Neutral Citation Number: [2024] EWCA Crim 357

Case No: 202300362 B5, 202300367 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM the Central Criminal Court
The Recorder of London, HH Judge Lucraft KC
T2020 7185

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2024

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
LORD JUSTICE SNOWDEN
and
MR JUSTICE JEREMY BAKER

- -

Between:

RONAN HUGHES	**Applicant**
CATHERINE HUGHES	**Interested Party**
- and -	
THE KING	**Respondent**

- -
- -

Tim Moloney KC (instructed by Tuckers Solicitors) for the **applicant**
John Carl Townsend (instructed by McNamee McDonnell Solicitors) for the **Interested Party**
Paul Jarvis (instructed by **CPS Proceeds of Crime Division**) for the **Respondent**

Hearing dates: 28 September 2023

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Approved Judgment

Note - include here the details of any specific reporting restrictions that have been made by the court. This will have been identified in the Criminal Appeal Office Summary under the Reporting Restrictions heading or from the Court Order. The wording of any reporting restriction must appear in RED TEXT.

Lord Justice Holroyde:

Introduction:

1. The applicant Ronan Hughes was the manager of a haulage company in the Republic of Ireland. From early 2018 onwards, he played a leading role in smuggling illegal immigrants across the Channel from northern France into the United Kingdom, receiving cash payments of £3,000 for each person he transported. In October 2019 two of his employees took part in transporting 39 Vietnamese nationals in an airtight trailer from France to Essex. When the doors of the trailer were opened nearly 12 hours later, all those inside were dead. The causes of their dreadful deaths were asphyxiation, carbon dioxide poisoning and hyperthermia. In August 2020, at the Central Criminal Court, the applicant pleaded guilty to 39 offences of manslaughter and one offence of conspiring to assist unlawful immigration.

2. In January 2021 the applicant was sentenced to 20 years' imprisonment, less a number of days which he had spent in custody whilst awaiting extradition from the Republic of Ireland. Confiscation proceedings were adjourned.

3. A subsequent application for leave to appeal against the total sentence was refused by this court, differently constituted, in November 2021.

Confiscation proceedings in the Crown Court:

4. The confiscation proceedings came before the Recorder of London ("the judge"). They were delayed by the need to make enquiries both in this jurisdiction and elsewhere. At the hearing in December 2022 the respondent was represented by Mr Polnay. As in this court, the applicant was represented by Mr Moloney KC and the Interested Party Catherine Hughes ("Mrs Hughes"), the applicant's mother, was represented by Mr Townsend.

5. In the event, a substantial measure of agreement was reached between the parties. It was agreed that there was no material difference between Irish law and English law on the law relating to registered title to land and the creation of equitable interests in land. Further, the applicant accepted that in accordance with s6 of the Proceeds of Crime Act 2002 ("the Act" or "the 2002 Act"), the "lifestyle" provisions of the Act applied to his case; that his benefit from his general criminal conduct was £182,078.90; and that in calculating the available amount under s9 of the Act, he had available assets (in the form of cash seized, the credit balance in a bank account, and the value of vehicles owned by him) to a total value of £55,265.23.

6. There was, however, an issue as to the value of any interest the applicant may have in a property at Leitrum Silverstream, Tyholland, County Monaghan in the Republic of Ireland, comprising a house ("the house") which the applicant (until his arrest) occupied with his wife and children. The applicant had paid for the house to be built at the centre of a large area of farmland ("the land") which was at the time registered in the name of his father, Gerard Hughes. In October 2020, Mrs Hughes was added to the registered title as joint owner with her husband, and following Gerard Hughes' death in January 2021, the land is now registered in the sole name of Mrs Hughes.

Section 10A:

7. In accordance with s10A of the Act, Mrs Hughes was joined as an interested party in the confiscation proceedings. Section 10A provides:

> "**10A Determination of extent of defendant's interest in property**
>
> (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), and
>
> (b) does not apply in relation to a question that arises in proceedings before the Court of Appeal or the Supreme Court.
>
> (5) In this Part, the 'extent' of the defendant's interest in property means the proportion that the value of the defendant's interest in it bears to the value of the property itself."

8. The respondent contended that the applicant and his wife each owned an equitable half share in the house.

The evidence:

9. The evidence before the judge did not include any oral evidence. In summary, it was as follows.

10. In 2006 the applicant, describing himself as "the prospective owner", applied for planning permission to build the house. His father gave written permission for the applicant "to build a house on my land".

