Neutral Citation Number: [2020] EWCA Crim 1715

Case No: 201903291/B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Cardiff Crown Court
HHJ Bidder QC
T20167190

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2020

Before :

LORD JUSTICE GREEN
MR JUSTICE JULIAN KNOWLES
and
HIS HONOUR JUDGE BLAIR QC
Recorder of Bristol

- -

Between :

REGINA
- and -
Mohammed NAWAZ

(Transcript of the Handed Down Judgment.
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Dr Anton van Dellen (instructed by **Direct Access**) for the **Applicant**
The Crown did not appear and was not represented

Hearing date: Wednesday 4th November 2020

Judgment
As Approved by the Court

Lord Justice Green :

Introduction: The Issues

1. Two issues arise upon this application. The first concerns the decision of the Court to exclude the applicant from the Royal Courts of Justice ("RCJ") and in consequence from the hearing of his application for permission to appeal against a confiscation order made against him under the Proceeds of Crime Act 2002 ("POCA") (Issue I). The second concerns the substantive merits of the application (Issue II).

The Facts

2. In order to place both matters into context we start by setting out the facts which gave rise to the proceedings under the POCA.

The Criminal Proceedings for Conspiracy

3. On 2nd August 2017, in the Crown Court at Cardiff (before H.H.J. Bidder Q.C.), the applicant was convicted of conspiracy to produce a controlled drug of Class B. On 4th August 2017 (before the same Judge) he was sentenced to 7 years imprisonment. His application for permission to appeal against conviction and sentence was refused by the single judge. A renewed application for appeal against sentence was rejected by the Court of Appeal on 21st June 2018.

4. The facts can be shortly stated. The applicant engaged in a conspiracy between July 2011 to November 2014. He was charged with conspiring with another man, Abdul Manuf, ("Manuf") and others unknown. Manuf pleaded guilty before trial. There was no issue at trial but that there was a conspiracy to produce cannabis over the relevant period. There was also no issue at trial but that five premises owned or controlled by the applicant were used for growing cannabis. The issue was whether the applicant knew what they were to be used for and whether he was a party to the conspiracy. The prosecution case was that the applicant knew perfectly well what was going on, permitted it to happen and shared in the profits.

5. The defence case was that the applicant had a legitimate business in which he bought properties, which were often in a poor state of repair, for the purpose of selling them on. That was conceded by the prosecution. Further, the defence argued that, to start with, the applicant had no idea what the premises were being used for and when he became aware of the use being made of three of the premises, he notified the police. Again, it was common ground at trial that he had given information to the police about three premises. The prosecution case was that he only reported those matters to the police because he knew the game was up and was seeking to divert attention and suspicions away from himself.

6. As a result of the nature of the case being run by the applicant, the prosecution applied and were permitted to introduce bad character evidence relating to the applicant. He had been convicted on 11th December 2009 of a similar offence of conspiracy to produce cannabis. Most of the evidence at the trial was agreed. The issue was as to the applicant's state of knowledge. He gave evidence before the jury. He was convicted.

7. It was an admitted fact at the trial that a man called Toi Van Le (Mr Le) had been convicted of conspiracy to produce cannabis with cultivation at nine premises including the old Barclay's Bank at Grimsby, the Underwood Leisure Centre, and the dentist's surgery at Egremont. On 1st November 2014, Mr Le and three other men were stopped by police after trying to enter, by way of the fire doors, a property belonging to the applicant in Swindon.

8. The police operation that resulted in the applicant's arrest was known as Operation Canna. There was, however, a further operation, known as Operation Azure, which was responsible for investigating a larger over-riding conspiracy. Mr Le was deemed to be the main organiser of this conspiracy. Mr Le was convicted at Shrewsbury Crown Court of ten counts of conspiracy to produce cannabis and sentenced to 11 years and 10 months imprisonment. Phone records revealed no links between the applicant and anyone who had, at the time of his trial, been convicted for the Operation Azure conspiracy.

The Proceedings under the Proceeds of Crime Act 2002 and the Application for Permission to Appeal the Confiscation Order

9. Following conviction, confiscation proceedings ensued. On 18th April 2019, Mr Le was found to have benefitted from his offences in the sum of £783,759.55. In the light of a finding as to his available means, a Confiscation Order was made in the sum of £6,100. No confiscation order was made against Manuf, upon the basis that he was a "*man of straw*" i.e. had no available means.

10. On 1st August 2019, the judge found, in relation to the applicant, that the benefit figure was £599,623.79 and the applicant's available assets were £775,052.88. Accordingly, the Judge made an order for the entirety of the benefit figure against the applicant i.e. in the sum of £599,623.79. He also fixed the period of time in which the sum was to be paid and the period of custody (6 years) that would result in default of payment.

