Neutral Citation Number: [2019] EWCA Crim 163

Case No: 201704286

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Manchester Crown Court
HHJ Goddard QC
T20147139

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15th February 2019

Before :

LADY JUSTICE THIRLWALL
MR JUSTICE KERR
and
MRS JUSTICE MAY DBE

- -

Between:

GARY PETER FULTON	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Ms Bewsey QC and Mr Brown (instructed by **Crown Prosecution Service**) for the **Crown**
Ms Eastwood (instructed by **Brunskill Solicitors**) for the **Appellant**

Hearing date: 31st August 2018

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Approved Judgment

LADY JUSTICE THIRLWALL:

1. This is the judgment of the court to which we have all contributed.
2. The central issue is whether the appellant, an experienced foreign exchange dealer, convicted of conspiring to launder money, benefitted from his criminal conduct.

Background

3. On 25th April 2016, in the Crown Court at Manchester the appellant, Gary Fulton, 52, was convicted after a trial of conspiracy to disguise, convert or transfer criminal property contrary to s1(1) of the Criminal Law Act 1977. He was later sentenced to four and a half years' imprisonment. A Serious Crime Prevention order was imposed, to run for two years from his release into open conditions. His appeal against sentence was dismissed on 10th March 2017.
4. Confiscation proceedings took place at the end of which on 25th August 2017 the appellant was made the subject of an order under section 6 of the Proceeds of Crime Act 2002 (POCA) in the sum of £104,228 to be paid within six months, with a term of 18 months' imprisonment in default.
5. There were six other people charged with the same offence as the appellant: Daniel Wood was convicted at the same trial and sentenced to 7 years' imprisonment. A confiscation order was made against him in the sum of £70,000. All other defendants had pleaded guilty at an earlier stage. They were sentenced by a different judge, well before the trial. All received one third credit for their guilty pleas. Mohammed Aslam was sentenced to 6 years' imprisonment and a confiscation order was made in the sum of £383,637.52. Thejinder Thethi was sentenced to 34 months' imprisonment. A confiscation order was made in the sum of £15,395. Amir Mohamed was sentenced to 40 months' imprisonment. A confiscation order was made in the sum of £16,165. Adam Lulat was sentenced to 28 months' imprisonment. Alexander Hart was acquitted.
6. Permission to appeal the confiscation order was granted by the full court on 29th June 2018 after refusal by the single judge.

Facts

7. We take the facts of the money laundering offence from the judgment of this court on the appeal against sentence **[2017]** 2 Cr. App. R. (S) 11 at [1] to [9]. The underlying fraud was a Missing Trader Intra Community (MTIC) fraud which cheated predominantly the German Revenue by (missing) traders failing to pay or account for VAT received from a trader in another EU country to whom they had sold or purported to sell goods. It was investigated under the name Operation Vista.
8. The laundering of the proceeds of the fraud was carried out through a number of companies under the control of Mohammed Aslam. Although he was not a director or other officer of any of the companies it was he who gave instructions for money transfers on their behalf. The money transfers were made through several money service bureaux ("MSB"). Monies were exchanged from one currency into another and payments were made into and out of accounts in the name of the companies by the MSB. One of the MSB performing those operations was Omnis FX Capital ("Omnis").

