benefit from the Appellant's general criminal conduct.

(12) The Respondent's Notice complied with Part 39.6 of the Criminal Procedure rules, and it made clear in the recital at the outset that, in the event that leave was granted, the Prosecution wished to make submissions at the hearing of the appeal.

(13) Contrary to Part 36.7(1)(a) of the Criminal Procedure Rules, the Prosecution were not informed of the date of the hearing of the renewed application for leave. If they had been informed, a representative would have attended.

(14) The principle of finality presupposes that in any contested matter both parties will have the opportunity to make representations before any final determination is made, and there is a well-established practice that in confiscation appeals (and notwithstanding the service of a Respondent's Notice) the Prosecution will attend any final hearing and make representations.

(15) In any event, the overriding objective requires that cases be dealt with justly, which includes dealing with the parties fairly (see Part 1.1(2)(b) of the Criminal Procedure Rules), and the Court's approach in the analogous case of *Martin* (above) was illuminating.

(16) In the absence of the Prosecution at the hearing on 16 January 2020, and in part as a result of the submissions advanced on behalf of the Appellant, the Court had fallen into the errors summarised in [46] above.

(17) If the Court had been aware of the correct position, it was inconceivable that the appeal would have been allowed. Rather, it was bound to fail. There was not the mere possibility (as suggested on behalf of the Appellant) that a decision might have gone the other way. The result had been an unjustified reduction of the confiscation order by £62,000.

(18) Although the errors were clear, they were not undisputed by the Appellant. However, there was no merit in the submissions now advanced on the Appellant's behalf.

(19) No alternative remedy was available – in that an application to the CCRC was not possible, and an application for a civil recovery order under Part 5 of POCA was prevented by s.308(9): "*Property is not recoverable if it has been taken into account in deciding the amount of a person's benefit from criminal conduct for the purpose of making a confiscation order*".

(20) Against that overall background, and thus in exceptional circumstances where there was no alternative effective remedy, there was a plain requirement for the Court to avoid a manifest injustice by exercising its discretion to reopen the hearing and to uphold the original confiscation order.

57. On behalf of the Appellant, Mr Jeyes submitted that:

(1) The full Court had acted entirely appropriately in allowing the appeal on 16 January 2020, there was no injustice, the case did not reach the required threshold of exceptionality, and the principle of finality applied – all in a case in which the Appellant had been subjected to a sizeable confiscation order notwithstanding the fact that he had been acquitted of possession of the frozen 1.5kg block of cannabis with intent to supply. Indeed, the Appellant remained of the view that the only identifiable injustice in the case was the imposition on him of a confiscation order in such an amount.

(2) At the outset of the hearing on 16 January 2020, the Court had confirmed that it had read and considered the Respondent's Notice, and the Court had thus been aware of the submissions identified by leading counsel for the Prosecution as being pertinent to the appeal.

(3) Given that the Court had ultimately concluded, rightly, that the two reasons cited by the Judge for not rebutting the assumption in relation to the land to the west of Silt Pit Lane (not declaring the beneficial interest which he said that his mother retained in 64 Norfolk Street, and answering "no" on the application when asked whether he had any previous convictions) were invalid, it followed that his judgment in that regard could not be upheld, and thus the Court's ultimate decision had plainly been correct.

(4) The Respondent's Notice was notable for its lack of argument, or indeed any comment at all, in relation to the arguments advanced on behalf of the Appellant in relation to Ground iv(c) – and the truth was that that was because nothing could be said as the Ground was plainly right, as the full Court had held.

(5) In accordance with Part 39.6(6) of the Criminal Procedure Rules (above) the Respondent's Notice should have identified each ground of opposition on which the Prosecution relied, numbered them consecutively, concisely outlined each argument in support, identified the ground of appeal to which each related, and summarised any relevant fact not already summarised in the appeal notice.

(6) By analogy with the requirement on Appellants to set out all Grounds of Appeal on which they intend to rely, and to have to seek leave for any additional Grounds (see *R v James* [2018] 1 Cr.App.R. 33), and whilst the rules were not so explicit for Respondents, the general rule had to be the same – as, with both parties being under a duty to further the overriding objective, it would create manifest unfairness if applicants were required to apply for leave to vary their Grounds, but the Respondent was able to add to, vary and supplement its grounds of opposition at will.