11. The basis of the ruling was that the applicant was jointly and severally liable for the benefit figure with the co-conspirators, including Mr Le and Manuf. The reasoning can be summarised as follows. First, on the evidence that the judge had heard during the trial he was sure that the cannabis was jointly held by the conspirators. Second, there was (it followed) no evidence to show that the conspirators held "*specific shares*" in the cannabis or that the "*cannabis was in any sense divided by the conspirators*". Third, the law was that where Defendants had benefited jointly by acquisition and growth of cannabis "… *they effectively share the, the property in an indivisible amount*". Fourth, applying the cases of *May* [2008] 2 WLR 1131, *Rooney* [2010] EWCA Crim 2, and *Fields* [2013] EWCA Crim 2042 this was a case where the cannabis should therefore be treated as owned jointly by the conspirators. Fifth, it was both just and proportionate that each conspirator should be liable for the entire amount. Sixth, the applicant was therefore liable for the entire amount of the benefit.

12. In rejecting evidence advanced by the applicant, the Judge made certain findings of relevance to both issues arising. The judge concluded that Mr Nawaz was a "*plausible and determined liar, self-obsessed, and determined to avoid as much responsibility, as possible for his own actions*". He was a "*determined*" man and he was "*prepared to sack people… when… they don't say precisely what he wants them to say*".

13. Following this ruling the applicant, in person, advanced written grounds to the single judge justifying why permission to appeal should be granted against the confiscation order. The single judge said as follows:

> "I have considered the grounds of appeal (and the notice of opposition).
>
> You advance no arguable ground of appeal. Your grounds amount to no more than an assertion that (i) you should not have been convicted and you seek thereby to go behind the verdict of the jury (ii) HHJ Bidder was wrong in his findings. The jury convicted you.
>
> The prosecution provided the evidence for the Proceeds of Crime Act application and provided the evidence to support the confiscation order made by the learned judge of £599,623,79.
>
> You do not advance any argument as to why the evidence was false or why the learned judge was wrong to accept it.
>
> He found your evidence to be wholly dishonest.
>
> He applied the law and he reached a confiscation figure, which you cannot dispute.
>
> You do not raise any point of law. You cannot just keep on making assertions of innocence. You were able to provide your evidence at the hearing (and at the trial) and to make your submissions. These were all rejected, first by the jury, then by the learned judge at the confiscation hearing. I have read the learned judge's ruling and can find no fault. Your application totally lacks merit."

14. In the light of this this emphatic rejection by the single judge, Dr Van Dellen, counsel, who appears for the applicant, has reframed the applicant's case. He recognised that, in view of this rejection, there was a limit to the points that could properly now be advanced. He accepted that he could not simply rehash evidential points rejected by jury and judge at trial. He does not challenge the benefit figure or the available amount. He has identified what he says are three discrete points of law all concerning the principles of apportionment. We will return to those grounds in due course. Dr Van Dellen seeks permission to amend the prospective grounds of appeal to focus on these three points.

15. Before addressing the merits of the application to amend and the substantive merits of the proposed grounds of appeal, we turn to the reasons for the decision of the Court to exclude Mr Nawaz from the RCJ and, hence, from attending the hearing of his application for permission to appeal.

Issue I: The Exclusion of the Applicant from the Royal Courts of Justice

The Exclusion of the Applicant from Court

16. The substantive application for permission to appeal against the confiscation order was to be heard on 4th November 2020. There were four cases to be heard that day and the present case was second in the list to be heard at 11.00am. At about 10.00am on 4th November 2020, the applicant sought entry to the RCJ. He was identified by security staff at the entrance (a photograph taken from the internet having been provided to the security personnel) and was refused access. This was upon the basis of an express direction from the Court.

The Events leading up to the Exclusion: The Health Protection (Coronavirus Restrictions) (Self Isolation) (England) Regulation 2020 (SI 2020/1045)

17. On Monday 2nd November, two days before the hearing of the application, the applicant sought to adjourn the application. The Court was informed of this by reason of a communication from Dr Van Dellen, counsel then instructed to make the application, to the Court of Appeal Criminal Appeal Office ("the Office") which informed the Court of a number of matters. First, the applicant wished to dispense with Dr Van Dellen and instruct new leading counsel. Second, he wished to see the full documents used at trial which he said he needed to support his application and which should have been before this Court on the application. Third, he had Covid-19 and was in quarantine. The email from counsel to the Office was in the following terms and included a clear account of instructions given to him by the applicant:

> "Dear [ ],
>
> Thank you for the documents which have been safely received and which I have passed on to my client.
>
> Please be advised that I no longer act for the Appellant. He has informed me that he intends to instruct Sean Larkin QC. I have copied my former client into this email. Please direct all further correspondence to him.
>
> My client has informed me that he will be contacting the Court requesting an adjournment. My client has requested that I pass on to the Court the following information:
>
> *He requests that Court adjourn the hearing listed on 04/11/20 at 10 am on the basis that there is a lockdown due to Covid 19 and also that he is self-isolating and suffering from Covid 19. He is also concerned that the Court of Appeal will not have the bundles of documents from the trial. He considers that he needs to submit these bundles to the Court of Appeal and on that basis also needs an adjournment and also for Sean Larkin QC to be instructed to deal with his appeal.*
>
> Should my client have any further submissions to make in relation to his request for an adjournment, I am sure that he will contact you directly with those.
>
> Yours sincerely

Dr Anton van Dellen

Barrister"

18. We saw no reason to question the information from Dr Van Dellen and we accept that it accurately reflected the instructions given to him by the applicant. A formal application to adjourn from the applicant followed which repeated the claim that he had Covid-19.