9. Wood was the sole director of and sole shareholder in Omnis which he had set up in about 2008. Omnis operated from a small office in Truro. Wood was an experienced foreign exchange trader and well aware of the money laundering regulations. He was authorised as a fit and proper person and was the designated Money Laundering Reporting Officer for Omnis. The appellant was also an experienced FX trader. The appellant and Hart (who was acquitted) were accounts managers at Omnis. They processed all the payments into and out of the company's accounts, exchanging money from pounds sterling to euros and vice versa. The ultimate destination of the monies varied; some were paid into UK accounts which were under the control of a student, Ali, who was acting indirectly under the instructions of Aslam. There was no apparent commercial rationale for exchanging sums between pounds sterling and euros.
10. Omnis had a "know your customer" file for each company, to which the appellant and Hart paid no regard. The appellant, Hart and Wood dealt with Aslam knowing that he was not the named customer for any of the companies and was not a named officer or employee. They carried out no due diligence checks.
11. HMRC conducted compliance visits to Omnis and on each occasion the appellant and Wood gave the impression that they were fully complying with the money laundering regulations. They were not.
12. The transactions at Omnis in respect of which the appellant was convicted took place between March and November 2011. During that period the estimated tax loss to the European Revenue Authorities from the MTIC fraud was put at about £17½ million. Not all of that money passed through Omnis. At least two other MSB were used.
13. There were 597 transactions in the relevant period passing through the Omnis accounts for the companies involved in the MTIC fraud. They involved a total of about €35 million which was treated as equivalent to about £30 million. The appellant was responsible for handling 362 transactions, about 60% of the total. Hart was responsible for the remaining 40%. Evidence of transcripts of telephone calls made clear that Wood and the appellant knew that this was not legitimate trade but the laundering of illegal funds.
14. As was clear from the sentencing remarks and the judgment in the confiscation proceedings, of those before the court Aslam played the most important role; he was one of the leading conspirators. The judge found that Wood played a leading role; he was the sole director and shareholder of Omnis FX. He was the Money Laundering Reporting Officer. The judge accepted that his initial dealings with Aslam were legitimate but that he actively sought to acquire Aslam's **later** illegitimate business. She regarded Wood's part in the conspiracy as "very serious indeed" and sentenced on the basis that he fell within Category A1 of the guidelines for the substantive offence with high culpability. She took a starting point of 8 years which she reduced to 7 years on account of the mitigation.
15. The judge found that the appellant's situation was different. She found specifically that he did not play a leading role and assessed his culpability as medium, making the offence category 1B with a starting point of seven years. She observed "you did carry out a significant function in this and within this conspiracy, taking responsibility for registering the companies… and making effort to get Mr Aslam's companies through the registration process". She observed "It's right that you didn't make a significant personal gain but nevertheless I find that you were motivated by getting more business for the company and therefore more commission for everybody." In light of the role he had played she moved down from the starting point of seven years to six years' imprisonment before taking account of personal mitigation which led to the

sentence of four and a half years.

The confiscation proceedings

16. Aslam did not dispute that he had benefitted from the money laundering. Wood accepted that he also had benefitted but argued that his benefit figure should be restricted to the equivalent of the VAT of which the foreign revenue authorities were deprived by the fraud, namely £17.5m. The judge rejected that argument in his case.
17. In her judgment on the confiscation proceedings the judge, having set out Wood's role within the conspiracy as above, acknowledged that he was not responsible for the day to day contact with Aslam but he knew "exactly what trading was being done on an almost daily basis."
18. The appellant argued that he had benefitted only by the amount of commission he had obtained. It was the prosecution case that the benefit figure was the full amount of the money that went through Omnis as a result of the trading with the Operation Vista companies: £29,750,000 for Wood (ie the full amount) and £17,850,000 for Fulton, ie 60% of the total.
19. The judge summarised the defence case thus: "the benefit should be calculated in accordance with the general principles set out in *R v Sivaraman* [2008] EWCA Crim 1736, 12 and *R v Allpress & Ors* [2009] EWCA Crim 8 on the basis that he acted purely in the capacity of an employee and that he himself had not obtained the monies in the ordinary meaning of the word. Although his acts may have contributed significantly to the money being so obtained, Fulton should be seen in the same light as a courier or custodian of cash, that he had no personal right to possession of the money, that any control he could be said to have had over the money came in his capacity as an employee and he acted as directed by Wood. He's in a wholly different position to that of Wood who was a director of the company, he was a mere employee, he was not a signatory on the Omnis company account nor was he a shareholder. He accessed the Omnis bank account via a banking platform and she submits only as directed as an employee by Daniel Wood. Wood authorised all customer files and all transactions, his only benefit from his participating in the conspiracy was the commission he earned from the relevant trading, £4206.12. He would have been paid his salary regardless. Thus the benefit figure should be £4,206."
20. In the central passage of her judgment the judge noted that the bank account was not the appellant's. Nor was he a signatory on it. She concluded that "Fulton was far from being a bailee of goods or a minor contributor to the conspiracy. He played a very significant role as I've outlined above, he was responsible for the know your client procedures … and was the main point of contact with Aslam. Although not a signatory as such on the Omnis bank account he had ready access to the Omnis bank account which contained sub-sections for each client, he was authorised to access the banking platform that allowed transfers between the client account of different currencies and to transfer [monies] both between client account and onwards to third parties or back to the client's own account. He did not need Wood's authorisation to make such transfers, he carried out hundreds of transactions. Although Wood had to authorise the opening of the client account Fulton had considerable autonomy to conduct trade and although Wood wanted to know what trading was going on, it was not the case that he personally authorised each and every currency trade on my consideration of the evidence.
    Such was his involvement in the conspiracy ***that to all intents and purposes Fulton***

was in control of the money transfers within the Omnis account. He may only have received a small personal profit by way of commission but he had obtained the money transfers into the Omnis account from the companies fronted by his co conspirator, Mohammed Aslam jointly on behalf of himself and the other conspirators with the intention that the criminal property it represented would be passed on to others within the conspiracy. The appropriate amount of Fulton's benefit in my judgment is therefore £17,850,000 being 60% of £29,750,00" (our emphasis).