(7) In any event, the principal arguments now advanced by the Respondent in relation to their application were not mentioned in the Respondent's

Notice at all, and the recital at the start of the Notice had no status in law and could not absolve the Prosecution of the duty to set out its case – which it could and should have done, but had signally failed to do.

(8) The suggestion that there were three, rather than two, reasons for the Judge's findings was plainly bad on its face, and it was wrong of the Prosecution to adopt a strained construction of the judgment to try to produce the outcome that they desired. In relation to 64 Norfolk Street the constraint was Sylvia Court's alleged ongoing beneficial interest. In any event, even if there were other constraints they would not have affected the situation - as there were no other legal interests to be declared and it was a legal mortgage.

(9) Equally, whilst it was correct that the screen print for the mortgage recorded the Appellant as being employed (and the judge found that he had not been) that was irrelevant as it was a "Buy to Let" mortgage. In any event, the Prosecution had not strongly pressed the point during the confiscation hearing. The key consideration was the rental income. The mortgage had been paid throughout its life, and had always been fully secured. In addition, the judge had taken time to consider his judgment and (plainly) had not considered that this was a ground on which the mortgage could be vitiated.

(10) In addition, there would be a risk of injustice in holding that the mortgage was fraudulently obtained when there was doubt, variously, as to the importance with which this was regarded by the lender; the content of what was discussed between the mortgage broker and the Appellant; the extent of remunerative work undertaken at the time of the application (which might not have been the same point in time as that in relation to the judge's cash deposit findings).

(11) In any event, it would be wrong at this stage to try to establish a new basis on which the judge's conclusion on the mortgage question should be upheld. Given that the Court was required to avoid any risk of injustice, the ultimate decision on 16 January 2020 should remain.

(12) The purported injustice relied upon by the prosecution was not beyond dispute and certainly not manifest. Moreover, this was a case in which there was no evidence of drug dealing, and a jury had acquitted the Appellant of any such intention. Thus, in reality, the State had recovered many times over what the Appellant could have obtained.

(13) The principle of finality applied, and the proceedings, and the distress that they had caused, should finally end. Therefore, the Prosecution's application should be dismissed.

The merits

58. There is no doubt, given Schedule 2 of POCA and the decision in *Parvaez* [2017] EWCA Crim 873, that the Prosecution were entitled to pursue confiscation proceedings against the Appellant, despite his acquittal in relation to possession with intent to supply,

59. Against the background that, as to benefit, the property held assumption applied in relation to the land to the west of Silt Pit Lane, and that the Prosecution case was that the funds from the mortgage on 64 Norfolk Street which were used to purchase that land had been fraudulently obtained, it is now clear that, as summarised in [23(3)] & [56(4)] above, the Prosecution case was that the assumption was not rebutted by the Appellant, because:

    (1) It was a "Buy to Let" mortgage and, contrary to what had been asserted in the mortgage application, the monies had been used to purchase land that was not let out, and/or

    (2) It had been falsely represented in the mortgage application that the Appellant was in permanent employment when he was actually unemployed, and/or

    (3) The Appellant had failed to mention in the mortgage application that there were constraints on his ownership of both 64 Norfolk Street and the land to the west of Silt Pit Lane, in that:

        (a) His mother received all the rental income from 64 Norfolk Street.

        (b) He had an arrangement with Mr Ruck that the land to the west of Silt Pit Lane would not be sold, but retained until Mr Ruck was in a position to buy it back (having had to raise money in connection with his divorce proceedings), and/or

    (4) The fact that the appellant had failed to disclose that he had previous convictions, and/or

    (5) In the ultimate alternative, and if he was not the sole owner of 64 Norfolk Street (because his mother had retained the beneficial interest), he had fraudulently represented that he was the sole owner.

60. Equally, it is now clear, as summarised in [29] above, that when giving his reasons in relation to benefit in respect of the land to the west of Silt Pit Lane, HHJ Easteal:

    (1) Failed to address the first two matters relied on by the Prosecution, albeit that the first was not in dispute, but was said not to be material, and that he had already ruled in favour of the Prosecution in relation to the second (when dealing with cash deposits).

    (2) Addressed all three of the other matters relied on by the Prosecution, ruling in favour of the Prosecution in relation to each of them.