19. The Court declined to grant the ensuing application for adjournment. The reasoning can be summarised as follows.

20. First, there is in principle no right to representation at an application for permission to appeal following refusal by the single judge. Many renewals are non-counsel matters in court. Though, where an applicant seeks to be represented, it is the normal practice of the Court to entertain oral argument (see paragraph [28] below). The Court had accordingly been willing to receive oral submissions on the renewed application and the case had been listed accordingly i.e., as an application with counsel attending. The applicant had instructed experienced specialist counsel who had lodged submissions which were carefully crafted and comprehensible. It was a matter for the applicant if he wished to instruct new counsel. The issue was narrowly confined and new specialist counsel could prepare at short notice. There was no reason why what was, in the view of the court, a last-moment and tactical decision to switch counsel should warrant the court declining to address the application. We noted in this regard the observation of the judge below about the applicant's determination to get what he sought, and to instruct and discard lawyers on a strategic basis.

21. Second, as to the need for the full trial papers there was no such need. The issue arising on the application rested upon findings of fact made by the judge, were narrowly confined and we had counsel's written submission which fleshed out the points that could be made. The court had all the documents needed to determine the issue. It was relevant that the written submission of Dr Van Dellen, already lodged in court, did not evince any need for extraneous material.

22. Third, as for the applicant's assertion, via instructions to counsel and repeated in the application to adjourn, that he had Covid-19, the Court was provided with no supporting medical evidence. Nonetheless, even if he had Covid-19, he had no automatic right of attendance. He could have been represented by counsel. Further, he had no personal need to be in the RCJ physically. He could have attended the hearing, as a client, remotely under the CVP procedure. These were the reasons leading to the Court declining to adjourn the application. That decision was communicated by the Office to the applicant.

23. In view of this, the applicant now informed the Office that he intended to appear *in person* to make submissions. This created a dilemma. The applicant had indicated that he had Covid-19 yet intended to turn up to the RCJ, demand entry through security, and then appear in court on Wednesday 4th November 2020. At this point in time there were still people around the Courts, albeit in modest but not insignificant numbers. This was the day before the second lockdown which commenced on Thursday 5th November 2020. The risk to health was obvious. The fact that the applicant indicated that he was going to attend threw into doubt the veracity of the applicant's earlier statement that he

had Covid-19 and was in quarantine. However, the Court did not know the truth and it was unacceptable to permit a health risk to be presented to court staff and to the general public attending court by allowing an infected and potentially infectious person free access to the RCJ and the court room.

24. The position is complicated by the Covid-19 emergency legislation and in particular the Health Protection (Coronavirus Restrictions) (Self-Isolation) (England) Regulations 2020 (SI 2020/1045) ("the Regulations"). Regulation 2 provides:

> "Requirements on person notified of positive test for acute respiratory syndrome coronavirus 2 (SARS-CoV-2) and close contacts of such persons"
>
> 2.— (1) This regulation applies where an adult is notified, other than by means of the NHS Covid-19 smartphone app developed and operated by the Secretary of State, by a person specified in paragraph (4) that—
>
> (a) they have—
>
> (i) tested positive for severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) ("coronavirus") pursuant to a test after 28th September 2020, or
>
> (ii) had close contact after 28th September 2020 with someone who has tested positive for coronavirus;
>
> (b) a child in respect of whom they are a responsible adult has—
>
> (i) tested positive for coronavirus pursuant to a test after 28th September 2020, or
>
> (ii) come into close contact after 28th September 2020 with someone who has tested positive for coronavirus.
>
> (2) Where—
>
> (a) paragraph (1)(a) applies, the person notified must—
>
> (i) self-isolate for the period specified in regulation 3; and
>
> (ii) notify the Secretary of State, if requested by a person specified in paragraph (4), of the address at which they will remain pursuant to the restriction in paragraph (3)(a); and
>
> (b) paragraph (1)(a)(i) applies, the person notified must notify the Secretary of State of the name of each person living in the same household as P;
>
> (c) paragraph (1)(b) applies, R must—

(i) secure, so far as reasonably practicable, that the child self-isolates for the period specified in regulation 3; and

(ii) notify the Secretary of State, if requested by a person specified in paragraph (4), of the address at which the child will remain pursuant to the restriction in paragraph (3)(a); and

(d) paragraph (1)(b)(i) applies, R must notify the Secretary of State of the name of each person living in the same household as the child.