21. The appellant had realisable assets in the sum of £104,228, most of it in a property bought with damages he had received after a motorcycle accident. It was submitted on his behalf that it would be disproportionate to make an order in that sum for a number of reasons including his family's straitened circumstances and the fact that he could only be shown to have profited by a relatively small amount personally. The judge considered that latter point to be of limited relevance "in a case where such vast sums are involved and where he was so closely involved. Whilst I acknowledge the effect on Mr Fulton's finances will be severe as in most confiscation orders, given the important and pivotal role he played in the money laundering conspiracy...I do not consider the making of an order for £104,228 will be disproportionate." She declared the benefit figure as £17,850,000 and made a confiscation order in the sum of £104,228.

Grounds

22. There are 4 grounds of appeal:
    1) The judge erred in finding the appellant had obtained the benefit of the monies in the Omnis bank accounts jointly on behalf of himself and the other conspirators.
    2) Alternatively, the judge erred in finding the appellant's benefit was to be assessed by reference to the monies transacted within the conspiracy rather than the pecuniary advantage of the tax associated with such monies that had been evaded.
    3) The finding of benefit in the confiscation order was disproportionate, as was the confiscation order itself.
    4) The order potentially allowed multiple recovery. It should have been qualified so as to ensure this did not happen.
23. There is no dispute about ground 4. This was an oversight. The Crown accept that the order ought to include a provision that it shall be enforced only to the extent that it has not been satisfied from co-defendants.

Ground 1

24. It is the appellant's case on ground 1 of the appeal, as it was before the trial judge, that he obtained nothing beyond the commission on the trades he undertook as part of the conspiracy (and, possibly, that part of his salary that could be attributed to those trades). The judge was in error in treating the sums he moved through the Omnis bank account as property he had obtained for himself.
25. Ms Bewsey QC, who did not appear at the confiscation proceedings, and Mr Brown rely on the judge's findings of fact. That he was in control of the money transfers in the context of money laundering, as the judge found, leads inevitably, they submit, to the conclusion that the appellant obtained property and thereby benefitted from the transfers.

The Statutory Framework

26. Part 2 of POCA applies. This is not a criminal lifestyle case. Pursuant to section 6(4)(c) the court must decide whether the defendant has benefitted from his particular criminal conduct. Having done so, the court must then assess the recoverable amount which is an amount equal to the defendant's benefit from the conduct concerned, usually referred to as the benefit figure. But if the available amount is less than the benefit figure the recoverable amount is the available amount unless the available amount is nil in which case the recoverable amount is a nominal amount (see section 7).

Benefit

27. S76(4) of Proceeds of Crime Act 2002 (POCA) provides:
"A person benefits from conduct if he obtains property as a result of or in connection with the conduct."
28. Section 84 defines property thus :
"(1) Property is all property wherever situated and includes-
(a) money;
(b) all forms of real or personal property;
(c) things in action or intangible or incorporeal property.
(2) The following rules apply in relation to property-
(a) property is held by a person if he holds an interest in it;
(b) property is obtained by a person if he obtains an interest in it:…
(h) references to an interest, in relation to property other than land, include references to a right (including a right to possession)."
29. Funds going through bank accounts are property within the meaning of section 84.
30. It is not in dispute that the appellant obtained commission in connection with the money laundering. That is a benefit. The issue for this court is whether the judge was right to find that he obtained 60% of the funds which came through the Omnis account from the VAT (or MTIC) frauds uncovered during Operation Vista.
31. Ms Eastwood relied, as had her predecessor below, on the decision of this court in *R v Sivaraman*. To place her submissions in context it is necessary to look at the case in some detail.
32. An employee pleaded guilty to conspiracy to contravene section 170(2) of the Customs and Excise Act. His employer had conspired with him to evade excise duty on diesel by buying red diesel, removing the red dye and then selling it on for use as DERV (diesel engine road vehicle fuel). The appellant received £15,000 for his part in the conspiracy. The total amount of VAT evaded was £130,000, of which his employer had had the benefit. At the confiscation proceedings the judge imposed an order in the sum of £59,365, with some misgivings and gave permission to appeal.
33. The summary of the decisions of the House of Lords (all of which are relied on here) at paragraph 12 is of assistance.
"[12] In the trio of cases recently decided by the House of Lords [*R v May* [2008] UKHL 28, *R v Jennings* [UKHL] 29 and *R v Green* [UKHL] 30 a number of matters were made plain:

> (1) The legislation is intended to deprive the defendants of the benefit they have gained from the relevant conduct within the limits of their available means. It does not operate by way of fine: *May*, paragraph 48(1); *Jennings*, paragraph 13.
>
> (2) The benefit gained is the total value of the property or pecuniary advantage obtained, not the particular defendant's net profit: *May*, paragraph 48(1).