61. The judge undoubtedly erred in law in his finding in relation to the Appellant's failure to mention his spent previous convictions, and also erred in his finding that the Appellant had failed to disclose that his mother had retained the beneficial interest in 64 Norfolk Street - as the need for that conclusion, which was put in the ultimate alternative, did not arise, and (in any event) the finding was inconsistent with his subsequent conclusion that the Appellant was the sole owner of the house.

62. Nevertheless, and against the background of the judge's adverse findings as to the Appellant's veracity, we have no doubt that:

    (1) If he had considered the matter, he could only have concluded that the admitted assertion in the mortgage application that the mortgage funds were going to be used in the purchase of a "Buy to Let" property was material, and that it was demonstrated to be fraudulent by the chronology and the use of the funds to purchase the land to the west of Silt Pit Lane – which was never let out.
    (2) Likewise, there were ample grounds for his conclusion (reached when dealing with cash deposits) that the Appellant had had no legitimate employment at all at the material time, and if he had considered the matter when dealing with the mortgage application he could only have concluded that the assertion that the Appellant was in permanent employment was material, and that it was fraudulent.
    (3) The judge was also entitled to conclude that the relevant constraints (which were not in dispute) were material, and that the failure to mention them had been fraudulent.
    (4) Those findings, and the more so the combination of them, could only have led to the conclusion that the property held assumption in relation to the land to the west of Silt Pit Lane had not been rebutted by the Appellant, and that therefore the value of that land (£62,000) was part of his benefit from his criminal lifestyle. Indeed, any other conclusion would have been perverse.
    (5) Thus, there was no merit in Ground (iv)(c), and the appeal should have been dismissed.

63. At the hearing on 16 January 2020 the Court was plainly unaware of the first three matters relied on by the Prosecution, and confined its analysis to the last two It seems to us that the reasons for that were as follows:

    (1) In his judgment, the judge failed to deal with the "Buy to Let" issue at all; only dealt with the employment issue when dealing with cash deposits; and dealt with the constraints issue in a way that was not necessarily clear to anyone who had not been involved in the confiscation hearing.

    (2) In his long Grounds of Appeal the Appellant failed to indicate the full breadth of the Prosecution case in relation to benefit and the land to the west of Silt Pit Lane, and asserted that the judge's findings had been confined to the previous conviction and beneficial ownership issues.

    (3) In the "Prosecution Response to Grounds of Appeal" (which contained the recital quoted in [2(1)] & [35] above) the Prosecution failed, in breach of Part 39.6(6)(b) of the Criminal Procedure Rules, to identify each ground of opposition on which it relied, and to concisely outline each argument in support, identifying the

ground of appeal to which each related. Instead (see [37] above) in relation to Ground iv(c) the Prosecution simply set out the judge's ruling at Transcript p.4A-G (see [28] above); set out the undisputed chronology in relation to the land to the west of Silt Pit Lane; underlined that the land had to be considered under the property held assumption; and asserted that, since the land had been acquired by a fraudulently obtained mortgage, the judge had been wholly justified in treating it as benefit. Thus, the Prosecution failed to set out either the full breadth of its case during the confiscation hearing or any of the more detailed arguments (see [56] above) relied upon before us as to the lack of merit in Ground iv(c).

(4) In breach of Part 36.7(1) of the Criminal Procedure Rules (see also CPD IX Appeal 39A.3(c)) the Registrar failed to notify the Prosecution of the hearing of the renewed application on 16 January 2020 – whereas if the Prosecution had been warned, a representative would have attended.

(5) At the hearing on 16 January 2020, the Appellant (whilst asserting for the first time that Ground iv(c) was his principal point) again failed to indicate the full breadth of the Prosecution case in relation to benefit and the land to the west of Silt Pit Lane, and again asserted that that the judge's findings had been confined to the previous conviction and beneficial ownership issues.

(6) After granting leave, the Court proceeded to determine the appeal without adjourning to enable the Prosecution to attend, upon the basis that such was the normal practice - whereas (as we have indicated in [46] above) that is not the norm in confiscation appeals, in which the well-established practice is that the Prosecution are invited to attend any final hearing, and (save in exceptional circumstances) will do so and will make representations.