(3) in paragraph (2), "self-isolate" means P is subject to the following restrictions—

(a) P must remain in—

(i) P's home;

(ii) the home of a friend or family member of P or of R where P is a child; or

(iii) bed and breakfast accommodation, accommodation provided or arranged under section 4, 95 or 98 of the Immigration and Asylum Act 1999(1) or other suitable place;

(b) P may not leave the place specified in sub-paragraph (a) except where necessary—

(i) to seek medical assistance, where this is required urgently or on the advice of a registered medical practitioner, including to access—

(aa) services from dentists, opticians, audiologists, chiropodists, chiropractors, osteopaths and other medical or health practitioners, or

(bb) services relating to mental health,

(ii) to access veterinary services, where this is required urgently or on the advice of a veterinary surgeon,

(iii) to fulfil a legal obligation, including attending court or satisfying bail conditions, or participating in legal proceedings,

(iv) to avoid a risk of harm,

(v) to attend a funeral of a close family member,

(vi) to obtain basic necessities, such as food and medical supplies for those in the same household (including any pets or animals in the household) where it is not possible to obtain these provisions in any other manner,

> (vii) to access critical public services, including social services, and services provided to victims (such as victims of crime),
>
> (viii) to move to a different place specified in sub-paragraph (a), where it becomes impracticable to remain at the address at which they are."

25. As set out above under Paragraph 2(3)(b)(iii) a person notified as being infected may not leave his home except where "*necessary*" to: "*to fulfil a legal obligation, including attending court or satisfying bail conditions, or participating in legal proceedings…*".

26. Applying this to the applicant, there were three levels of uncertainty.

27. First, it was unknown whether the Regulations applied to the applicant at all. It was unclear, the applicant refusing to provide clarification, whether he did in truth have Covid-19 and therefore fell within the category of person to whom the provisions applied.

28. Second, if however he did, was it "*necessary*" for him to attend the RCJ to "*participate in legal proceedings*", given that this was a renewed application for permission which can be determined without representations and from the Court's perspective, his participation was therefore not strictly "*necessary*"? The position of an applicant for permission to appeal is covered by section 22(2) Criminal Appeal Act 1968. The European Court of Human Rights in *Monnell and Morris v UK* (1988) 10 EHRR 205 confirmed, in the case of a person renewing an application, that there was no right to a public hearing or to the personal appearance of the applicant before the Court. In this regard we would observe that it is the invariable practice of the Court to give a right of oral representation to legal advisers who seek to appear (often pro bono – because legal aid is not available) on an oral renewal; but that it a matter of practice arising out of the Courts inherent discretion, not statute.

29. But, third, even if (to test the argument) it was "*necessary*", and he had a right to participate, was it "*necessary*" for him to leave home given that he could attend court remotely, as is now commonplace on the part of prisoners, lay persons and professionals including legal representatives, interpreters, stenographers etc?

30. To work through the implications of this the Office needed urgently to determine, as a starting point, whether the applicant did in fact have Covid-19. A series of attempts were made to contact the applicant. However, he declined to respond to emails and other attempts to contact him. In one email sent to him he was expressly asked to confirm, by no later than 13.00 on Tuesday 3rd November 2020, the following:

> "Do you wish to address the Court and make oral representations in support of your renewed confiscation application at Wednesday's hearing?
>
> Are you, indeed, presently suffering from Covid-19? When were you diagnosed with the condition? Can you provide any medical evidence to support your assertion?"

31. Pending clarification, the Court directed that the hearing of the application was to remain in the list. No one knew whether the applicant would clarify that he did or did not have Covid-19, or whether he would turn up at the RCJ expecting to attend the hearing of his application, or whether he would instruct counsel to represent him.

32. When it became apparent that the applicant would not provide the sought-after information and having discussed the matter with senior Court administrative staff, the Court directed that if the applicant sought to enter the RCJ, he was to be denied access using powers of exclusion under section 53(2) Court Act 2003. It was neither right nor fair to leave it to the security staff at the entrance to the RCJ to take a substantive decision as to whether or not to allow the applicant access to the RCJ. The stance had to be taken by the Court and to be unambiguous. The applicant's legal right to participate in court proceedings (assuming he had one) would be protected by the Court. If he turned up, was without legal representation and was turned away then the hearing would be adjourned and rescheduled so that in due course the applicant could make representations, probably, remotely.

33. What happened next was that the hearing of the application was called on for hearing at about 11.00am on 4th November. The Court was informed (via security) that the applicant had turned up and had been refused entry. He had been asked by security whether he had Covid-19. He had said that he did not and that he had test results to prove it. He was asked to produce those results, for instance by revealing a text message confirming a negative test from a testing centre. He could not (or would not) do this.

