Neutral Citation Number: [2021] EWCA Crim 956

Case No: 2019 04229 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT SITTING AT SOUTHWARK
HH Judge Loraine-Smith
T2016 0100

Royal Courts of Justice
Strand, London, WC2A 2LL

IN THE MATTER OF AN APPEAL PURSUANT TO S.31(4) OF THE PROCEEDS OF CRIME ACT 2002

IN THE MATTER OF R v MICHAEL ROBERT MOORE

Date: 25/06/2021

Before :

LADY JUSTICE ANDREWS
MR JUSTICE JEREMY BAKER
and
HER HONOUR JUDGE MOLYNEUX

- -

Between:

DAVID PARKER	**Appellant**
- and –	
FINANCIAL CONDUCT AUTHORITY	**Respondent**
-and-	
MICHAEL ROBERT MOORE	**Defendant/ Interested Party**
-and-	
CARLY MOORE	**Interested Party**

- -
- -

Jon Colclough (instructed by **Laytons LLP**) for the **Appellant**
Andrew Bird QC (instructed by **Financial Conduct Authority**) for the **Respondent**
Katy Thorne QC (instructed by **Hodge Jones & Allen**) for the **Defendant, Michael Moore**
Tom Doble (instructed by **Mishcon de Reya LLP**) for **Carly Moore**

Hearing date: 25 May 2021

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Approved Judgment

Lady Justice Andrews:

INTRODUCTION

1. This is an appeal pursuant to s.31(4) of the Proceeds of Crime Act 2002 ("POCA"). It is brought by Mr David Parker against the determination of HH Judge Loraine-Smith ("the Judge"), sitting at Southwark Crown Court on 11 October 2019, that the Defendant Michael Moore, a convicted fraudster, had an interest of 50% in the equity of a property known as Bockingford Court, Maidstone, the legal title to which was held by his stepfather, the Reverend Andrew Higgs. This was the only property of any value that was attributed to Michael Moore.

2. POCA was intended to enforce the message that crime does not pay by depriving a convicted defendant of what he has obtained (or gained) as a result of or in connection with his crimes: see *R v May* [2008] 1 AC 1028. To that end, if a person is convicted of an offence from which he has obtained a benefit, the prosecutor (in this case, the Financial Conduct Authority ("FCA")) may request the Crown Court to make a confiscation order, which obliges the offender to make payment of a specified sum to the State by a specified date. Interest will run on the money if payment is not made by the due date, and the offender will be liable to serve a term of imprisonment in default of payment. The confiscation proceedings will involve an assessment by the Court of the benefit obtained by the offender and the available amount; the amount of the confiscation order will be the lesser of those two sums.

3. The Judge's determination was made under section 10A of POCA. That section, introduced by s.1 of the Serious Crime Act 2015, caters for the situation where there is a dispute as to the extent of the offender's interest in an asset or assets. Section 10A is entitled "Determination of extent of defendant's interest in property" and provides as follows:

> "(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 may be a person holding an interest in the property a reasonable opportunity to make representations to it.
>
> (3) A determination under this section is conclusive in relation to any question as to the extent of the defendant's interest in the property that arises in connection with -
>
> (a) the realisation of the property or the transfer of an interest in the property with a view to satisfying the confiscation order, or

(b) any action or proceedings taken for the purposes of any such realisation or transfer.

(4) Subsection (3) –

(a) is subject to section 51(8B)

(b) does not apply in relation to a question that arises in proceedings before the Court of Appeal or the Supreme Court."

4. In this case, despite believing Mr Parker's evidence of his dealings with Michael Moore, set out in the factual narrative below, the Judge decided that Mr Parker had no beneficial interest in the property by reason of a constructive or resulting trust. He held that Michael Moore and his ex-wife Carly Moore each had a 50% share in the equity.

5. An appeal against such a determination lies to this Court under s.31(5)(b) of POCA at the instance of a person who the Court of Appeal thinks is or may be a person holding an interest in the property, if s.31(6) or s.31(7) applies. Permission to appeal was initially refused by the Single Judge, but granted by the Full Court on 9 February 2021, when Mr Parker was also granted permission to amend his grounds of appeal and to raise a fresh legal argument. The operative provision was s.31(7), as it appeared to the Court to be arguable that giving effect to the determination would result in a serious risk of injustice to Mr Parker. Indeed, if Mr Parker's appeal were to succeed, the risk had already materialised.

6. For the reasons set out in this judgment, the Judge erred in law and consequently significantly overstated Michael Moore's interest in the property. Mr Parker did have an equitable interest in the property which crystallised upon its acquisition. After the mortgage was satisfied, Michael Moore's interest in the net proceeds of sale of Bockingford Court was 15%, not 50%. Carly Moore was also entitled to 15%. The remaining 70% belonged to Mr Parker.

7. The upshot of the Judge's determination was that an elderly disabled man was not only defrauded of close to £1,000,000, but then, in the context of confiscation proceedings against the fraudster, wrongly deprived of a significant amount of money to which he was entitled, which would have gone some way towards mitigating his loss.

8. Mr Parker has been badly let down by the criminal justice system. Sadly, despite the successful outcome of this appeal, and through no fault of his own, he has next to no chance of recovering the bulk of the money, since nearly all of Michael Moore's supposed half share of the property has already been paid out to some of his other victims pursuant to a court order. Any claim against Carly Moore would have to be pursued in the civil courts.

9. This unhappy state of affairs has arisen in part because of a combination of unusual circumstances which it is hoped will never be repeated. However, the case does raise wider concerns about the fairness of the requirement that issues concerning the beneficial entitlement to property in the context of confiscation proceedings under POCA should always be determined in the Crown Court, instead of there being at

least an option to transfer the more complex cases into the business and property courts. Were this to happen, there would be a greater chance of the judge having relevant expertise, and of the judge having the benefit of the assistance of experienced specialist counsel. An alternative would be for a specialist judge to sit in the Crown Court to hear such cases. That may be difficult to achieve in practical terms when the matter is to be resolved by the trial judge at the confiscation stage, as happened here. However, the Crown Court may decline to make a determination under s.10A at that stage, (see s.10A(1)) which would leave it to be dealt with at the enforcement stage, and an Enforcement Receiver may be appointed to litigate the issue. In the present case, no party sought the deferral of the matter to enforcement.

10. This observation is not intended as a criticism of the experienced judge who heard this matter, but as a reflection of the considerable disadvantages that judges of the criminal court will face when confronted with issues of this nature, without having (or being expected to have) expertise in the law of trusts, and without necessarily having the assistance of specialist counsel. In this case, despite having such assistance, in the form of clear and cogent submissions by Mr Colclough, backed by references to supporting authorities, the Judge still fell into error.

FACTUAL BACKGROUND

11. The Judge justifiably described Michael Moore as a "classic fraudster," whose chosen method of operation was to target elderly and vulnerable individuals and persuade them to purchase worthless (or almost worthless) "investments," ranging from land to carbon credits. He said that, even aside from the matters of which Mr Moore was convicted or pleaded guilty, "these proceedings have been riddled with examples of his willingness to tell anybody anything which he thinks would be to his advantage."

12. On 7 December 2016 in the Crown Court at Maidstone, Michael Moore and two co-defendants (including his brother Paul) were convicted after trial before HH Judge Griffith-Jones and a jury of fraudulent trading, contrary to s.993(1) of the Companies Act 2006. Their appeals against conviction were dismissed by this Court on 3 February 2021: see *R v Byrne and others* [2021] EWCA Crim 107. Michael Moore was sentenced to 7 years' imprisonment.