(7) If a Prosecution representative had attended the hearing on 16 January 2020, the Court would have been alerted (at the least of it) to that well-established practice in confiscation cases, and had that practice been followed the appeal would inevitably have been dismissed.

64. We agree with the Prosecution that:

(1) When a Defendant has a criminal lifestyle, there is a substantial public interest that any property held by them, and in relation to which the relevant assumption is not rebutted, is included in their benefit – as "crime should not pay".

(2) Given the well-established practice in confiscation appeals (to which we have just referred), and notwithstanding the service of a Respondent's Notice, the principle of finality presupposes that in any such contested appeal both parties will have had the opportunity to make oral representations before any final determination.

65. This is not a case in which the order of the Court had yet to be entered on the relevant record, nor is it suggested that the proceedings in this Court on 16 January 2020 were a nullity. Therefore (against the broad background outlined above) we turn to the question of whether the Prosecution have discharged the accepted burden on them to show that there is a real requirement to re-open the determination of the appeal. As the

authorities (see [53] above) make clear, the same test must be applied regardless of whether an application to re-open is made by the Prosecution or the Defence.

66. Against the background of the public interest to which we have referred in [64(1)], and given that, if the full picture had been known to the Court, the appeal would inevitably have been dismissed, we have no doubt that there is a necessity to avoid real injustice.

67. Equally, we have no doubt there are also exceptional circumstances which make it appropriate to re-open the appeal, namely that:

    (1) There was a procedural error by the Registrar in that, contrary to Part 36.7(1) of the Criminal Procedure Rules, and in circumstances analogous to those in *R v Daniel* (above), the Prosecution were not informed of the hearing of the renewed application – whereas, if they had been informed, a representative would have attended, and the errors that followed would have been avoided.
    (2) There was a procedural error by the Court at the hearing on 16 January 2020 in that, in the erroneous belief that it was the norm in confiscation appeals, the Court proceeded to determine the appeal without adjourning to enable the Prosecution to attend – whereas the well-established practice in confiscation appeals (as opposed to other sentence appeals, save for those involving a fatality – see CPD IX Appeal 39A.7 and *Palmer* [2017] EWCA Crim 471) is to invite the Prosecution to attend the final hearing and (save in exceptional circumstances – which did not arise in this case) the Prosecution will attend and make representations.
    (3) Whilst those procedural errors are not undisputed, the disputes raised are without merit, and the errors are clear.
    (4) The combination of the procedural errors led to the case being dealt with unjustly – contrary to the overriding objective.
    (5) If the Prosecution had been invited to attend the final hearing of the appeal they would have done so and would have made representations – in consequence of which the full picture would have been made known to the Court, and the appeal would inevitably have been dismissed.

68. In addition, we have no doubt that no alternative remedy is available to the Prosecution – given that an application to the CCRC is not possible, and that it is not possible to make an application for a civil recovery order under Part 5 of POCA.

69. However, that is not the end of the matter, as we must finally consider our residual discretion to decline to re-open the proceedings even where, as is the case here, the necessary conditions are satisfied.

70. This case illustrates, all too clearly, why the well-established practice in confiscation appeals is to invite the Prosecution to attend the final hearing and why, save in exceptional circumstances, the Prosecution do attend and make submissions. Confiscation appeals are almost always complex and difficult both factually and legally, and typically involve consideration of the detail of what happened during the confiscation hearing. Thus, the well-established practice plays an important role in ensuring a just outcome on appeal. Hence, we regard it as being a golden rule.

71. Against that background, we have taken into account, in particular, both the passage of time and the failure to comply with Part 39.6(6)(b) of the Criminal Procedure Rules in the "Prosecution Response to Grounds of Appeal", along with the other reasons (including those attributable to the Appellant – see [63] above) why the Court was not aware of the full picture. In the result, and although we agree with the Appellant that the recital in the "Prosecution Response to Grounds of Appeal" did not obviate the need to comply with Part 39.6 (which clearly must be followed – see also CPD IX Appeal 39D.1), we have concluded that this is an appropriate case in which to exercise our discretion to re-open the appeal, to uphold the original confiscation order in the sum of £166,232.93, and to dismiss the appeal.

Conclusion

72. For the reasons set out above, we re-open the appeal, uphold the original confiscation order in the sum of £166,232.93, and dismiss the appeal.