11. In a statement dated 12 March 2021, served pursuant to s18(2) of the Act, the applicant said:

> "I own my family home which is my principal and only residence at Leitrum Silverstream, Tyholland, Monaghan. I am the joint owner of the property with my wife Michelle Hughes. The land on which the house is built is owned by my parents Jerry and Cathy Hughes. I do not own any other property."

The respondent relied on that statement as an admission by the applicant.

12. In a statement dated 12 May 2021 the respondent's financial investigator Mr Finbow valued the house at £531,994.28 (€618,598).

13. The applicant disputed that valuation. In a statement dated 21 September 2021, served pursuant to s17 of the Act, the applicant said that he was not the registered owner of the land. He referred to an opinion of counsel, who had expressed the view that the applicant (either alone, or in conjunction with his wife) "may very well" have an equitable interest in the house and land, but that it was not possible to form a complete view on the information available, although the documents relating to planning permission contained evidence of permission by the applicant's father and an expectation that the applicant would become owner in the future. The applicant's statement continued:

> " The [applicant] may have an equitable interest in the House and Lands, however such equitable interest cannot be ascertained based on the current available evidence and the property is not saleable until such time as the true equitable interest is settled. Furthermore, any such interest would be shared with Catherine Hughes and Michelle Hughes. The [applicant] believes that as the property cannot be sold with good title and it currently has Nil value in the hands of the [applicant]."

14. In response, Mr Finbow filed a further statement referring to an opinion of counsel who had expressed the view that it was "probable" that the applicant had a beneficial interest in the property equal to 50% of the open market value of the property, less the costs of sale.

15. Further documents produced by Mr Finbow included –

i) an estimate of the construction cost of the house in the sum of €638,398; and

ii) a certificate of market value, obtained by the applicant's wife, showing the current value of the house, if offered for sale on the open market with good title, as approximately €350,000.

16. Mrs Hughes submitted that the applicant had no interest relating to the house that could be included in his property within the meaning of s84 of the Act, and that any such interest would in any event have no realisable value. She filed an affidavit dated 13 December 2022, in which she said amongst other things –

> "14. … the reality is that the [applicant] and his family were given permission to erect a property upon the land for them to reside in … remain close to the family and provide a base for their children to attend school in the local area. Gerard and I were, like many parents and grandparents, keen to have our family close to us and were happy with that aspect of the arrangement. Gerard and I did not, however, agree intend or provide any assurance, whether expressly or by implication, to the [applicant] or his family (a) that they would obtain rights to the land; or (b) that they could sell the property.
>
> …
>
> 20. I make no concession of any kind and nothing that is said on my behalf should be taken to in any way dilute my rights as legal owner of this land. Under Irish law I am the owner of the land, and I shall continue to be the owner of the land. No other person has any marketable or other interest in the land. My son Ronan, the [applicant], had permission to build his house and to reside at this house. This permission was personnel [sic] to my son Ronan and no other party."

17. Mrs Hughes also referred in her affidavit to her intention to distribute her property (including the land and house) among her wider family on her death, and indicated that the location of the house (in the middle of the farm estate) would give rise to problems if there were any attempt to sell it, not least because she would not willingly grant any rights of way to a third party to access it.

18. The respondent did not seek to cross-examine Mrs Hughes upon her affidavit.

The decision of the judge:

19. In a detailed written ruling handed down on 6 January 2023 the judge referred to case law establishing that, when deciding what amount is available to a defendant in confiscation proceedings, practical difficulties which he may face in producing a liquidated sum of money are not a relevant consideration.

20. At paragraphs 41 and 42 of his ruling, the judge said:

> "41. On the issue of seeking to ascribe a value between land and property based on it, Mr Townsend reverts to his submissions as to the absence of a market and hence no value.