13. On 5 May 2017 in the Crown Court at Southwark, Michael Moore pleaded guilty to:

> Creating a false or misleading impression as to the market/price of investments to induce others to acquire them contrary to s.397(3) of the Financial Services and Markets Act 2000 ("FSMA") (Count 1);
>
> Carrying on a regulated activity when not authorised contrary to s.23(1) FSMA (Count 2); and
>
> Creating a false or misleading impression contrary to s.90 of the Financial Services Act 2012 (Count 4).

Another count of a similar nature (Count 3) was ordered to lie on the file.

14. The essence of the offending which was the subject of the Southwark indictment was persuading the victims to purchase worthless shares in a company named Symbiosis

Healthcare Plc. The ringleader in that particular scam was a Mr Bhandari. Michael Moore made his money by syphoning off "commission" on the investments. There were a number of co-defendants, including Mr Bhandari and Paul Moore. Michael Moore was sentenced to 15 months' imprisonment on Counts 1 and 4, and 12 months on Count 2, all to run concurrently to each other, but consecutively to the 7 year sentence imposed in respect of the offences on the Maidstone indictment.

15. David Parker fits the typical profile of Michael Moore's victims. He is now in his eighties and is a widower. He has suffered all his life from cerebral palsy, and has been confined to a wheelchair since suffering a stroke in 2014. Most importantly, he was found by the Judge, who had the advantage of seeing and hearing him, to be an "entirely credible" and "truthful" witness.

16. There were numerous victims of the frauds that were the subject of the Maidstone and Southwark indictments, but Mr Parker was not among them. Indeed, Michael Moore has never been prosecuted in respect of the fraudulent enterprises to which he fell prey. However, the Judge accepted that of all Mr Moore's victims, Mr Parker had probably lost the most money. He has lost close to £1,000,000 in Mr Moore's various scams.

17. Mr Parker's dealings with Michael Moore begin in the summer of 2009 when Mr Parker was cold-called by someone acting on behalf of a company calling itself Cavendish Moore Ltd, and told that there was an opportunity to invest in some land that had been bought cheaply by a limited liability partnership ("LLP") because of the recent financial crash. They said that the land had the benefit of planning permission, and was expected to increase very significantly in value when the market recovered.

18. After Mr Parker expressed an interest, Michael Moore and a colleague came round to visit him at his home. They persuaded him to invest £558,000 into six LLPs run by Cavendish Moore (or a related company) each of which owned land in various parts of the country. Four of the six LLPs ended up going into liquidation, and the land was sold at a loss. Mr Parker lost in the region of £230,000 as a result of those investments.

19. After he had invested in the Cavendish Moore LLPs, Mr Parker was persuaded by Michael Moore to make a loan of £260,000 to a wine company called Spirited Ventures Ltd for 12 months at an absurdly high rate of interest (he was promised a return of £60,000), and also to purchase wine from that company for £124,000 that was allegedly deposited in a bonded warehouse. Spirited Ventures Ltd went into liquidation in 2016 without repaying a penny of the loan, and its liquidators informed Mr Parker that there was no wine in any of the company's bonded warehouses. Mr Parker also fell victim to a similar scam, purchasing around £52,000 of wine supposedly owned by another company, Montevino Partners Ltd, whose director was also a director of Spirited Ventures. He lost all the money he invested in Spirited Ventures and Montevino.

20. Finally, and before these other investments went sour, in around the autumn of 2010, Mr Parker was contacted by Michael Moore who told him that he and his brother were leaving Cavendish Moore to set up their own company, Manor Rose Ltd. This would work on the same model as Cavendish Moore by offering similar opportunities for investing in land.

21. Mr Parker was completely taken in by Michael Moore and trusted him absolutely. He made an initial loan of £320,000 to Manor Rose that was paid in two tranches, £200,000 on 5 October 2010 and £120,000 on 8 October, but was undocumented apart from the bank statements that showed the flows of money in and out of Mr Parker's account. Mr Parker explained to the Judge that Michael Moore was not very good at giving documentation, but that he never thought it was odd, because he had no reason not to trust him.

22. Mr Parker subsequently made a number of further payments to Manor Rose. The total amount he paid was £379,970. Apart from the money which was used towards the purchase of Bockingford Court in the circumstances described below, Mr Parker did receive some payments back from Manor Rose, though these were sporadic, and the total amount of his receipts is not entirely clear from such records as exist. However, even if all the sums that the liquidator of Manor Rose says he paid to Mr Parker are assumed to have been received by him, the maximum sum repaid, inclusive of interest, and leaving aside the money that went into Bockingford Court, was £102,000.

The investment in Bockingford Court

23. Shortly after Mr Parker had paid the £320,000 to Manor Rose in October 2010 Michael Moore visited him again and told him that a better opportunity had come up, not involving Manor Rose, concerning a large house in Maidstone (i.e. Bockingford Court). He told Mr Parker that the property represented a good investment because it could be refurbished and then sold at a profit. Mr Moore showed Mr Parker an estate agent's valuation which suggested that following the renovation, the property would be worth around £1 million. Mr Moore said that he was interested in personally investing in the property, and offered Mr Parker the chance to join in. Mr Moore said that he would deal with the conveyancers and live at the property whilst supervising the refurbishment, which he would finance. Mr Parker would be a "silent investor". What Mr Moore did not tell Mr Parker was that he was planning to use the property as his matrimonial home.

24. Mr Moore suggested that Mr Parker could redirect the money he had loaned to Manor Rose towards the purchase of the property. It was Mr Parker's understanding that Manor Rose would repay the loan to him by putting the money into the property, and he authorised Mr Moore to make the necessary arrangements. It was agreed that Mr Parker would own a percentage in the property corresponding to the amount of his financial contribution. The balance of the money would be made up by Michael Moore, who would also finance the refurbishment. When the property had been refurbished and sold, the profits would be split between them in the same proportions as they had invested.

25. A little later, Mr Moore visited Mr Parker again and told him that his stepfather was going to be joining in the investment, but that this would not affect Mr Parker's investment, as it just meant that Mr Moore and his stepfather would divide the share of the profits that would originally have gone only to Mr Moore. Unfortunately, once again nothing was put in writing. Mr Parker specifically asked Mr Moore to ensure that the lawyers he instructed did whatever was necessary to record and protect his interests, and Mr Moore agreed. Of course, this never happened. The lawyers he used appear to have had no knowledge of Mr Parker.

26. In the event, the property was purchased in the name of Rev Higgs for £650,000 on 22 December 2010. The acquisition was partly funded by an interest-only mortgage for £307,750 taken out in the name of Rev Higgs. The expenditure on the acquisition was £678,069.58 because there were also fees and stamp duty to be paid. The stamp duty was paid from the proceeds of sale of the Moore's previous family home, of which Michael and Carly Moore were joint owners.

27. On 11 October 2010, £300,000 was transferred from Manor Rose to Rev Higgs, but that sum was transferred back to Manor Rose only three days later, on 14 October 2010. This was part of a plan by Michael Moore and Rev Higgs to convince the mortgage lender that Rev Higgs had sufficient funds to provide the deposit on the property, and that the source of the funds was a gift made by Michael Moore to his stepfather. Among the documents in evidence was a letter from Michael Moore to the mortgage lender pretending that he had given the £300,000 to Rev Higgs to buy the property for himself. It stated: "I confirm that this gift is non-refundable and non-interest bearing and I will not retain any interest in the property whatsoever". The Judge found that Michael Moore told the mortgage company that he had no interest in the property so that he would not impede the granting of a mortgage to his stepfather. With classic understatement the Judge described the mortgage as "rather dubious". The mortgage lender knew nothing of Mr Parker, who had supplied the money to Manor Rose which was used (without his knowledge) to persuade the lender to grant the mortgage to Rev Higgs, and then returned to Manor Rose.