(3) In considering what is the value of the benefit which the defendant has obtained, the court should focus on the language of the statute and apply its ordinary meaning (subject to any statutory definition) to the facts of the case: *May*, paragraph 48(3) and (4); *Jennings* paragraph 13.

(4) "Obtained" means obtained by the relevant defendant: Jennings, paragraph 14.

(5) A defendant's acts may contribute significantly to property, or to a pecuniary advantage, being obtained without that defendant obtaining it: *Jennings*, paragraph 14.

(6) Where two or more defendants obtain property jointly, each is to be regarded as obtaining the whole of it. Where property is received by one conspirator, what matters is the capacity in which he receives it, that is whether for his own personal benefit, or on behalf of others, or jointly on behalf of himself and others. This has to be decided on the evidence: *Green*, paragraph 15. By parity of reasoning, two or more defendants may or may not obtain a joint pecuniary advantage; it depends on the facts.

34. At [15] the court dealt with the position of the appellant;

"…The proposition that a person acting purely in the capacity of an employee, who receives a consignment of illicit fuel on behalf of his employer, and who, as a reward for doing so, receives only an enhanced wage or cash payment, must necessarily as a matter of law be taken to profit to the same extent as his employer does from the purchase and sale of the consignment is unsound. But that was the proposition which caused the judge to find as he did.
…

[19] The greater the involvement of a defendant in a conspiracy, the greater will be the appropriate level of punishment. But it does not follow that the greater the involvement the greater the resulting benefit to that defendant. Within the statutory definitions contained in the Act, what benefit a defendant gained is a question of fact. As we have said, the critical question in relation to the conduct of the appellant in supervising the bunkering operations carried out under his control was the capacity in which he was acting. Was he, in point of fact, a joint purchaser of the fuel for resale as DERV who, by his conduct, jointly gained the pecuniary advantage of being able to resell it as DERV without having incurred the duty which would have had to be paid on purchasing DERV; or was he acting just as an employee? The judge did not find the former. Indeed, it is plain that he believed the position to be the latter. Otherwise he would have had no misgiving in finding that the appellant obtained benefit of the amount which he felt obliged to find. It would be wrong for this court to make a different finding."

35. The court rejected the submission that all conspirators must be taken to enjoy a 100 per cent share in the benefit.
36. In focussed submissions Ms Eastwood made four points:-
i) The judge has erroneously equated central involvement in the conspiracy with receiving the benefit of it. She relied in particular on paragraph 14 of *Jennings*, "A person's acts may contribute significantly to property being obtained without his

obtaining it. But under section 71(4) (of the Drugs Trafficking Offences Act [to the same effect as section 76(4)) POCA 2002] a person benefits from an offence if he obtains property as a result of or in connection with its commission, and his benefit is the value of the property so obtained, which must be read as meaning "obtained by him". She submitted that the appellant obtained nothing beyond commission. The judge was wrong to find that he obtained the funds into the Omnis Account for his benefit and that of his fellow conspirators.

ii) The appellant was an employee, conducting himself in accordance with the terms of his employment. The judge should have concluded that his position was the same as the employee in *Sivaraman*.

iii) His role was akin to that of a custodian or courier (as described by Lord Bingham in the Endnote to *May*. Such control as he exercised over the transfers was within the course of his employment and circumscribed by the instructions of the client.

iv) The effect of the order is to impose a fine upon him, which is impermissible (see *May* [48], *Jennings* [13] and *Sivaraman* [12].

37. Ms Bewsey and Mr Brown submit that on the evidence:-

    i) the appellant was instrumental in the money movements by which the conspiracy to launder was effected

    ii) the appellant had a central and active role in the mechanics of the laundering process and

    iii) he acted in conjunction with others involved in the conspiracy, but he retained a significant level of autonomy within the execution of the money laundering process.

38. Ms Bewsey also relied on a passage from the endnote to the decision in *R v May* where Lord Bingham was dealing with the meaning of the word obtain in an identical context. He observed that "[obtain] must ordinarily mean that he has obtained property so as to own it, whether alone or jointly, *which will ordinarily connote a power of disposition or control as where a person directs a payment or conveyance of property to someone else."*(our emphasis).