As I indicated in the course of the submissions, anyone looking on the situation would see the defendant, his wife (and their children) living in a house they paid to be built on land owned by another. Most bystanders would say they have an asset in the house – an equitable interest. Mr Townsend relies on the decision of the Court of Appeal in *Inwards and others v. Baker* [1965] 1 All ER 446 and the case of *Smyth v. Halpin* [1997] 2 IRLM 38. In *Inwards v. Baker* Lord Denning stated:

> *"In his case it is quite plain that the father allowed an expectation to be created in the son's mind that this bungalow was to be his home. It was to be his home for his life or, at all events, his home as long as he wished it to remain his home. It seems to me, in light of that equity, that the father could not in 1932 have turned to his son and said: "You are to go. It is my land and my house." Nor could he at any time thereafter so long as the son wanted it as his home.*
>
> *Mr. Goodhart* [counsel for the plaintiffs] *put the case of a purchaser. He suggested that the father could sell the land to a purchaser who could get the son out. But I think that any purchaser who took with notice would clearly be bound by the equity. So here, too, the present plaintiffs, the successors in title of the father, are clearly themselves bound by this equity. It is an equity well recognised in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there. It is for the court to say in what way the equity can be satisfied. I am quite clear in this case it can be satisfied by holding that the defendant can remain there as long as he desires it to be his home."*

42. Mr Townsend submits that the situation is entirely analogous to the facts here and that the 'son', the defendant here, did not obtain a right to the land as a consequence. However, it seems to me that this submission ignores the import of the decision of Lord Denning – the 'son' had an equity. What is being submitted by the prosecution here is that the defendant has an equitable interest in the house built on the land and that equitable interest is to be regarded as property under the provisions of the Act. In my judgement the prosecution submissions are right: this defendant has an equitable interest in the house built on the land in Ireland."

21. Later in his judgment, the judge added this:

> "47. On all the material available to me I am entirely satisfied that the defendant has an equitable interest in the property in Ireland. I agree with the observation made by Mr Polnay that,

> taking a step back, it would be a remarkable conclusion if the existence of an equitable interest would be extinguished merely by the opposition of a bare legal owner. I am also entirely satisfied that the equitable interest the defendant holds has a value. Two valuations have been provided. The defendant's wife obtained a certificate for market value of €350,000 and the estimated costs of construction are given as €683,398. Taking the lower of these amounts (which is probably being over generous to the defendant) and on the basis of a 50% share, it produces a figure of €175,000. The sterling equivalent is approximately £150,000."

22. The judge accordingly held that, in calculating the available amount, £150,000 was to be added to the agreed figures totalling £55,265.23.

23. On that basis, the judge concluded that the applicant had not discharged the burden which s7(2) of the Act places upon him of showing, on the balance of probabilities, that the available amount was less than the benefit figure. He therefore made a confiscation order in the sum of £182,078.90, with 2 years' imprisonment in default of payment. He directed that the confiscation sum be paid as compensation to the bereaved families of those who had been killed.

The applications to this court:

24. Both the applicant and Mrs Hughes have applied for leave to appeal against the judge's ruling. They both contend that that the judge erred in finding that the applicant has an interest in the property and that the value of that interest is to be included in the amount available to pay the confiscation order. The Registrar, treating both applications as having been lodged in time, has referred the applications to the full court.

The submissions:

25. We have been assisted by the written and oral submissions of Mr Moloney KC and Mr Townsend, and of Mr Jarvis, now representing the respondent. Following the hearing, the parties provided helpful additional submissions in writing as to the powers of this court. We are grateful to all counsel.

26. Mr Moloney adopts and supports the submissions of Mr Townsend. Mr Moloney submits that, in the statement of 12 March 2021 which we have quoted at [11] above, the applicant was stating what he then understood his position to be, but says that the applicant now accepts that he was wrong. He emphasises that the applicant had only ever claimed to be the owner of the house, not the owner of any part of the land on which it was built. Mr Moloney argues that there was no evidence before the judge to contradict Mrs Hughes' sworn evidence that the applicant has only a personal right to occupy the house with his family. Mr Moloney therefore submits that the judge was wrong to find that the applicant has a realisable 50% interest in the property. He further submits that, even if the applicant has an equitable interest in the property, it is an interest which is incapable of realisation (because Mrs Hughes will not surrender her title to any part of the land, or grant a right of way to access the house, and a court

is unlikely either to make an order against her or to appoint a receiver) and should therefore have been valued at nil.