28. On 4 November 2010 a sum of just under £225,000 (£224,900.37) was transferred from Manor Rose's account to Michael Moore's bank account. A further £35,000 was transferred from Manor Rose's account to Michael Moore's account on 17 December 2010. Mr Parker had transferred £30,000 to Manor Rose on 15 December and £5,000 to Manor Rose on 17 December; those payments were obviously the source of the £35,000 received by Michael Moore on 17 December.

29. Between 9 and 20 December 2010, Michael Moore transferred £346,000 to Hobson & Latham, the solicitors acting in the conveyance of Bockingford Court. He transferred £65,000 on 9 December, £200,000 and then £50,000 on 20 December, and £25,000 and £6,000 on 22 December, which was the date on which the sale completed. Of the £346,000 transferred by Michael Moore to Hobson & Latham in that period, £259,900.37 emanated from Mr Parker and had been paid by Manor Rose into Michael Moore's bank account pursuant to the oral agreement between Mr Parker and Mr Moore. For ease of reference, we will refer to Mr Parker's contribution in the rounded-up sum of £260,000. That was 40% of the total purchase price of £650,000, and approximately 70% of the capital used to fund the deposit (excluding the money borrowed on mortgage).

30. Carly Moore had no knowledge that Mr Parker had contributed to the acquisition of the property. Michael Moore had told her that the money he was putting into the property had come from his business.

31. Reverend Higgs remained the registered owner of Bockingford Court until the property was sold, even though Michael and Carly Moore and their two children (who were subsequently born) lived there. The property was re-mortgaged in 2013, apparently to help finance the refurbishment, again without the new mortgagee being told of Mr Parker's involvement.

32. The Judge found that Carly Moore clearly understood that the house would be transferred into her and her husband's joint names (though it never was). The remains of the proceeds of the sale of the Moores' previous family home were used to finance the interest payments on the mortgage, and contributed towards the costs of the refurbishment. Carly Moore's salary went into her bank account, which commonly discharged the outgoings on the property and other household expenses. She and her husband each contributed as much to the household as they reasonably could, "and they each would share the eventual benefit or burden equally".

33. A restraint order was made against the property on 9 January 2014 and registered at the Land Registry on 16 January 2014. It was only after this happened and before he was convicted on the Maidstone indictment that Michael Moore took steps to create a documentary record of his 2010 agreement with Mr Parker. He first created a document entitled "summary of investments" dated 7 January 2016 which described Mr Moore as Mr Parker's "business partner." Mr Parker signed that document on 8 January 2016.

34. In broad terms the contents accorded with Mr Parker's evidence of the agreement between them relating to the investment in Bockingford Court. It referred to Mr Parker investing in a development property in Maidstone of which he would be part owner, and to money being transferred from Manor Rose's account to Michael Moore's bank account under Mr Parker's instruction, to be sent to Hobson & Latham for the purchase of the property, because Michael Moore was "helping to broker the deal on my behalf". It identified the payments out of Manor Rose which went into Michael Moore's account on 4 November and 17 December 2010 as being the source of Mr Parker's investment of approximately £260,000. The document then went on to deal with arrangements relating to the money that was left in Manor Rose, but those aspects of it are immaterial to this appeal.

35. Michael Moore also made attempts to create a deed of trust over the property to which he, Rev Higgs and Mr Parker were party, though they were incompetent efforts which referred to Mr Parker as a trustee rather than a beneficiary. Mr Parker was given a copy of the first draft declaration of trust sometime in 2016 but did not sign it (and it was not signed by anyone else). Sometime in 2017 Rev Higgs sent a second declaration of trust to Mr Parker under cover of a handwritten note, asking him to sign it and forward the signed document to the solicitor who was representing Mr Moore in the criminal proceedings on the Southwark indictment. The document was fashioned to make it look as if it had been created in 2010. It bore the date of 20 December 2010, and Michael Moore's address was given as his address prior to the move into Bockingford Court. It had already been signed by Michael Moore and Rev Higgs.

36. Mr Parker, who was by then aware that Mr Moore had been convicted of fraud on the Maidstone indictment, refrained from signing that document, as any honest person would, and instead went to consult solicitors. His solicitors obtained a copy of the entry on the land register for Bockingford Court, which showed that there was a restraint order in place. They contacted the FCA asserting Mr Parker's interest on 1 November 2017.

37. Those solicitors drafted a new declaration of trust dated 25 June 2018 reciting that Mr Parker had contributed £260,000 to the purchase of the property and that it was held as to 40% by Rev Higgs for Mr Parker. That document was signed by Rev Higgs, Mr

Parker and Mr Moore, but Mr Parker, very properly, never sought to rely upon it as creating a trust. He described it an attempt to record what had been agreed back in 2010. In the light of the restraint order it could not have had the effect of creating an interest in the land, if that interest had not already crystallised.

38. Whilst Mr Parker may have been able to take steps to prevent the sale of Bockingford Court by putting a notice on the land register, he is not to be blamed for trusting Michael Moore to ensure that all the necessary steps were taken to protect his interests, as he assured him he would. By the time that the scales fell from Mr Parker's eyes, and he found out about the Maidstone conviction, the restraint order was already in place.

PROCEDURAL HISTORY

39. It was not disputed that Michael Moore had a criminal lifestyle for the purposes of POCA. On 11 October 2019, the Judge applied the statutory assumptions and assessed his total benefit as just over £2 million. However, as already mentioned, the only asset of any substantial value that was available was Bockingford Court. At the time of the Judge's determination, the estimated sale value of Bockingford Court was £825,000 and the estimated net value after repayment of the mortgage and other costs was £309,458.

40. Having determined that Michael and Carly Moore each had a 50% share in the equity of Bockingford Court and rejected Mr Parker's claim to an interest in the property, the Judge decided the available amount was £154,729, plus £255 in Michael Moore's bank accounts. He made a confiscation order for £154,984 under s.6 of POCA, to be paid within 3 months, and 32 compensation orders in the same aggregate sum. For ease of reference, unless the context otherwise requires, we will refer to these orders collectively as "the compensation order". The compensation order only related to the Maidstone frauds because the Judge had made compensation orders against Mr Bhandari and other co-defendants on the Southwark indictment that were apparently sufficient to reimburse the victims of those frauds.

41. The confiscation order was subsequently increased. When Bockingford Court was eventually sold, around a year later, it made more money than expected. The amount of a confiscation order can be adjusted, so if, for example, the offender's realisable assets turn out to be worth less (or more) than they were believed to be worth at the time of the hearing in the confiscation proceedings, the prosecutor (or the offender) can make an application to the Court for an amendment to the order. That is what happened here, and HH Judge Grieve varied the restraint order and the confiscation order to reflect the increased value of Mr Moore's supposed 50% share of the net sale proceeds.

42. Payment of 50% of the net proceeds of sale, £170,393.97, was made to Westminster Magistrates' Court on 9 October 2020 and £154,733.42 of that sum was earmarked for distribution under the compensation orders. The difference between that and the aggregate amount of the compensation orders, £154,984, is no doubt explained by the small amount of cash that the Judge found was available in Michael Moore's bank accounts. On 30 November 2020, the Magistrates' Court paid the £154,733.42 to 32 victims of the frauds that were the subject of the Maidstone indictment apportioned pro rata to their losses, pursuant to the compensation orders made by the Judge.

The relationship between the confiscation order and the compensation orders

43. The Court's statutory power to make a compensation order in favour of the victim or victims of the offence for which the defendant was convicted does not arise under POCA. At the time that is relevant to this appeal, that power arose under s.130 of the Powers of Criminal Courts (Sentencing) Act 2000 ("the 2000 Act"): the relevant provision is now s.133 of the Sentencing Act 2020. The Court may require an offender to pay compensation for any loss or damage resulting from the offence or any other offence which is taken into consideration by the Court in determining the sentence for that offence.