39. The question of ownership has been discussed in later cases (see *R v Ahmad and Fields* [2012] EWCA Crim 391) at paragraph 47 and it is not necessary to develop that here. Suffice it to say that legal ownership of property is not required in order for a person to obtain it. Ms Bewsey did not seek to suggest that the appellant legally owned the money transfers and the judge made no finding to that effect. On analysis Ms Bewsey's submission was that a power of disposition or control over property is cogent evidence that a person has obtained that property, here the money transfers, within the meaning of section 76(4). He is exercising the rights of an owner – here, jointly with Aslam and others.

40. That the appellant was centrally involved in money laundering (which is what the submission at paragraph 37 (i) and (ii) above come to), is not in dispute, nor is the fact that he acted in conjunction with others involved in the conspiracy but it is Ms Eastwood's contention that the involvement all took place in the course of the appellant's employment.

41. As to the proposition that the appellant retained a significant level of autonomy within the execution of the money laundering process Ms Eastwood submits that his autonomy was only in respect of mechanical tasks – and was circumscribed by the terms of his employment. She reminded us that the process of money laundering was as follows: the appellant received written instructions that monies were to be paid into the Omnis Account. Aslam/the client set out in writing what was to be done with the money by way of foreign exchange. The appellant would obtain a spot rate

and would communicate that rate to Aslam/the client who would confirm that the rate was acceptable. The appellant would then access the online banking platform and carry out the transaction. There was some dispute about whether the instructions were always written or were often oral. For the purposes of determining whether the appellant obtained property the distinction does not matter.

42. In support of the proposition that the appellant retained a significant level of autonomy Ms Bewsey relied in particular on the fact that on occasion the appellant had refused to move monies, despite instructions to do so and the fact that on some occasions he would advise the client which trade he felt was best for the client. Ms Eastwood pointed out that the only occasions on which the appellant refused to move monies notwithstanding instructions to do so was when there was no money on account or when what was being required was outside the proper function of a MSB.
43. The judge found that the appellant retained a significant amount of autonomy;

> "Although Wood had to authorise the opening of the client account Fulton had considerable autonomy to conduct trade and although Wood wanted to know what trading was going on, it was not the case that he personally authorised each and every currency on my consideration of the evidence."

The context of this passage is set out in full at paragraph 20 above.

44. Ms Eastwood argued that far from obtaining the money transfers for himself, the appellant's position was the same as the employee in *Sivaraman*, the till operator in *Allpress* [48], and the appellant in *R v Clark and Severn* [2011] EWCA Crim 15.

Discussion

45. The decision in *Sivaraman* is not authority for the proposition that an employee who is involved in a conspiracy with his employer does not individually gain a benefit. As we have set out in paragraph 34 above the court declined to interfere with the judge's finding of fact, which was not explicit but which the court inferred, that the appellant in that case was acting "just as an employee". In this case, the judge rejected the submission that the appellant was acting just as an employee.
46. We have considered the analogy with the till operator described by this court in *Allpress* at paragraph 48. No one would suggest that a till operator (where such a role still exists) who receives money from a customer obtains it within the meaning of the Act, as this court observed in *Allpress*. The same would be said about an honest foreign exchange dealer who in the course of his employment receives from an honest client funds in one currency with instructions to change it into another. Even closer to the facts of this case is the position of the acquitted defendant Hart. He was (without knowing it) involved in the mechanics of money laundering in the course of his employment. It would not be suggested that he obtained the money that he was moving through the Omnis accounts.
47. Is the position of the appellant different from that of Hart in respect of obtaining the money transfers? In our judgment it is and it is different from the position of the other notional employees to whom we have referred; the difference between the position of an employee acting honestly in the course of his legitimate employment and that of the appellant is fundamental. The appellant was acting as a money launderer. His employment was the context within which he was able to carry out very large scale money laundering. He was money laundering because he was involved in the conspiracy, not because he was employed as a foreign exchange dealer. Money laundering was not a requirement of his employment. It was the

result of his involvement in criminal activity. What he did was not circumscribed by the terms and conditions of his employment, he did what was necessary to achieve the aim of money laundering. Aslam and Wood, amongst others, relied on his experience and skills as a money launderer. By contrast each of the three notional individuals to whom we have referred above is conducting himself only as an employee. None is engaged in criminal conduct and the question of benefitting from such conduct does not arise.