27. Mr Townsend submits that, in accordance with the understanding of the applicant and his parents at the time when the house was built, the applicant has only ever had an equity, namely a personal right to reside in the house with his family, but does not have an equitable proprietary interest in the land. Accordingly, he argues, this is not a case of the applicant having a saleable asset but facing potential difficulties in realising its value: rather, the house and land are not the applicant's asset to sell. He relies on the decision of this court in *R v Cornfield (Mark)* [2007] 1 Cr. App. R. (S) 124 at p177:

> "In our judgment, market value … has to be viewed in the context that it is seeking to define 'realisable property'; and in the context of legislation, draconian certainly, but whose purpose is to confiscate that which a defendant is able to realise. It must be realisable in some real way."

28. Mr Townsend submits that the applicant does not have any present right to sell the house, because the land on which it sits is owned by Mrs Hughes. He further submits that there is no evidence that there was ever any shared intention between the applicant and his parents that the applicant would in the future have a right to acquire the land. Therefore, Mr Townsend submits, the house has no value in the applicant's hands, and there was no proper way in which the judge could ascribe a market value to the house when it was not realisable by the applicant.

29. Mr Townsend acknowledges that the applicant paid the costs of building the house, thereby suffering a detriment in reliance on his father's promise that he and his family would have a right to reside in the house without having to make any payment for the land on which the house stands. Mr Townsend accepts that principles of proprietary estoppel would mean that Mrs Hughes therefore could not require the applicant (or his family) to vacate the house. He further concedes that the applicant might have an arguable claim based on proprietary estoppel if Mrs Hughes left him nothing in her will, and therefore might have a chose in action which could be capable in the future of amounting to an interest in property for the purposes of the Act – although Mr Townsend suggests that it is no more than a contingent possibility based on difficult legislation and with an uncertain outcome in any litigation.

30. Mr Townsend points out that, at the conclusion of the hearing before the judge, he referred to Mrs Hughes' evidence contained in her affidavit and added that –

> "… but she is available on the link and if Mr Polnay wishes to cross-examine Catherine Hughes and your Lordship feels it would be helpful to hear from Catherine Hughes of course that procedure can be followed before this hearing is concluded."

31. The judge in response said that he did not think he would be greatly helped by hearing Mrs Hughes repeat, and be cross-examined about, what was contained in her affidavit. Mr Polnay said that the respondent did not seek to go behind the position of the third party intervener. He did not wish to add to his written submissions and therefore did not suggest it was necessary for the court to hear oral evidence from Mrs Hughes.

32. In response to that last point, Mr Jarvis submits that at the start of the hearing before the judge no party had suggested there was any need for oral evidence, and the judge could properly make the findings he did on the evidence before him. In the event, Mr Jarvis observes, the applicant gave no evidence resiling from his written statement that he owned the house.

33. Mr Jarvis acknowledges that the judge did not precisely identify the basis on which he found the applicant to have an equitable interest in the property; but he emphasises that the judge clearly rejected the submission that the applicant merely had a licence to occupy the house. Mr Jarvis' core submission, advanced towards the end his submissions, is that the judge was entitled to, and did, find that the applicant has an equitable interest in the house and land arising from a constructive trust reflecting the common intention of the parties. He submits that the evidence contemporaneous with the building of the house, including the applicant's reference to himself as the "prospective owner", is consistent with his having an equitable interest in the property – that is, the house and the land on which it sits, together with an entitlement to the grant of a right of way necessary to access it. He argues that it would be unrealistic to suggest that, if Mrs Hughes and her late husband had sold the land a year or two after the applicant paid to have to have the house built on it, the applicant would simply have accepted that they were entitled to do so free of his interest. Mr Jarvis therefore submits that the applicant has a proprietary interest in the house and the land upon which it sits, even if it may be difficult for him to realise it.

34. In his brief reply, Mr Townsend argues that Mrs Hughes had no opportunity at the hearing to respond to the way the respondent's case is now for the first time articulated, namely on the basis of a common intention constructive trust.

Analysis:

35. By s6(5) of the Act, the Crown Court, having determined that the applicant had benefited from his criminal conduct, was required to decide the recoverable amount and to make a confiscation order requiring the applicant to pay that amount. Subject to exceptions which do not arise in this case, s7 of the Act provides in material part:

> "**7 Recoverable amount**
>
> (1) The recoverable amount for the purposes of section 6 is an amount equal to the defendant's benefit from the conduct concerned.
>
> (2) But if the defendant shows that the available amount is less than that benefit the recoverable amount is –
>
> (a) the available amount, or
>
> (b) a nominal amount, if the available amount is nil."