44. If this power is exercised, the person in whose favour it is made is not entitled to receive the amount due to him or her until (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility of an appeal on which the [compensation] order could be varied or set aside (s.132(1) of the 2000 Act). That must mean an appeal against conviction or sentence by the defendant against whom the compensation order has been made, because a third party such as Mr Parker has no right to appeal against a compensation order. Such a person also has no status to request a stay of the compensation order.

45. The relationship between the two types of order is addressed in s.13 of POCA, which provides that if the Crown Court makes both a confiscation order and a compensation order against the same person in the same proceedings, and it believes that the person will not have sufficient means to satisfy all those orders in full, the Court must direct that so much of the amount payable under the compensation order as it specifies is to be paid out of any sums recovered under the confiscation order; and the amount it specifies must be the amount it believes will not be recoverable because of the insufficiency of the defendant's means. That is what happened in the present case.

46. If the amount that is realised from the assets subject to the confiscation order is more than the amount of the compensation that was ordered to be paid out of that order, there is no power to amend the *compensation* order to increase the amount of compensation specified, even though the amount of the confiscation order may be increased. That explains why, in the present case, the difference between those two sums was retained in court funds.

47. The practical impact of these provisions is that when the Crown Court directs the compensation to be paid out of the moneys realised from the confiscation order, the recipient(s) of the compensation will not and cannot get paid until after the confiscation order is satisfied. If the confiscation order is set aside, or the amount is reduced, this will obviously affect the amount which is available to satisfy the compensation order, even though an appeal against the confiscation order will not operate as an appeal against the compensation order. Thus, in the normal course of events an appeal against the confiscation order ought to preclude the payment of the compensation until after the appeal is determined.

48. However, the appeal will not automatically operate as a stay on the confiscation order, and therefore the position of the appellant is not fully protected, especially if the appellant is someone other than the defendant. The offender may be keen to pay the confiscation order as soon as he can, in order to avoid interest running. We were told by Ms Thorne QC that this was the position of her client, Mr Moore.

49. If an interested third party such as Mr Parker appeals against the confiscation order, then even if the defendant complies with the order pending the hearing of that appeal, as Mr Moore did, for obvious reasons one would not expect the Magistrates' Court (which is responsible for the execution of the compensation order) to take steps to distribute the money under the compensation order until such time as the status of the confiscation order or its amount has been finally determined. That necessarily depends on the Magistrates' Court being kept informed of the existence and status of any appeal; but there appears to be no specific requirement that the Criminal Appeals Office or the prosecutor should do this, and once the time for appealing (or the renewal of an application for leave to appeal) has expired without receipt of any such notification, on the face of it there would be no reason to delay the payment of the compensation any longer. Unlike confiscation orders, it is no part of the prosecutor's function to police the execution of a compensation order.

Where things went wrong in this case

50. In the present case, Mr Parker's application for leave to appeal was refused on the papers by the single judge on 14 August 2020 – almost two months before the sale of Bockingford Court. Unfortunately his legal representatives were not made aware of this before the time expired for renewing the application to the Full Court; it appears that if a notification was sent to them by the Criminal Appeals Office (which we are not satisfied it was), it went astray. The application to renew out of time was made with due expedition, on the next working day after they became aware of the situation. The reasons for the delay were fully explored at the time of the hearing of the renewed application for leave to appeal, and the Full Court was satisfied on the evidence that through no fault of their own, or of their client, Mr Parker's legal representatives did not know about the refusal of leave on the papers until after the time for renewal had expired, and that it was in the interests of justice to grant the requisite extension of time.

51. At that hearing, the Court was informed by Mr Bird QC on behalf of the FCA that the compensation order had already been satisfied from the proceeds of sale of Bockingford Court and the money had been distributed to the designated recipients of the compensation. At that time it was believed that this had occurred before the renewed application was made on 10 October 2020, but at the substantive hearing of this appeal Mr Bird informed the Court that the payment was made *after* that application had been lodged with the Criminal Appeals Office and the extension of time had been sought. Further research by the FCA had revealed that the money earmarked for the compensation order had been moved into a compensation "pot" on or around 10 October, and that it was not paid out to the victims until 30 November 2020.

52. It is unclear whether the Criminal Appeals Office told the Magistrates' Court of the existence of the renewed application, though the FCA's researches suggested it did not. Even if it did, the information may not have stopped the distribution of the money, given that even an appeal against the compensation order itself will not operate as a statutory bar to payment if the application for leave to appeal is made after the expiry of a relevant time limit. In fact, there was no statutory inhibition on payment and no court order in place to preclude the Magistrates' Court from executing the compensation order even if it was aware of the pending appeal. By the

time the matter came before the Full Court on the renewed application for leave to appeal it was too late to do anything about it.

53. This is a systemic deficiency which can lead to injustice, as the present case demonstrates, and which ought to be considered on any future assessment of the provisions of POCA or the Criminal Procedure Rules. At the very least there ought to be a system in place whereby the Magistrates' Court is formally notified of the status of any appeal and kept updated, and a record is kept (e.g. on the POCA 1 form).

54. There can be no doubt that if Mr Parker's legal team had received notification of the refusal of leave to appeal on the papers, they would have renewed the application in time and prior to the sale. Whilst in consequence of the systemic deficiencies that we have pointed out, that may not have prevented the sale of the property from going ahead, nor the payment of the confiscation order, there is at least a chance that it might have stopped the distribution of the money under the compensation orders. As it was, Mr Parker was deprived of that chance.

MR PARKER'S APPEAL

55. Mr Parker's case is that the Judge was wrong to find that Michael Moore had a 50% interest in the property (and that he and Carly Moore were the only persons with a beneficial interest in it).

56. At the time of the confiscation proceedings Mr Parker believed that Rev Higgs had an interest in the property, and had invested on the same basis as himself, which explains why his case below was that Rev Higgs held the property on trust for himself (as to 47.3%), Mr Parker (as to 40%) and Michael Moore (as to 12.7%). In fact, as the Judge found, Rev Higgs had put no money into the property but had taken out the mortgage in his own name to assist the Moores in acquiring it as a family home. Mr Colclough, who represented Mr Parker at the hearing before the Judge and on this appeal, submitted that, in the light of the finding that Rev Higgs had no interest in the property, once the mortgagee was paid off, Mr Parker had a beneficial interest in 70% of the net sale proceeds (corresponding to his financial contribution to the deposit) and Michael and Carly Moore each had an equal share in the remaining 30%.

57. His primary argument was that Mr Parker obtained that interest through a common intention constructive trust by virtue of the express agreement made between himself and Mr Moore as to the use of his funds to invest in the property. He relied on the principle that a common intention constructive trust will arise where a party has acted to their detriment in reliance upon a common intention that he or she will acquire an interest in a property: see, e.g. *McGuinness v Preece* [2016] EWHC 1518 (Ch) per Newey J at [64]. The test to be applied in ascertaining the parties' intentions is an objective one. Mr Colclough submitted that Mr Parker's evidence established all the requisite elements for a common intention constructive trust and that the Judge gave no, or no adequate reasons for rejecting Mr Parker's claim despite accepting his evidence as truthful.

58. Alternatively if, contrary to his primary case, there was no common intention because it was never Mr Moore's objectively ascertained intention to give Mr Parker an interest in Bockingford Court, Mr Colclough contended that Mr Parker had an interest

in the property pursuant to the fraud constructive trust principles summarised in *NCA v Robb* [2014] EWHC 4384 (Ch).