48. In the case of *Clark* upon which Ms Eastwood also relied, the appellant played an integral role in the moving of stolen cars through Felixstowe to East Africa. This court found that the trial judge had erred in reasoning from a finding that he was a principal conspirator, an essential cog in the wheel of the conspiracy "directly to a value judgment" that "accordingly, the assessment of his benefit…should be the valuation of the motor vehicles which passed through his hands"
49. Rix LJ gave the judgment of the court. At [30] he said

> "it is true that a courier's or custodian's role may be of a more limited nature, although there could be no disguising the importance of the courier's role in *Allpress*, where for instance Casal was carrying almost £10m in cash as a director of his company; and the roles of the service station manager in *Sivaraman* and of the pilot in *Anderson* plainly went well beyond those of a courier or custodian and were vital elements in those conspiracies. In truth, however, talk of mere couriers or custodians is not, or not only, a reference to the possibility that the roles of such conspirators are generally of a more minor nature, but rather, as a matter of principle, that such persons who are paid a fee or salary for their involvement are not conspirators or participants of such a nature as to make it likely, or to suggest the inference, that the property concerned is in their joint ownership.
>
> That, after all, is the ultimate question to which the trilogy of cases in the House of Lords directs attention. As pointed out in *Jennings* and again in *Allpress* a defendant may play an important role in a conspiracy without obtaining property for the purpose of the test of benefit. As in *Anderson* the judge in this case proceeded to his decision as he was invited to do by the Crown, but without making clear findings about the capacity of Clark or about where he had received and dealt with the cars as a matter of jointly obtained property".

50. At paragraph 47 of *Ahmad and Fields* Lord Neuberger said
> "as was said in *Sivaraman*, para 12 (6) and in *Allpress*, paras 30-31 (and approved in *Mackle*, paras 64-65), when a defendant has been convicted of an offence which involved several conspirators and resulted in the obtaining of property, the court has to decide on the basis of the evidence, often relying on common sense inferences, whether the defendant in question obtained the property in the sense of assuming the rights of an owner over it, either because he received it or because he was to have some sort of share in it or its proceeds, and, in that connection, the role of a particular conspirator may be relevant as a matter of fact, but that is a purely evidential matter."

51. In this case, unlike the judge in *Clark*, the judge made very clear findings about the role of the appellant (see paragraph 20 above). On her analysis, which was correct, she was bound to reject the submission that he was a custodian or a bailee. He was centrally responsible for laundering money for the benefit of the members of the conspiracy of whom he was aware and for himself. He was not receiving a fixed fee.

He was receiving commission based on the turnover of the business and so directly related to the money he was laundering. It was a share in the proceeds.

52. Ms Bewsey argued that the appellant was in the same position as the appellant in *R v Morris*, which formed part of the decision in *Allpress* at paragraphs 83-87, under the heading "The Money launderer through the banking system". Morris was a partner in a solicitors' firm. He was convicted of assisting his co-defendant to retain control of the proceeds of the partner's criminal conduct. Monies were paid into the client account of Morris and his partners at their bank. Morris had sole operational control over the account. He submitted that by operation of the Solicitors' Accounts Rules 1998 he was a mere trustee of the funds, acting on behalf of his co-defendant. The court rejected that submission and found that the money in the account was held for his benefit. He was not a mere nominee or a bare trustee, [86] "It is true that the offences of which Morris was convicted all contained the ingredient of assisting Woolley to retain control of the proceeds of his criminal conduct, but with that ultimate objective Morris received funds, in respect of which he had legal ownership and also practical control."

53. Ms Eastwood submitted, correctly, that the case of the appellant is different. The Omnis account was not his and he had no legal interest in it. He was not a signatory on the account and, unlike Morris, did not have sole operational control over it.
54. As a matter of fact, as the judge found, the appellant had sole operational control over the transfers for which he was responsible and, importantly, he had access to the banking platform for the purposes of transferring money. That he was not a signatory on the bank account is neither here nor there. He was controlling the funds electronically while carrying out the transactions and was responsible for them coming into the Omnis account, as the judge found.
55. In *Morris* the court "did not exclude" the possibility of a case where money was paid into the bank account of A but B operated the account entirely for his own benefit. Such a situation might arise, the court considered, in a domestic context; A would be a mere nominee who did not obtain the funds. We would add that B, operating the account for his own benefit would obtain the money for himself, irrespective of his lack of legal interest in the account. It is not necessary to be the legal owner to obtain property (see *Ahmad and Fields* at paragraph 42).
56. We are satisfied that the appellant's lack of legal interest in the bank account of Omnis does not lead to the conclusion that he did not obtain the funds he controlled. He did so as effectively as if a co-defendant had brought the funds to the MSB in a suitcase and handed them to him so he could exchange them into currency of a different kind for the benefit of the two of them.
57. Accordingly, notwithstanding Ms Eastwood's submissions we reject the first ground of appeal.