36. The applicant, as we have indicated, sought to discharge the burden of proving, on the balance of probabilities, that the available amount was less than his benefit from his criminal conduct. The effect of s9 of the Act was that the judge was required to identify all the free property in which the applicant had an interest at the time of the

hearing, and to calculate its market value. The principal issues between the applicant and the respondent were as to whether the applicant held any, and if so what, interest he held in the house and land. By s84(1) of the Act, "property" is all property, real or personal, wherever situated; and by s84(2)(a), "property" is held by a person if he holds an interest in it.

37. The judge was clearly correct to exercise his powers under s10A of the Act to determine the extent of the applicant's interest in the property, and to give Mrs Hughes the opportunity to make submissions in that regard. Her submissions, and those of the applicant, raised issues of fact and law, such that the judge was faced with a difficult task.

38. The first point to make is that, under Irish law as well as English law, a house built upon land becomes part of the land, and belongs in law to the person who owns the land. It is not possible, as a matter of land law, to separate ownership of the house from the land upon which it is built and to sell the house alone. It follows, moreover, that merely paying for a house to be built upon land owned by another does not, of itself, give the person paying for the building works any equitable interest in the completed house, still less in the land upon which it sits.

39. Did the applicant nonetheless have some proprietary interest in the land upon which the house in which he lived was built? We must consider whether the evidence below provided an identifiable legal or equitable principle supporting the judge's conclusion that the applicant did have such an interest.

40. One possibility might have been if the court was able to find that, contrary to Mrs Hughes' evidence, there was in fact an agreement, promise or assurance given by her late husband to the applicant that if he built a house on the land, the land upon which the house was built would belong to him, coupled with the applicant acting in reliance on that agreement, promise or assurance to his detriment by building the house. In such cases, the courts have either been prepared to find that there was a common intention constructive trust (see *Jones v Kernott* [2012] 1AC 776), or to intervene on the basis of proprietary estoppel to prevent the unconscionability that would arise if the promisor were to renege on the agreement, promise or assurance (see e.g. *Guest v Guest* [2022] UKSC 27 at [4] (per Lord Briggs) and at [108] (per Lord Leggatt)).

41. However, Mrs Hughes had denied the existence of any such agreement, promise or assurance on oath in her affidavit, and she was not cross-examined on her evidence. The judge did not make any finding (or express any basis for finding) that Mrs Hughes and/or her late husband had made any agreement or given any such promise or assurance. Nor did the judge make any finding to the effect that he rejected as inherently implausible the explanation which Mrs Hughes had given for her late husband permitting the applicant to build a house on the land, but not agreeing or giving any promise or assurance that, if he did, he would own the land.

42. We think it unfortunate that neither the parties nor the judge felt it necessary for oral evidence to be heard and tested in cross-examination. We see the attraction of the respondent's submissions to the effect that the applicant would not have invested such a large sum in building the house if he did not think he was to acquire any proprietary interest in the land upon which it stood. It might have been possible for an inference to be drawn that there was a common intention, or at least that a promise or assurance

was given by Gerard Hughes, that if the house was built Gerard Hughes would hold such land on trust for his son and, if called upon to do so, would convey that land to him and grant a right of way over the remainder of the family farm to enable the house to be accessed.

43. It is not, however, clear to us that such an argument was made before the judge, and we therefore see force in Mr Townsend's submission that Mrs Hughes did not have any opportunity to address it. In any event, even if submissions to the effect of those made by Mr Jarvis to this court had been put forward below, they are submissions which would have required Mrs Hughes' clear assertions to the contrary to be challenged in cross-examination.

44. Moreover, the judge's reference at paragraph 41 of his ruling (which we have quoted at [20] above) to the likely reaction of a bystander looking at the situation could not in our view provide any basis for invoking the principles of a common intention constructive trust or of proprietary estoppel. The first and essential element of a common intention constructive trust is that there is an actual shared intention between the registered owner and the claimant that the latter will have a beneficial interest in the relevant property. Although the existence of that shared intention is to be deduced objectively from the words and actions of the parties, the trust is not simply a solution to be imposed upon them: see *Jones v Kernott* at [31], [46] and [51]. Similarly, the first and essential element of a proprietary estoppel is a finding that a promise or assurance was actually given by the legal owner: see *Guest v Guest* (above) and *Thorner v Major* [2009] 1 WLR 776 at [29].