59. Whilst that case establishes that the victim must take steps to rescind the fraudulent transaction in order to benefit under such a (remedial) constructive trust, Mr Colclough submitted that at the time of the hearing before the Judge, Mr Parker was still in a position to do so, and that his signature of the trust deed in 2018 did not amount to an affirmation of the tainted transaction with full knowledge of all the relevant circumstances. He made the powerful forensic point that Mr Parker could not have known that he had no interest in the property under a common intention constructive trust unless and until the Court made a finding to that effect. The alternative case was brought to cater for that possibility.

60. Mr Colclough denied that he had made any concession in the Crown Court that Mr Parker had sufficient knowledge to be able to affirm the transaction at the time when he signed the trust deed. As he pointed out, signing a document which on the face of it suggested that he did have a beneficial interest in the property, and which Mr Parker explained he signed because it reflected what was agreed in 2010, contradicts the suggestion that he knew when he signed it that he had no such interest.

61. Finally, if for any reason the intended purpose for which the £260,000 was paid to Michael Moore, and by Michael Moore to Hobson & Latham failed, Mr Colclough contended there was a resulting trust by application of the principles in *Barclays Bank v Quistclose Investments Ltd* [1970] AC 567. That argument was not raised before the Judge, but the Full Court granted permission to raise it when it gave leave to appeal. Mr Colclough had run a similar, but not identical, resulting trust argument before the Judge to cater for the possibility that a constructive trust was held to be unavailable because the relationship between Mr Parker and Mr Moore was a business relationship, rather than a family one (see paragraph 69 below). The Court felt that in fairness to Mr Parker he should be given the opportunity to raise all available legal arguments as to the potential consequences of a finding that there was a common intention to create an interest in the property, but for whatever reason that purpose was not or could not be brought into effect. At the time when leave to appeal was granted, the FCA appeared to be contending that if an express trust was unenforceable, because it was not made in writing, it was not open to Mr Parker to claim under a constructive trust and he was therefore without a remedy. No-one appeared to have considered whether, if the FCA was right about there being no constructive trust creating an interest in the property itself, there might be a resulting trust, at least in respect of the money Mr Parker had contributed to its purchase.

62. Mr Doble, on behalf of Carly Moore, objected to this argument being raised on appeal on the basis that if it had been run below, there were factual issues that he would have wished to explore with Mr Parker as to whether the money would have been returned to Mr Parker or to Manor Rose in the event that the purpose for which the money was intended could not be implemented. Mr Doble contended that it would or might make a difference to the existence of a *Quistclose* trust if the money would have gone back to Manor Rose, and that the inability to obtain any fact findings on the point put him at a forensic disadvantage. However, for reasons that will appear, we are not persuaded that Mr Doble's inability to explore that issue in the way he would have liked has led to any irremediable prejudice.

The Judge's determination

63. The Judge's task under s.10A was to ascertain what Michael Moore's interest was, if any, in Bockingford Court. The FCA's case (as stated in the judgment) was that he owned 100% of the property. Initially, besides Mr Moore, there had been four other claimants to an interest in the property, including Rev Higgs, but in the event the Judge only had to resolve the claims made by Carly Moore and Mr Parker. Rev Higgs decided not to give evidence and the Judge did not accept his claim to a share of the equity in return for taking on the mortgage, which was made in his witness statement. Mr Moore, having initially supported Mr Parker's claim, changed his position late in the day: he too did not give evidence.

64. Mr Parker was cross-examined by Mr Bird on the basis that his account of the money transferred out of Manor Rose being a personal investment in the property was made up after the event in order to gain an advantage over Mr Moore's other victims. Mr Parker strongly refuted that suggestion. That line of cross-examination was understandable in the light of the documents created by Michael Moore after he was prosecuted on the Maidstone indictment, and the absence of any contemporaneous documentary record of the arrangements made between Mr Parker and Mr Moore. However, the Judge rejected the prosecution case. He accepted that Mr Parker was telling the truth, and that the £260,000 which came from the Manor Rose account in turn contained money that Michael Moore had obtained from David Parker. He made fact-findings consistent with Mr Parker's account of his dealings with Mr Moore (which Michael Moore had accepted).

65. The Judge dealt with Mr Parker's claim extremely briefly – and only after finding that Michael and Carly Moore each had a 50% interest in Bockingford Court as their matrimonial home (on the basis of the type of common intention constructive trust to be inferred from the behaviour of persons living together in an intimate relationship described in *Stack v Dowden* [2007] 2 AC 432). Logically, he should have dealt with Mr Parker's claim first. Had he done so, he may not have fallen into error in the manner in which he did.

66. His entire reasoning was as follows:

> "And so I turn to the question of whether Mr Parker is the beneficiary of a resulting implied or constructive trust so that he would be entitled to the sum that he had contributed to the sale. I have reluctantly come to the conclusion that he is not. The purchase money in fact came from Manor Rose, of which Mr Parker was one of a number of victims; albeit, I suspect, the most seriously affected. Such interest as he had is so poorly recorded that the FCA had not heard of his existence until as late as 2017 and in fact there is nothing in writing until 2016. I have no doubt that Mr Parker was a truthful witness, as evidenced by his refusal to sign the backdated declaration of trust. But the evidence I have heard and read does not persuade me that he is the beneficiary of the trust which means that he can take precedence over other losers.
>
> I have considered the authority of *The National Crime Agency v Robb* [2014] EWHC 4384 upon which Mr Colcough relies, but that envisages a situation different from this. This case is all about a specific interest in a property and accordingly the Law of Property Act 1925 is engaged. Secondly, the money handed over by Mr Parker went into the Manor Rose account to be mixed with money belonging to other investors;

and thirdly, Mr Parker understood that his money was being used to purchase a property and he consented to that suggestion".

67. When Mr Bird was asked at the hearing to identify whereabouts in that passage there was any explanation of the Judge's reasons for rejecting the case of a common intention constructive trust, he candidly accepted that it was difficult to find. In fact there is no explanation. The final sentence of the first paragraph begs the question, why? If and insofar as it suggests that the evidence did not support the claim that there was a constructive trust, the Judge fails to identify where he regarded it as deficient.

68. Regrettably there is no reference in the judgment to the principles to be applied. They were accurately set out in Mr Colclough's skeleton argument in the court below, which cited relevant authorities and submitted that the parties' common intention was critical. He summarised the position in this way:

> "If there was a common intention as to beneficial ownership, effect should be given to that intention; if there is no such common intention, then a resulting trust analysis may be appropriate".

69. The "resulting trust analysis" was a reference to the type of resulting trust described by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at page 708:

> "… a resulting trust arises… where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions."

Although that passage was quoted verbatim in his skeleton argument in the Crown Court, Mr Colclough did not need to rely on such a presumption on appeal, because on the evidence accepted by the Judge there was an express agreement that the money was to be used to make an investment for Mr Parker in Bockingford Court.

70. The second of the relevant paragraphs in the Judge's determination quoted above appears to be addressing Mr Parker's alternative case, based on *NCA v Robb*, although even then it does not really engage with the legal arguments, and the reasons given for distinguishing that case are confused and provide no justification for refusing the remedy. There is no finding in relation to the vexed question of rescission or affirmation, for example. At most it might be inferred that the Judge was rejecting the factual premise on which the alternative case was based, on the basis that Mr Moore *did* objectively intend to give Mr Parker an interest in the property, because of the references to the Law of Property Act 1925, s.53 of which relates to express trusts of land, and to Mr Parker's understanding of what the money was to be used for, but that involves reading a great deal into his observations.