The Decision to Proceed in the Absence of the Applicant

34. However, Dr Van Dellen was in attendance in court. He, very carefully, explained what his client's instructions to him were: he did not have Covid-19; he had never said that he did; he needed to be present so that his counsel (Dr Van Dellen) could take instructions on evidential matters; and there should be an adjournment to enable counsel to take instructions. Dr Van Dellen informed us that he was nonetheless prepared to proceed to put the applicant's case. By virtue of Dr Van Dellen's attendance and his preparedness to continue, the Court was able to move on to consider the merits of the application. In these circumstances the Court decided to hear the application. Counsel then proceeded to make detailed submissions, lasting for about 60 minutes, on issues relating to the test of apportionment as it applied in confiscation proceedings. At the culmination of the hearing, the Court reserved judgment.

35. So far as the decision of the Court to refuse access to the applicant is concerned, we make the following observations: (i) in the final analysis the Court was in possession of inconsistent evidence as to whether the Regulations applied to the applicant since he had refused to provide medical evidence establishing that he had Covid-19; (ii) the Court could not however take a risk that an infected and possibly infectious person be allowed in to the RCJ to attend the Court; (iii) the safety and health of court staff and users were crucial considerations; and (iv), even if the Regulations had applied, given the attendance of counsel it was not "*necessary*" for the applicant to be present in person. In our judgment the refusal to permit the applicant to enter the RCJ and to attend his application was therefore justified.

36. We should set out what we intended to do *if* the situation had arisen whereby the applicant had attended Court to make oral representations, had been denied access and

had not been represented by counsel. Notwithstanding our doubts as to the veracity of the claim to be infected, in the absence of clear evidence, the Court would have acted upon the precautionary basis that he *was* or *might* be infected. By his conduct he had created a genuine health concern. He intended to appear in court and thereby perpetuate a health risk. On this basis, the Court would have adjourned and rescheduled the application. Had this occurred, the Court would have set in train inquiries to uncover the truth. If it transpired that the applicant had misled the Court, for example about his being infected with Covid-19, in order to obtain a forensic advantage (e.g. delay), then the Court would have given serious consideration to whether such conduct amounted to a contempt of court. The Court would not have countenanced an applicant deliberately lying to the Court in order to seek an advantage.

Issue II: The Confiscation Proceedings - Apportionment

37. As observed the Court was able to proceed, assisted ably by counsel, to determine the merits of the applicant. We turn now to that application which we deal with upon the basis of the papers before the court and upon the written and oral submissions of Dr Van Dellen. These identify three issues of law relating to apportionment. To raise these grounds, the applicant needed permission to amend the existing grounds. The Court considers it convenient to grant permission to amend so that the issues can be properly aired and determined and because the points raised have a degree of novelty to them. We therefore grant permission to amend the grounds. The thrust of the argument now advanced is that, for a variety of legal reasons, the judge erred in failing to apportion liability as between the co-conspirators, and in particular, between the applicant and Manuf. The target of the application is to have the order of the judge set aside and an order that the applicant be required to pay only 50% of the benefit figure be substituted in its place.

The Applicant's Amended Grounds

38. The grounds can be summarised as follows.

39. ***Proportionality***: The finding by the Judge that the applicant was jointly liable for the entire benefit amount was wrong in law and the Judge erred in failing properly to consider that the appellant fell within the proportionality exception in *May* [2008] 1 AC 1028 at paragraph [45] where the Court stated: "…*There might be circumstances in which orders for the full amount against several defendants might be disproportionate and contrary to article 1 of the First Protocol, and in such cases an apportionment approach might be adopted …"*. On the facts, the applicant's liability was disproportionate given the extent to which he was bearing the liability of the confiscation relative to his co-defendants (Manuf and Mr Le) and/or to the extent that he would need to sell his properties in order to satisfy the entirety of the confiscation order. The duty to apply proportionality was buttressed by Article 1 of Protocol No. 1 ("A1P1") of the European Convention on Human Rights ("ECHR") because the confiscation order involved depriving the applicant of his property. Accordingly, the Court had to ascertain whether by reason of the order (which was a depriving action of the State) an individual (the applicant) was being required to bear a disproportionate and excessive burden. It is said that upon the basis of fact that are, in effect, undisputable and common ground, the Order did not strike a "*fair balance*" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

40. ***Evidential rules and fairness***: Second, the order violated the evidential rules set out by the Court of Appeal in *Rooney* [2010] EWCA Crim 2 whereby the Court indicated that where there was no evidence as to the manner in which the spoils of crime were divided up, it was "*fair*" to make an equal division as between the conspirators. In this case, it was not fair for the applicant to bear effectively 100% of the confiscation and his co-defendants to bear none (Manuf) or only a negligible amount (Mr Le).