45. We also think, with respect to the judge, that his reliance on *Inwards v Baker* [1965] 2 QB 29 as a basis for finding that the applicant had an "equity", and thus an equitable proprietary interest in the house or land, was misplaced. As *Guest v Guest* confirmed and examined at great length, a finding that it would be unconscionable for a promisor to renege on a promise, representation or assurance given in relation to property may give rise to an "equity", but that does not answer the question of what remedy should be granted by the court to address the unconscionability and do justice between the parties. A proportionate remedy might involve the enforcement of the promise or assurance by requiring the promisor to transfer the land in question to the promisee, but it might only involve an order for payment of a monetary amount.

46. That flexibility to fashion a remedy to give effect to the "equity" was apparent from *Inwards v Baker* itself. In that case, a son had at his own expense, built a bungalow upon land owned by his father, with his father's knowledge and encouragement, and lived there for twenty years. His father died without having made any contractual arrangement or promise with the son as to the terms upon which he could own or live in the house. The trustees of the will sought to evict the son from the house.

47. The Court of Appeal first held that the son had what Lord Denning MR described as

> "an equity well recognised in law … [that] arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there."

48. However, as Lord Denning MR went on to explain,

> "It is for the court to say in what way the equity can be satisfied. I am quite clear in this case it can be satisfied by holding that the defendant can remain there as long as he desires it to be his home."

49. It is thus clear that, contrary to the judge's view at paragraph 42 of his ruling (which we have quoted at [20] above), Lord Denning MR's finding of "an equity" was not determinative of the issue of whether the person in question should be entitled to any proprietary interest in the land. The court may simply find (as it did in *Inwards v Baker*) that the "equity" can be satisfied by ordering that the individual in question has a personal right to remain in occupation of the house for so long as he desires it to be his home. Such a right would not be transmissible and could not be sold to a third party. Or the court might simply make a monetary award. In accepting, at paragraph 42, the prosecution's submission that "the defendant has an equitable interest in the house built on the land", the judge did not engage with this important issue.

50. In short, the course which the proceedings took below had the effect that there was no evidence sufficient to support the judge's finding, and no evidence on which he might have reached similar findings by a different route.

51. In those circumstances, the judge's conclusion to the effect that the applicant should be taken, for the purposes of making a confiscation order, to have a proprietary interest in the house built upon the land registered in the name of Mrs Hughes cannot stand and must be set aside.

What order should this court make?

52. Having identified the insufficiency of the evidence heard below to support the judge's findings, there are obvious practical obstacles to this court hearing evidence and making its own findings of fact. On the face of it, it is clearly desirable to remit the matter to the Crown Court so that there may be, in effect, a rehearing. Mr Jarvis submitted that, if his primary argument failed, this court should so order. Mr Moloney and Mr Townsend did not strongly argue against such a course if it can properly be taken. But does this court have power so to order? The written submissions made after the hearing identified a number of previous decisions of this court which have left that question unresolved.

53. It is necessary to begin by considering the nature of the applications before this court. Two different routes of appeal are engaged.

54. First, a defendant convicted in the Crown Court has a right to seek leave to appeal against his sentence under s9 of the Criminal Appeal Act 1968. The meaning of "sentence" in this context is defined by s50 of the 1968 Act, which so far as is material for present purposes provides:

> "**50 Meaning of 'sentence'**
>
> (1) In this Act, 'sentence', in relation to an offence, includes any order made by a court when dealing with an offender including, in particular –

> …
>
> (ca) a confiscation order under Part 2 of the Proceeds of Crime Act 2002 (but not a determination under section 10A of that Act) …"

55. Where a defendant appeals against a confiscation order, s11 of the 1968 Act contains the following material provisions as to the powers of this court:

> "**11 Supplementary provisions as to appeal against sentence**
> …
>
> (3) On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below may
>
> (a) quash any sentence or order which is the subject of the appeal; and
>
> (b) in place of it pass such sentence or make such as other order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence;
>
> but the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely deal with on appeal than he was deal with by the court below.
>
> (3A) Where the Court of Appeal exercise their power under paragraph (a) of subsection (3) to quash a confiscation order, the Court may, instead of proceeding under paragraph (b) of that subsection, direct the Crown Court to proceed afresh under the relevant enactment.
>
> (3B) When proceeding afresh pursuant to subsection (3A), the Crown Court shall comply with any directions the Court of Appeal may make.
>
> (3C) The Court of Appeal shall exercise the power to give such directions so as to ensure that any confiscation order made in respect of the appellant by the Crown Court does not deal more severely with the appellant than the order quashed under subsection (3A)."