71. In his oral submissions, Mr Bird characterised his Respondent's skeleton argument on behalf of the FCA as an attempt to provide some *ex post facto* rationalisation for the Judge's decision. In a section of that document entitled "the Judge was right in law," Mr Bird accepted that on the evidence of Mr Parker there was an express agreement

that he should have a beneficial interest in the property. The three certainties (intention, subject matter, and objects) were all present. However, the express agreement for a beneficial interest in the property was oral only and s.53 (1)(b) of the Law of Property Act 1925 provides that an express trust in relation to land is of no effect unless it is in writing:

> " a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will."

Mr Bird submitted that because the express trust was never reduced to writing, it could not take effect. That is right, as far as it goes. Indeed it appears to have been common ground in the court below. It was also common ground that because of this, the only trust that could arise was a resulting or constructive trust.

72. However, in the next section of his skeleton argument, Mr Bird then went on to submit that "there cannot be (and is no room for) a constructive trust where there is an express one", and that "this was a commercial arrangement and not a family arrangement". He also repeatedly referred to Mr Parker's failure to take steps to secure or record his interest. None of these points provides an answer to Mr Parker's claim. If an express trust is operative, then of course there is no room for a constructive trust, and in that sense the two types of trust cannot exist simultaneously; but it is not and never has been the law that where an express trust of land fails for want of the prescribed statutory formalities, the intended beneficiary is precluded from acquiring a beneficial interest in the property under a constructive trust because there was an express agreement.

73. Mr Bird's written submissions made no mention of two important matters. First, at the time of the oral agreement between Michael Moore and Mr Parker, Michael Moore was in no position to create an express trust of the land because it had not yet been purchased. Indeed, even when it was purchased, Michael Moore did not acquire the legal title because it was conveyed to Rev Higgs as the registered owner. Rev Higgs could be regarded as Michael Moore's nominee, but nevertheless as the registered owner and only person with the legal title he would have had to have been a party to any express deed of trust over the land, because he was the person with power to declare the trust, as was recognised at the time of the attempts by Michael Moore to create such a deed. However, the inability to create a valid express trust of land at that time would not preclude the investment moneys paid from Manor Rose's account via Michael Moore to Hobson & Latham with Mr Parker's assent from being treated as subject to a trust from the moment they came into Michael Moore's possession, because on Mr Parker's evidence they were to be used for the sole and express purpose of buying the property as an investment (and were in fact used to acquire that property in due course). The question the Judge ought to have addressed, but never did, was what were the consequences of those moneys being used for that agreed purpose, pursuant to an agreement that Mr Parker would obtain a pro rata share in the property?

74. More importantly, bearing in mind that it was common ground that Mr Parker could only claim under a constructive or resulting trust, the FCA's skeleton argument did not mention, nor address in terms, s.53(2) of the Law of Property Act 1925 which provides that:

"This section does not affect the creation or operation of resulting, implied or constructive trusts."

As this demonstrates, Parliament has expressly envisaged the possibility of a constructive trust of land arising in circumstances where there is a common intention or an express or implied agreement to give a beneficial interest in property which has not been committed to writing (and thus cannot take effect as an express trust). A *Stack v Dowden* trust over a family home is a paradigm example, but it is not exclusive.

75. Moreover, there is Court of Appeal authority directly in point. That authority, *Kahrmann v Harrison-Morgan* [2019] EWCA Civ 2094, post-dated the Judge's determination and therefore could not have been cited to him. The reserved judgment in that case was handed down on 27 November 2019, around a week after the lodging of the Respondents' Notices of Carly Moore and the FCA. It was not mentioned in Mr Bird's skeleton argument on appeal, served on 4 May 2021, because he still did not know about it. Mr Doble is to be commended because, in the best traditions of the Bar, he brought that authority, which is adverse to his client's case, to the attention of this Court (and of his opponent Mr Colclough) as soon as he became aware of it, very shortly before the hearing of the appeal.

76. In *Kahrmann v Harrison-Morgan* the Court of Appeal considered an express agreement between two parties, K and H, that they would hold the freehold interest in a specified property in equal shares after the freehold was acquired by K (or by one of his companies) exercising rights of enfranchisement under the Leasehold Reform Act 1967. The agreement could not take effect as an immediate trust because the freehold was future property which would be acquired only if a successful claim for enfranchisement was made. It could not take effect as a valid contract relating to the future ownership of the freehold once it was acquired, because such a contract would be void for failure to comply with the formal requirements of s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989. However, the Court held that it could give rise to an equitable interest in the form of a common intention constructive trust because it reflected the common intention (express or inferred) of K and H.

77. Henderson LJ, who gave the leading judgment, relied on the following quotation from paragraph 9-074 of Lewin on Trusts, 19th Edition:

> "The interest to be taken under an express agreement, arrangement or understanding by the party who is not the legal owner may be either defined or undefined. Where there is an express agreement that the claimant is to have some defined interest in the property, it will of course be necessary to have recourse to the law concerning common intention trusts only where the failure to comply with some formal requirement (section 53(1)(b) of the Law of Property Act 1925 in the case of land) prevents the agreement from taking effect as an express trust. If the parties agreed that the claimant should have some defined share, effect will be given to that agreement."

78. In fairness to Mr Bird, he substantially modified the FCA's position in his oral submissions at the hearing of the appeal, and readily accepted that s.53(1)(b) was not a complete answer to Mr Parker's claim. Mr Bird submitted that a constructive trust is an equitable concept, and if an express trust has failed, the Court must decide whether

the circumstances were such as to give rise to such a trust. Here, the Judge had decided that they were not, for reasons that were not clearly articulated, but which Mr Bird said he had tried to discern from the Judge's observations; whether those were in fact his reasons, it was for this Court to determine whether the Judge's decision was right or wrong in law. Thereafter Mr Bird very properly adopted a position akin to that of an *amicus curiae* and made some extremely helpful submissions on the three different ways in which Mr Parker claimed a beneficial interest under a constructive or resulting trust, for which we are grateful.

79. We make it clear that we intend no personal criticism of Mr Bird, who was plainly acting in accordance with his instructions and trying his best to advance the prosecution case, bearing in mind the interests of the 32 other victims who received the compensation, whilst accepting that the Judge's fact-findings precluded the FCA from advancing the same case as it had in the court below. However, once the Judge had rejected the prosecution case as it was put before him, and accepted Mr Parker's evidence as truthful, there *was* a proper basis for finding a common intention constructive trust. *Kahrmann v Harrison-Morgan* spelled this out most clearly, but the authorities on which Mr Colclough had relied before the Judge were also supportive of that analysis. It was also obvious that no coherent explanation had been given by the Judge for rejecting his claim. Despite this, the FCA served a Respondent's Notice and written submissions opposing his appeal root and branch. This is regrettable. The failure to put the express trust in writing did not leave Mr Parker without a right to claim the beneficial interest he had been promised in the property, as the FCA suggested. Careful consideration of the applicable principles and the relevant authorities should have led to the FCA taking a neutral stance instead of the "express trust or nothing" stance that it did. Moreover, all three parties could and should have found *Kahrmann v Harrison-Morgan* much sooner than they did.

80. We accept that there was some muddying of the waters because of an initial unwise decision not to pursue the common intention constructive trust argument on appeal (which Mr Colclough explained, but prudently retracted with the Court's permission at the hearing of the renewed application for leave). Even so, entirely properly, Mr Bird did address Mr Parker's primary case in his skeleton argument, whilst noting that the argument was no longer pursued, because the FCA was trying to provide reasons why the Judge was right to reject it. When the argument was resurrected, and leave to appeal was granted, the FCA adhered to its position that there was no basis for the Judge to have found a constructive trust, right up to the hearing of the appeal.