Ground 2

58. It is contended for the appellant, in the alternative, that the judge erred in finding that the appellant's criminal benefit was the amount of monies found to have been transacted by him within the conspiracy. Rather, it is said, the judge should have decided that his criminal benefit was an amount equivalent to "the tax evaded associated with such monies", as it is put in the grounds of appeal, and not the full amount (£17.85 million) of the monies transacted by him on behalf of Omnis. This was not an argument that was made before the judge below. Her judgment therefore

does not examine this argument. Nonetheless, the full court gave leave for this ground to be argued as part of this appeal.

59. The appellant accepted he had benefited from his criminal conduct (section 6(5)) and that the judge was therefore required to "decide the recoverable amount" (section 6(5)(a)) and make a confiscation order accordingly. As we have said above the "recoverable amount" is (by section 7(1)) "an amount equal to the [appellant's] benefit from the conduct concerned".
60. We return to section 76. Subsection (5) provides as follows:

> "(5) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.
>
> (6) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and some other.
>
> (7) If a person benefits from conduct his benefit is the value of the property obtained."

61. Sections 79 and 80, which we need not set out, enact rules for ascertaining the value of property held by a person at a particular time, and the value of property obtained by a person as a result of or in connection with his criminal conduct.
62. Those provisions all form part of Part 2 of the 2002 Act, headed "Confiscation: England and Wales". A separate Part of the same Act, Part 7, is headed "Money Laundering". As is well known, it starts with section 327 which created (along with other offences enacted by sections 328 and 329) the offences of disguising, converting or transferring criminal property. It is those substantive offences which, it is common ground, the appellant conspired with others to commit in this case.
63. The interpretation section at the end of Part 7 is section 340, which "applies for the purposes of this Part" (section 340(1)). It defines "criminal conduct" as conduct constituting an offence (section 340(2)) and includes within the scope of "criminal property", property which (by section 340(3)(a)) "constitutes a person's benefit from criminal conduct or … represents such a benefit (in whole or part and whether directly or indirectly)", and which (by section 340(3)(b)) "the alleged offender knows or suspects … constitutes or represents such a benefit".
64. However, in establishing "criminal conduct" for the purpose of the money laundering offences, it is "immaterial … who carried out the conduct" (section 340(4)). This is because the money laundering offences are committed, broadly, by dealing with the proceeds of criminal conduct but it is unnecessary, and often impossible, to identify the prior underlying criminal conduct which has produced the ill-gotten gains which the defendant is accused of laundering.
65. By section 340(5), for the purpose of the money laundering offences, "[a] person benefits from conduct if he obtains property as a result of or in connection with the conduct".
66. The premise of this second ground of appeal is that even if the appellant obtained monies held in Omnis's bank accounts, the benefit he obtained from criminal conduct was, at the most, property equivalent to a pecuniary advantage equal to the amount of tax successfully evaded as a result of the relevant Omnis transactions, and not the full amount of those transactions.

67. The appellant's submissions were developed in writing and in oral argument. We summarise Ms Eastwood's arguments as follows:
    (1) The total amount of money passing through Omnis's bank accounts was in the region of £30 million. The amount of VAT evaded as a consequence was a sum in the region of 19 or 20 per cent of that figure; say, about £6.1 million. There was therefore a pecuniary advantage to the principals in the VAT fraud of £6.1 million.
    (2) The appellant was responsible for about 60 per cent in monetary value of the "trades" passing through Omnis's accounts. Therefore, the amount of his benefit or pecuniary advantage is, at the most, 60 per cent of (about) £6.1 million, which amounts to (about) £3.66 million.
    (3) The present case was analogous to the position in *R. v. Ahmad (Shakeel)* [2012] EWCA Crim 391, CA (further appealed, see [2015] AC 299, but not reversed on this point). The defendants were convicted of cheating the Revenue of £12.6 million of VAT fraudulently reclaimed from the Revenue; their criminal benefit was held in the Court of Appeal to be £12.6 million, not (as held at first instance) the £92.3 million passing through bank accounts in furtherance of the fraud and representing the cost of committing the offences.
    (4) It would be perverse and unfair, as well as contrary to the authority of *Ahmad (Shakeel)*, if the primary wrongdoers who defrauded the tax authorities in this case could only be held accountable for a benefit of £6.1 million, while those who, like the appellant, merely assisted in transactions to facilitate the fraud could become accountable for a much larger benefit amounting to some £30 million.
    (5) In the appellant's appeal against sentence, *R. v. Fulton and Wood* [2017] EWCA Crim 308, Popplewell J had explained at [18]-[28] that when applying the sentencing guideline, the relevant amount is the amount of money laundered, not any lower amount representing the proceeds of the underlying criminal conduct. The offence is the laundering of the proceeds; the prior criminal conduct producing the funds to be laundered need not be and often cannot be identified. But when ascertaining the amount of benefit from criminal conduct in confiscation proceedings, the position is different and the provisions should not operate as a fine, taking from a defendant more than he gained from his criminal conduct.
    (6) The appellant did not himself obtain a "pecuniary advantage", since he was not the party personally liable to pay the tax unlawfully evaded by means of the conspiracy (see *R. v. Mackle* [2014] AC 678). His benefit should therefore be limited to the £4,206.12 he received in salary and commission. But if the court considered that he had received any pecuniary advantage or benefit, on any view it could not exceed the £3.66 million representing the tax evaded by means of the Omnis transactions for which he was responsible.