56. We observe that s11(3A) of the 1968 Act gives the court a discretion, upon quashing a confiscation order, to direct the Crown Court to hear the matter afresh. The discretion must of course be exercised in accordance with the interests of justice, and the constraint imposed by s11(3C) must be observed; but otherwise, the 1968 Act does not restrict the exercise of the discretion.

57. We would add that, although s50(1)(ca) of the 1968 Act has the effect that an appeal under s9 of that Act cannot be brought solely in respect of a determination under s10A of the 2002 Act, it does not in our view prevent such a determination being challenged as part of an appeal against a confiscation order. An appeal against a confiscation order may well include a challenge to a determination by the Crown Court of the defendant's interest in a property: that determination may have been an important part of the court's overall decision as to the defendant's available assets, and thus a factor in the computation of the confiscation order which is the subject of the appeal.

58. Those provisions of the 1968 Act do not assist a third party with an interest in property who is aggrieved by the Crown Court's determination of the defendant's interest in that property. Instead, relevant provisions are contained in ss31 and 32 of the 2002 Act, which so far as material provide:

> "**31 Appeal by prosecutor etc**
>
> …
>
> (4) An appeal lies to the Court of Appeal against a determination, under section 10A, of the extent of the defendant's interest in property.
>
> (5) An appeal under subsection (4) lies at the instance of
>
> (a) the prosecutor;
>
> (b) a person who the Court of Appeal thinks is or may be a person holding an interest in the property, if subsection (6) or (7) applies.
>
> (6) This subsection applies if the person was not given a reasonable opportunity to make representations when the determination was made.
>
> (7) This subsection applies if it appears to the Court of Appeal to be arguable that giving effect to the determination would result in a serious risk of injustice to the person.
>
> **32 Court's powers on appeal**
>
> …
>
> (2A) On an appeal under section 31(4) the Court of Appeal may –
>
> (a) confirm the determination, or
>
> (b) make such order as it believes is appropriate."

59. Those provisions give rise to two questions: first, does the definition in s31(5)(b) include a defendant, notwithstanding that the defendant has the right of appeal under

s9 of the 1968 Act to which we have referred? Secondly, does this court's power under s32(2A)(b) include a power to remit the matter to the Crown Court for rehearing?

60. In our view, the answer to each of those questions is Yes. Our reasons are as follows.

61. As to the first question, the language of s31(5)(b) echoes the language used in s10A, which is of course concerned with determining the extent of the defendant's interest in relevant property. Clearly, s31(5)(b) may provide a route of appeal for a third party who has, or claims to have, an interest in the property concerned; but we see nothing in it which excludes such a route of appeal for a defendant who faces a serious risk of injustice if effect is given to the Crown Court's determination of his interest. Moreover, and consistently with our view, the Explanatory Notes which accompanied the Serious Crime Act 2015, which amended s31 of the 2002 Act, with effect from 1 June 2015, by adding s31(4), stated that the new s31(4) enabled

> "… the prosecutor, the defendant or a third party to appeal to the Court of Appeal against a determination under new section 10A … This does not impact on the defendant's existing right to appeal a confiscation order to the Court of Appeal."

62. As we have noted at [52] above, the effect of s50(1)(a) of the 2002 Act is that an appeal against a determination under s10A is not an appeal against sentence. There is accordingly a procedural distinction between the two routes of appeal which are potentially open to a defendant. An appeal against a confiscation order pursuant to s9 of the 1968 Act must be commenced by filing Form NG Confiscation Order, whereas an appeal against a determination of interest in property pursuant to s31(4) must be commenced by filing Form POCA 1.

63. In the present case, the applicant made his application for leave on Form NG Confiscation Order. His grounds of appeal initially stated that the application for leave was made pursuant to s31(4) of the 2002 Act. In later submissions, however, the application was stated to be pursuant to s9 of the 1968 Act, as the form of appeal notice indicated.