81. Of course it is right that in the context of proceedings under POCA the prosecutor is concerned with the interests of the victims of the frauds for which the offender has been convicted, and owes no duty to his other victims. But that does not mean that it is incumbent on the prosecutor to try and uphold at all costs a decision that, despite rejecting the prosecution case, has led to a finding that the offender had a greater interest in the property than that to which he was truly entitled. POCA is intended to deprive the *wrongdoer* of criminal proceeds, not to deprive innocent third parties of their property in order that other victims can be compensated.

82. In *Kahrmann v Harrison-Morgan* at [98] and following, the Court roundly dismissed the argument (relied on heavily by Mr Doble and supported, at least initially, by Mr Bird) that the analysis referred to in paragraphs 76 and 77 above was not available where the parties were in a commercial relationship. It is therefore no answer to Mr

Parker's claim to argue that the *Stack v Dowden* type of constructive trust that the Judge found proved in respect of Carly Moore is not available in a commercial context. At [99] Henderson LJ said that he did not doubt that special considerations apply to the purchase of a home by co-habiting parties and cognate transactions, but explained that his analysis did not depend on any special features of such cases. The common understanding between K and H was a matter of express agreement between them; that was something very different from the inference or imputation of a common intention retrospectively ascertained by examination of the whole course of conduct between co-habiting parties over many years, following the seminal authorities in the domestic context of *Stack v Dowden* and *Jones v Kernott* [2012] 1 AC 776. He said:

> "There is no reason why constructive trusts of a traditional kind may not arise in a commercial context. As the authors of Lewin observe at paragraph 9-064, citing the decision of this court in Agarwala v Agarwala [2013] EWCA Civ 1763, [2014] WTLR 373:
>
> An express agreement, relied on to the detriment of the party claiming a beneficial interest, may found an interest under a common intention constructive trust outside the scope of the domestic consumer context".

<u>The correct analysis</u>

83. The issue at the heart of this appeal can be identified as follows: if A gives B money for the express purpose of using it only to purchase an identified property as an investment, A and B agree that A will have an interest in the property pro rata to his financial contribution, and the money is then used to buy the property, does A have a beneficial interest in the property? The answer is yes. It would be surprising if it were otherwise. A has acted to his detriment in consenting to the use of his money to fund the purchase, in reliance on the express promise of an interest in the property. It makes no difference to that answer that the property was subsequently purchased in the name of C, who was B's nominee or agent.

84. This was a classic example of a common intention constructive trust, with Mr Moore's intention being objectively evinced by what he expressly agreed, said and did at the time, which was consistent with Mr Parker's understanding of the arrangement between them. His subjective intention, even if different, is irrelevant. The money went to the conveyancing solicitors and was used for its intended purpose; Mr Moore did not take the money and use it for some other purpose, such as purchasing different land – had he done so, there would undoubtedly have been a trust. Mr Parker is no worse off because the oral agreement was performed.

85. Mr Doble submitted that irrespective of the finding of Mr Parker's honesty, the evidence did not establish a shared intention that Mr Parker would hold an interest in Bockingford Court. However, in our judgment the evidence plainly did establish such an intention and none of the points made by Mr Doble undermined Mr Parker's case. The Judge made no finding that Mr Parker had honestly but mistakenly confused what he was told in 2016 with what actually happened in 2010; on the contrary, he accepted his evidence about what happened in 2010.

86. If Mr Parker was telling the truth about what Michael Moore said and did, as the Judge found he was, it does not matter that Mr Parker had previously been prepared to lend money to Manor Rose without security, or that Michael Moore may not have needed to promise him an interest in the property in order to obtain the funds from him (or to take them out of Manor Rose). Nor does it matter that the agreement was not documented at the time, nor that the documents put together by Michael Moore years later may have contained some inaccuracies or inconsistencies about Mr Parker's share. It is possible to give effect to the common intention by working out the percentage of Mr Parker's beneficial interest in the net proceeds of sale, once the mortgage and the costs of sale were accounted for, by reference to his initial financial contribution.

87. Mr Doble relied on the fact that the funds (or most of them) had been provided by Mr Parker to Manor Rose before any question arose of granting Mr Parker an interest in the property. However, that argument (which seems to have had some influence on the Judge's decision) ignored Mr Parker's evidence about the investment being made independently of Manor Rose and about his loans to Manor Rose being repaid. Critically, Bockingford Court was never intended to be a Manor Rose investment. The fact that Mr Parker originally paid the money to Manor Rose and that most of it went into Manor Rose before he made the oral agreement with Mr Moore to invest in Bockingford Court, is as irrelevant as it would have been if the money had previously been sitting in Mr Parker's bank account. Nor does it matter that the money borrowed by Manor Rose may have been intermingled with money from other investors whilst it was held by Manor Rose, another irrelevant factor mentioned by the Judge.

88. On Mr Parker's evidence, the investment in the property was not being made through Manor Rose. His understanding was that Manor Rose would be repaying the loan(s) by paying the money to Hobson & Latham on his behalf (in the event, via Michael Moore, who was authorised by him to take the necessary steps to effect the payment). That understanding was legally correct. In the absence of any agreement to the contrary, Manor Rose was obliged to repay any loan to Mr Parker on demand. If a debtor pays a third party the sum owed, at the direction of the creditor, whether directly or through the creditor's agent, the debt is discharged. That is what happened here.

89. The fact that Mr Parker continued to receive payments from Manor Rose afterwards is not inconsistent with his having an interest in Bockingford Court, as the FCA had suggested in its Respondents' Notice. The evidence that the £260,000 originated from Mr Parker was overwhelming and the Judge accepted it. There was sufficient money left in Manor Rose to cover the maximum of £102,000 that Mr Parker received from Manor Rose or its liquidator after the investment in Bockingford Court, especially if interest on the repayments is taken into consideration.

90. There was never any intention that Mr Moore should *borrow* the £260,000 from Mr Parker, or have it as a gift. The investment opportunity was presented to Mr Parker as a joint venture with Michael Moore (and thereafter with him and Rev Higgs) and Mr Parker gave authority to Michael Moore to broker/effect the deal on his behalf. Therefore in his dealings with the money, Mr Moore acted throughout as an agent for Mr Parker and had fiduciary obligations in respect of it. It makes no difference to the analysis that he briefly intermingled Mr Parker's money extracted from Manor Rose

with other money in his own bank account, since that money also went towards the purchase of the property.

91. It was unnecessary for Rev Higgs to be party to the agreement or to share the common intention of Mr Moore and Mr Parker, a point that was hinted at by Mr Bird in his skeleton argument without ever being fully developed. The constructive trust operated on the conscience of Michael Moore; he could not evade its operation by using a nominee or agent to acquire the freehold, nor by keeping Rev Higgs in the dark about Mr Parker (though Rev Higgs stated in his witness statement that he was aware of Mr Parker's investment in the property from the time that he was first approached by Michael Moore to take out the mortgage). Rev Higgs is and was in no better position to resist Mr Parker's claim to a beneficial interest than Michael Moore himself.

92. In fact it appears from his witness statement that Rev Higgs *did* share the common intention that Mr Parker would have a beneficial interest in the property in proportion to his financial contribution towards its acquisition. The fact that Rev Higgs appeared anxious to persuade Mr Parker to sign the second declaration of trust prepared by Mr Moore is also consistent with his being aware of Mr Parker's involvement as an investor from the outset, and with his consent to that arrangement. Whilst it is true that Rev Higgs did not mention Mr Parker to Hobson & Latham nor to the original mortgagee nor even to the substitute mortgagee at the time of the re-mortgage in 2013, it must be remembered that Rev Higgs was fostering the illusion that he was buying the property for himself with money provided by his stepson to him as a gift, whereas in fact he was just lending his name as mortgagor to enable the Moores to obtain an interest-only mortgage which they would finance. Seen against that background, he had no reason to mention Mr Parker.