41. ***Constructive trust***: Third, the finding of joint liability for the benefit amount was wrong in law. The Judicial Committee of the House of Lords made clear in *May* [2008] 1 AC 1028 at paragraph [48(5)] that ordinary common law principles applied, and these would include rules on the operation of constructive trusts:

> "(5) In determining, under the 2002 Act, whether D has obtained property or a pecuniary advantage and, if so, the value of any property or advantage so obtained, the court should (subject to any relevant statutory definition) apply ordinary common law principles to the facts as found. The exercise of this jurisdiction involves no departure from familiar rules governing entitlement and ownership. While the answering of the third question calls for inquiry into the financial resources of D at the date of the determination, the answering of the first two questions plainly calls for a historical inquiry into past transactions."

42. In line with *AG Hong Kong v Reid* [1994] 1 AC 324 ("*AG Hong Kong v Reid*") and *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 ("*FHR European Ventures*") where a defendant benefitted from an unlawful act, for instance the making of a bribe, then the bribe and "*property from time to time representing the bribe*" are held on constructive trust. Applying ordinary principles in such circumstances the applicant's share of the constructive trust is 50% and not 100%.

Conclusion

43. We do not accept these submissions. The three submissions all operate upon a common assumption, namely that the object the law (which includes the proportionality principle) seeks to achieve is exclusively to do that which is fair *as between* wrongdoers. This is a mistaken view of the law as it presently stands[1], which is not value or policy free and which does not have, as its preoccupation, a need to calibrate the respective shares of the benefit to be allocated, by apportionment, as between co-conspirators. On the contrary it injects a significant dose of public policy into the equation which permits the making of orders which create joint liability, and which impose upon a wrongdoer liability for the full amount of the benefit. The judgment of the Judicial Committee in *May* (*ibid*) makes this clear. That case was concerned with the calculation of benefit as it applied to an individual defendant, and not, strictly, with the analysis of apportionment. There it was made plain, in this context, that it was not intrinsically unjust (or disproportionate) to make defendants jointly liable. The Court did accept that there "*might*" be circumstances where orders for the full amount might

[1] The Law Commission has, as of the date of this judgment, published a Consultation Paper proposing various reforms to the law: "*Confiscation of the proceeds of crime after conviction*" (Consultation Paper No 249, 17th September 2020). That paper does raise various points about proportionality. However, the Paper, of course, reflects *possible* future reforms, not what the law presently is.

be disproportionate and contrary to A1P1 (paragraph [45]) and it did accept that proportionality was relevant to the issue of apportionment. Nonetheless, the importance of making orders which protected the public interest, through the obligation on defendants to disgorge the whole benefit to the state, was also emphasised (paragraph [46]).

44. The issue was more squarely addressed in the judgment of the Supreme Court in *R v Ahmad* [2014] UKSC 36 ("*Ahmad*") which did concern apportionment. There the issue was analogous to that arising here. An order had been made imposing liability for the full benefit figure upon each defendant. In paragraph [53] the Court identified the issue:

> "53. … The argument can be analysed as amounting to a contention that Flaux J should have apportioned the £12.6m equally between the two Ahmad defendants, to justify the conclusion that the property each of them obtained under the 2002 Act was half the total sum acquired. The argument has its attractions. It can be said to accord with the presumption that, where two people lawfully own property jointly "the beneficial interest belongs to the[m] in equal shares" – per Lord Diplock in Gissing v Gissing [1971] AC 886, 908. It also would avoid the risk of double recovery or unfair recovery. However, we would reject the argument."

45. The Court stated that: (i) apportionment as between defendants was possible and should be made <u>if</u> it was evident that the benefit was held severally (paragraph [51]); (ii) where any payment or reward connected to drug trafficking was received jointly by two or more persons acting as principals, or where money was received by one defendant on behalf of several defendants jointly, or where there was no reliable evidence as to whether any particular person involved in the fraud received any particular portion of, or had any particular interest in or share of, the money obtained by the fraud, then it was open to a judge to decide that the proceeds of the criminal activity, the property, had been obtained jointly by the conspirators, or at least all of the main conspirators (paragraphs [51] and [54]); and (iii), the basis of POCA was "*obtaining not ownership*" (paragraph [55]).

46. Of importance was the relevance attached by the Court to the public interest in full recovery and in this regard the Court was influenced by the practical difficulties that a requirement to apportion precise shares would entail for a court:

> "55. … That is because, in many multi-party sophisticated crimes, it is unusual to have all the conspirators before the court, the defendants who are before the court will say that the other conspirators received all the property, and frequently many of those other conspirators will never be apprehended."