64. In the circumstances of this case, we are satisfied that the combination of the applicant's appeal pursuant to s9 of the 1968 Act, and Mrs Hughes' appeal under s31(4) of the 2002 Act, together with this court's powers under s11(3A) and s32(2A)(b) of those Acts respectively, enables this court to make appropriate decisions and to avoid unfair prejudice to any party.

65. Turning to the second question, it is necessary to refer briefly to three previous decisions by constitutions of this court when hearing appeals brought pursuant to s31(4) of the 2002 Act.

66. In *R v Bevan* [2020] EWCA Crim 1345, [2021] 4 WLR 19 the court at [49] doubted whether it had jurisdiction to remit the matter to the Crown Court, in effect by way of a rehearing on issues which had not been raised by the respondent until the appeal hearing. The court was clear that, even if there was such a jurisdiction, it would be wholly unfair and unjust to the third party intervener to exercise it in the circumstances of that case.

67. In *R v Ruto* [2021] EWCA Crim 1669, [2022] 2 Cr App R (S) 2 the court said at [34] that the ambit of this court's powers was not clear. However, the court found it unnecessary to resolve the question because, as in *Bevan*, it would not have been appropriate in the circumstances of the case to exercise any power to remit.

68. Most recently, in *R v Pawelski* [2023] EWCA Crim 653 the court again found on the facts that it was unnecessary to resolve the question. At [27] and [28], however, the court indicated that, were it necessary, it would be inclined to hold that s32(2A) does confer a power to remit. Three reasons were given for that provisional view: first, the wide terms of the subsection, which permit this court to make any order which it believes appropriate; secondly, because it gives a purposive construction to the subsection; and thirdly, because that interpretation is supported by the language of subsections 31(5)(b) and 31(7).

69. Thus the case law helpfully brought to our attention by counsel leaves the question unresolved. The circumstances of the present case require its resolution. In our view, the wide terms of s32(2A), which without qualification permit this court to make "such order as it believes is appropriate", do extend to the making of an order remitting the matter to the Crown Court. The reasoning of the court in *Pawelski* at [27] and [28] is in our view compelling. Moreover, our interpretation enables this court in appropriate circumstances to ensure that all parties are able to have a fair hearing of complex factual issues which this court is not best equipped to resolve. We think it important to bear in mind that a successful appeal by a third party intervener may well have the consequence that the assets available to a defendant to meet a confiscation order are reduced. That may particularly be so if the defendant and the third party are advancing competing arguments.

70. We add, for completeness, that it follows that this court's powers under s32(2A) are to be distinguished from those under s32(1). As this court held in *Barnet LBC v Kamyab* [2021] EWCA Crim 543, where a prosecutor appeals pursuant to s31(1) against the making of a confiscation order, there is no power under s32(1) to remit.

Conclusion:

71. Drawing these threads together, we conclude that the confiscation order must be quashed. We are satisfied that in the applicant's case we should exercise our power under s11(3A) of the 1968 Act to direct the Crown Court to proceed afresh. We are satisfied that giving effect to the judge's determination would result in a serious risk of injustice to Mrs Hughes, and that in her case we should exercise our broad power under s32(2A)(b) of the 2002 Act by remitting the matter to the Crown Court for a fresh hearing.

72. We have considered whether it would be appropriate to direct that the case be heard afresh by a judge with particular experience in property disputes and issues relating to constructive trusts. We are not persuaded that it is necessary or appropriate to do so. We invite the Presiding Judges of the South Eastern Circuit to allocate the case for hearing before either the Recorder of London or another judge.

73. For those reasons, we make the following orders:

    i) Leave to appeal is granted to the applicant and to Mrs Hughes.

ii) The applicant's appeal pursuant to s9 of the 1968 Act is allowed; the confiscation order is quashed; and we direct pursuant to s11(3) that the Crown Court should proceed afresh in accordance with s6 of the 2002 Act.

iii) Mrs Hughes' appeal pursuant to s31(4) of the 2002 Act is allowed; we direct pursuant to s32(2A)(b) that the matter be remitted to the Crown Court for a fresh determination of the applicant's interest in the property in Ireland; and we direct that Mrs Hughes' claim to an interest in that property be considered as part of the fresh determination.

iv) We direct that the Crown Court, in determining the issues now returned for its consideration, must ensure that any confiscation order made in respect of the applicant does not deal more severely with him than the order which we have quashed.