93. The Judge made no findings about when Rev Higgs became aware of Mr Parker's involvement or what he knew about it – of course, he was severely disadvantaged in that regard by the fact that Rev Higgs chose not to give oral evidence. But he did not need to make any such findings. Just as it would have made no difference to the existence of the constructive trust in *Kahrmann v Harrison-Morgan* if, upon enfranchisement, the freehold had been conveyed into the name of one of K's companies, instead of to K himself, it makes no difference in the present case that the Rev Higgs became the registered owner instead of Michael Moore.

94. Contrary to Mr Bird's written submissions, and Mr Doble's written and oral submissions, the constructive trust in favour of Mr Parker is not inconsistent with the Judge's finding of a *Stack v Dowden* trust in favour of Carly Moore. As Mr Bird rightly accepted in his oral submissions, that trust only operated in respect of any equitable interest in the family home that was acquired by Michael Moore for himself when the property was conveyed to Rev Higgs. Mr Moore held *that* interest on trust for himself and Carly in equal shares. Her interest under that trust did not take priority over the constructive trust in favour of Mr Parker.

95. Mr Doble at one point advanced the novel submission that in the event the Court concluded that there were two constructive trusts, one in favour of Mr Parker and the other in favour of Carly Moore, both trusts crystallised simultaneously on the acquisition of the property, and neither took priority over the other. Therefore, in order to work out Mr Parker's interest in the net sale proceeds his financial contribution of 70% of the deposit should be added to Carly Moore's, which the

Judge found was 50%, and prorated (120%:100%), leaving Mr Parker with a 58% share and Mrs Moore with 42%.

96. Whilst undoubtedly creative, that analysis is incorrect, and not just because it makes no allowance for Michael Moore's financial contribution, small as it was. The *Stack v Dowden* constructive trust only relates to what would otherwise have been Mr Moore's interest in the matrimonial home. As Purchas LJ succinctly put it in *Lloyds Bank Plc v Rosset* [1989] 1 Ch 350, at 402-403:

> "There was, therefore, an equitable interest enjoyed by the wife prior to the completion of the purchase. If the question is asked "an equitable interest in what? The answer lies in the concept that her equitable interest rests in the equitable interest enjoyed by the husband prior to completion."

There is no basis for a *Stack v Dowden* constructive trust operating in respect of Mr Parker's equitable interest in the property. It was not open to Michael Moore to create a further trust in favour of his wife over Mr Parker's share in the property.

97. Mr Colclough therefore succeeds in his primary argument. In those circumstances it is unnecessary to burden this already lengthy judgment with consideration of the alternative case based on *NCA v Robb*.

98. For the sake of completeness, if for any reason, the purpose for which Mr Parker's £260,000 was entrusted to Mr Moore had failed, and he could not obtain a beneficial interest in the property, we would have had no hesitation in finding that there was a *Quistclose* resulting trust. The money was plainly not intended to be at the free disposal of Michael Moore, but was only ever to be used towards the purchase of Bockingford Court as an investment for Mr Parker.

99. We reject Mr Doble's submission that the evidence did not establish the necessary exclusivity of purpose. The sole reason the money was taken out of Manor Rose and channelled via Michael Moore's bank account to the conveyancing solicitors was to make a payment of the lion's share of the deposit on that property. If he could not have used the money to create an interest for Mr Parker in Bockingford Court, then Mr Moore could not have used it for some other purpose without the further express assent of Mr Parker.

100. Mr Doble submitted that it was far more likely to have been contemplated that in such circumstances (if the purpose failed) the money would be returned to Manor Rose, but even if that were right, it would make no difference to the existence of the resulting trust. As Lord Millett made clear in *Twinsectra v Yardley* [2002] 2 AC 164 at [74], the key question is whether the parties intended the money to be at the free disposal of the recipient. In the present case, they did not. Michael Moore would not have been entitled to keep the money or the share in the property that it represented for himself; once the purpose failed, he would have been obliged to account for it to Mr Parker and deal with it in accordance with his directions.

101. The money belonged to Mr Parker, not to Manor Rose; it could only have been returned to Manor Rose at his direction or with his assent. If that happened, Manor Rose would have been re-borrowing the money from Mr Parker and liable to repay him on demand, and thus the situation would be the same as if the money had been

credited to a bank account in Mr Parker's name. However, as the purpose for which the money was to be used did not fail, Bockingford Court was acquired with the money and Mr Parker thereby acquired a beneficial interest in the property under a constructive trust, there is no need for a *Quistclose* trust.

CONCLUSION

102. Mr Parker's appeal is allowed. The Judge's determination that Michael Moore and Carly Moore each had a 50% interest in the equity of the property was wrong, and must be set aside. By virtue of the operation of a common interest constructive trust, Mr Parker was entitled to 70% of the net proceeds of sale of Bockingford Court, and Michael and Carly Moore were each entitled to 15%. The amount of the confiscation order was therefore too much, and half of Mr Parker's 70% share was wrongly treated as belonging to Michael Moore. The terms of the confiscation order will need to be varied to reflect the true amount available. That will not affect the fact that it has been satisfied by Mr Moore. We consider that this Court does have the power under s.32(2A)(b) POCA to vary the confiscation order, because if it does not uphold the determination it has the widely expressed power to make whatever other order it considers to be appropriate. It is obviously appropriate that the confiscation order should be adjusted to reflect the order the Judge should have made if he had correctly determined Mr Moore's interest in Bockingford Court. However, on instructions and for the avoidance of any doubt about this, Mr Bird has helpfully indicated that the FCA is prepared to seek leave to appeal against the confiscation order under s.31(1) POCA in order to seek a reduction consistent with our findings. The new available amount would be £255 (the money in the bank account) plus (15% x £340,787) = £51,373. This will apparently facilitate the return of the overpayment by the Magistrates' Court in respect of the confiscation order and interest. We are prepared to grant the FCA leave to appeal and the necessary extension of time, and allow the appeal in order to achieve this.

103. Obviously, in so far as there are any surplus moneys held in court funds by reason of satisfaction of the confiscation order they should be paid to Mr Parker, together with any interest that may have accrued, but it seems that in practical terms the Court is powerless to achieve the recovery of the money belonging to Mr Parker that was paid out to Mr Moore's other victims under the compensation orders. They were not separately represented on this appeal, and the compensation orders have not been appealed. We are not persuaded by Mr Colclough's written submissions on consequential matters that we should interfere with those orders even if we had the power to do so. This has nothing to do with reading the provisions of POCA compatibly with Article 1 Protocol 1 of the ECHR. Compensation orders are made under an entirely different statute. Mr Parker may wish to take some legal advice about his options regarding the sale proceeds that were paid to Carly Moore. However, he may not have the appetite for further legal proceedings; that would be entirely understandable in the light of his experiences to date.

104. We return to the point that we made at the outset of this judgment, that Mr Parker has been badly let down by the criminal justice system. Sadly, we cannot fully restore his money to him. However, Mr Bird informed the Court that the Lord Chancellor has a fund from which *ex gratia* payments can be made. If it were possible to resort to the fund in the extraordinary circumstances of this case, we would strongly recommend the Lord Chancellor to consider Mr Parker's situation sympathetically. He should not

be left in the position where his successful appeal has failed to achieve the fair result that would ordinarily follow from the setting aside by this Court of an erroneous determination under POCA. If there were any possibility to put this right, it would no doubt go a long way towards restoring his faith in British justice.