The dynamics of a typical contested criminal trial involve defendants denying participation in the conspiracy and, for this reason, not giving evidence as to how the spoils are divided up. And if there is a plea, involving an admission of guilt, it remains improbable in the extreme that anything will be admitted in relation to the division of the proceeds or, if it is, that it will be anything other than an attempt to minimise responsibility and gain, not least because of the inevitability that confiscation

proceedings will ensue. What might arise is evidence of the degree of participation of each defendant in the conspiracy and the judge will have to make finding about this for the purpose of determining roles when it comes to sentencing. This might provide some, though possibly limited, guidance relevant to determining how the rewards of the criminal conduct were split. In *Ahmad* these sorts of considerations were important:

> "55. … Fourthly, for similar reasons, it would render the task of a judge at a confiscation hearing more difficult than it already is and would make it correspondingly easier for an unscrupulous defendant (and most defendants in these cases appear, unsurprisingly, to be unscrupulous) to seek to avoid, or at least to minimise, his liability.
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> 56. In many cases it is often completely unclear how many people were involved in the crime, what their roles were, and where the money went. As a result, if the court could not proceed on the basis that the conspirators should be treated as having acquired the proceeds of the crime together, so that each of them "obtained" the "property", it would often be impossible to decide what part of the proceeds had been "obtained" by any or all of the defendants. There is obvious cause for concern about having to inquire into the financial dealings between criminals who have together obtained property, especially given that the ringleaders are often not even before the court. It is one thing for the court to have to decide whether a defendant obtained any property, which the 2002 Act requires. It is another thing for the court to have to adjudicate on the respective shares of benefit jointly obtained, which the Act does not appear to require."

47. At paragraph [57] the Court added that the fact that an order for the entire benefit figure might be harsh or "*oppressive*" was not a reason not to make such an order given the public interest in removing the benefit from wrongdoers: "*If an argument based on oppression were right, then no order could be made unless the number of participants and the role of every participant in the fraud could be ascertained*.". At paragraph [59], the Court highlighted that a finding of joint liability might also be a consequence of the mendacity of defendants:

> "59. … it may be that, if the Ahmad defendants had been frank rather than dishonest in their evidence, they could have shown that the facts justified a conclusion that the property which MST obtained was limited to the share of the £12.6m which it actually received, and/or that their individual liabilities should each be held to be for a sum equal to half the property obtained by MST. (It is only right to add that it may well be that, even if they had been honest with the court, the facts would not have justified such a conclusion.) As it was, given the complete absence of any assistance from the Ahmad defendants (indeed, what they said was positively misleading), the judge had no alternative to falling back on the natural conclusion that, through the vehicle of MST, they had been major participants in the carousel fraud, and had therefore obtained the whole £12.6m, albeit together

> with the other participants (only some of whom could be identified)."

48. Finally, at paragraph [74] the Court, wrapping up its analysis, said:

> "Accordingly, where a finding of joint obtaining is made, whether against a single defendant or more than one, the confiscation order should be made for the whole value of the benefit thus obtained."

49. It is apparent that the law is not wholly oblivious to fairness as between defendants. It is common ground that proportionality does apply. Adjustments might be made as between defendants, for example, to prevent double counting (*Ahmad ibid* paragraph [74] and see *R v Waya* [2012] UKSC 51). But that does not prevent orders for the whole amount being made.

50. The upshot is that whilst the test is one of proportionality, there are policy reasons why an order for the full amount can be made against a defendant even if this leads to some perceived unfairness. These policy reasons attract considerable weight in the proportionality scales.

51. In the light of this, did the Judge err? In our judgment he did not.

52. First, the Judge, based upon his having presided over the trial, made an express finding that the benefit was joint. This was a conclusion based upon the evidence he had heard during the trial. By way of example at page 6F of the transcript of the ruling, the Judge indicated that when determining the value of the available amount, he had heard argument from the applicant regarding control over property and when it was obtained, but that he had rejected this evidence. It follows that when the Judge said that there was no evidence that the proceeds were divided up as between the Defendants, this was not a finding that there was no evidence *at all* upon the subject of joint or several benefit. It was a conclusion which was the corollary of, and therefore corroborated, the judge's finding that there *was* evidence that the benefit was joint. For the reasons given in *Ahmad* (*ibid*) the fact that the evidence did not itself focus explicitly upon how the spoils of the conspiracy were divided up was not a bar to the judge drawing relevant inferences from such evidence as he did hear.

53. Secondly, there were policy considerations relevant to the proportionality test. If a 50/50% apportionment had been made then, based upon the facts as known (namely that Manuf was a man of straw and Mr Le could pay only c£6,000), then c. 50% of the benefit would remain unaccounted for contrary to the policy behind the Act which is that the total benefit from crime should be disgorged (to the State).

54. Thirdly, the of truthfulness of the applicant is also relevant. If he had wished he could have provided evidence to demonstrate that he obtained only (say) 50% of the benefit or such other percentage as accurately reflected his real benefit, but he did not.

55. Fourthly, it is also relevant that the benefit (which will be reflected in practice in property or other assets, including cash) is, by its nature, acquired criminally. The application of proportionality and A1P1 principles are necessarily attenuated. The law is not dealing with property owned legitimately by the applicant. This was also made

clear in *Ahmad* in relation to the process of the valuation of the assets amounting to the proceeds of crime. As the Court pointed in *Ahmad* out the defendants had no legal rights to these assets, since they were unlawfully obtained (*ibid* paragraphs [60] – [64]).

56. Fifthly, at the heart of the submission is that it is unfair that Mr Nawaz should disgorge the whole benefit and Manuf should get away with it. The link between policy and A1P1 and the risk that one defendant enjoys a windfall because another defendant is compelled to disgorge the full benefit amount was addressed in *Ahmad* in the context of an argument that to permit double recovery would be disproportionate and in breach of A1P1. The Court made clear that the state was entitled to recovery, but only once, and the fact that if recovered from one defendant another defendant might therefore gain a "*windfall*" was merely an incident (even if unfortunate) of the statutory system:

> "72. This Court has considered the provisions of A1P1 in the context of the 2002 Act in two recent cases: *Waya* and in *Barnes v Eastenders Cash & Carry plc* [2014] UKSC 26, [2014] 2 WLR 1269. In *Waya,* paras 11-13, Lord Walker and Hughes LJ summarised the requirements of A1P1 and section 3 of the Human Rights Act 1998. In *Barnes,* paras 53ff, Lord Toulson reviewed the Strasbourg jurisprudence. It is unnecessary to repeat the summary or the analysis in this case; the general principles are well understood. In our view Mr Mitchell's argument is as compelling as it is simple. To take the same proceeds twice over would not serve the legitimate aim of the legislation and, even if that were not so, it would be disproportionate. The violation of A1P1 would occur at the time when the state sought to enforce an order for the confiscation of proceeds of crime which have already been paid to the state. The appropriate way of avoiding such a violation would be, as Mr Mitchell has submitted, for the confiscation order made against each defendant to be subject to a condition which would prevent that occurrence.
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> 73. This approach may appear to risk producing inequity between criminal conspirators, on the basis that some of them may well obtain a "windfall" because the amount of the confiscation order will be paid by another. However, that is an inherent feature of joint criminality. If the victim of a fraud were to sue the conspirators and to obtain judgments against them, he would be entitled to enforce against whichever defendant he most easily could. The losses must lie where they fall, and there is nothing surprising, let alone wrong, in the criminal courts adopting that approach."

57. The analysis above is sufficient to deal with the applicant's grounds relating to proportionality, A1P1, fairness and evidential rules. We reject the submission that the order is disproportionate, or unfair, or inconsistent with findings of fact or the state of the evidence. We turn now, briefly, to address the argument based upon constructive trusts.

58. A constructive trust is a device used to impose an obligation upon a person in wrongful receipt of property, to disgorge that property by way of an account or restitution or in some other appropriate way. Constructive trusts have, on occasion, been used as part of the reasoning under section 10A(1) POCA (concerning the determination of interests of third parties). These determinations apply the usual principles for ascertaining a common intention constructive trust (as set out in cases such as *Jones v Kernott* [2010] EWCA Civ 578 and *Stack v Dowden* [2007] UKHL 17). This aside it is hard to see how or why the principle should have much or any application in relation to apportionment between defendants. The liability to pay is imposed by an order mandated under a statutory regime, not the common law, and is made *in personam.* The statute sets out a structured approach to the calculation of the final payment obligation which (see section 6(5)) can bring proportionality into play. Case law has equally made clear that proportionality should be injected into the analysis. There is little, if any, scope or need for the further overlaying of principles of equity to this statutory regime. If the making of an unapportioned order for the full benefit figure is proportionate, it is hard to envisage how that order could also be inequitable.

59. The authorities relied upon by Dr Van Dellen are not cases under POCA, but cases where the common law was concerned to find a remedy to ensure that wrongdoers disgorged their ill-gotten gains. *FHR European Ventures* (*ibid*) was a case concerning whether a bribe or sect commission received by an agent was held by the agent on trust for his principal or whether the principal merely had a claim for equitable compensation in a sum equal to the value of the bribe or commission (see per Lord Neuberger at paragraph [1]). *AG for Hong Kong v Reid* (*ibid*) was also a case concerning the correct analysis in equity of bribes, and property derived from bribes, which had been received by a public servant and concerned the scope of the duty to account. Insofar as these cases have resonance, it lies in the fact that in both cases a policy in favour of compelling full disgorgement of the benefit of wrongdoing was recognised. In equity, and in relation to the law governing constructive trusts, there is thus a recognised, powerful, public policy in ensuring that the full benefits of unlawful activity are wrested away from wrongdoers. We reject the submission that the order is inconsistent with the law relating to constructive trusts.

60. For all the above reasons, the application is refused.