68. For the Crown, Ms Bewsey QC in oral argument, and Mr Brown in written argument, countered with the following main points:
    (1) The concept of criminal property as property obtained through criminal conduct should be the same for the purpose of defining the money laundering offences and applying section 340, as for the purpose of identifying in confiscation proceedings the amount of a person's benefit from particular criminal conduct (*R. v. Lonnie Smith* [2015] EWCA Crim 333, per Sharp LJ at [41]). The reasoning of the Court of Appeal in *Ahmed (Shakeel)* is therefore not in point.

(2) Applying that approach here, the whole of the monies passing through Omnis's bank accounts were criminal property, since they constituted benefits from criminal conduct, in whole or in part and whether directly or indirectly (section 340(3)(a)) and the appellant knew or suspected (section 340(3)(b)) that those monies represented a benefit from criminal conduct. He benefited from that conduct because he obtained property "as a result of or in connection with the conduct" (section 340(5)).

(3) Here, the criminal conduct was the conspiracy to launder the criminal property. In confiscation proceedings, there is no anomaly in treating those involved in cheating differently, and less harshly, than those who launder the proceeds. As explained in the appellant's sentence appeal, the latter type of offending is concerned with the disguising of tainted funds by mixing them with clean funds, necessarily involving greater amounts than the amount of money of which the victim is cheated.

(4) It is not permissible to redefine the appellant's "benefit" without reference to the offence committed by the person subject to confiscation proceedings. Each time money is paid into a bank account, the account holder acquires a *chose in action* against the bank, amounting to a benefit.

69. We come to our reasoning and conclusions on the second ground of appeal.

70. In our judgment, the provisions defining the various money laundering offences, in Part 7 of the 2002 Act, do not assist in the present context. Section 340 applies "for the purposes of this Part" (section 340(1)). It does not apply, directly, in confiscation proceedings. Furthermore, the provisions in Part 7 defining "criminal property" are focused on the initial criminal conduct of the person whose crime produces the funds to be laundered. Thus, it is immaterial who carried out that conduct, when considering whether a money laundering offence is committed.

71. The definitions in section 340 are not focused on the conduct of, or the benefit received by, the subsequent launderer of (or conspirator in the laundering of) the funds produced by the initial criminal conduct of the person whose conduct produces the funds to be laundered. By contrast, in confiscation proceedings it is not immaterial who carried out the conduct amounting to laundering the proceeds, or conspiring to do so.

72. We do not think that this court in *R. v. Lonnie Smith*, an unsuccessful appeal against conviction, intended to decide otherwise. Sharp LJ pointed out at [41] that this court in *Ahmed (Shakeel)* did not intend the case to be an authority for the meaning of "criminal property" in a money laundering offence. We respectfully agree. Nor, we consider, did the court in *Lonnie Smith* intend that case to be an authority for the meaning of a benefit from criminal conduct in confiscation proceedings under Part 1 of the 2002 Act.

73. We therefore come back to the provisions in Part 1 governing confiscation proceedings. We accept that the decision of the Court of Appeal in *Ahmed (Shakeel)*, unaffected in this respect by the subsequent appeal to the Supreme Court, is authority for the proposition that where a person cheats the public revenue, the benefit for confiscation purposes is the amount of tax evaded by that person and not the cost of committing the offences or "priming the pump", as Hooper LJ put it in *Ahmed (Shakeel)*.

74. However, in the present case the appellant did not himself evade any tax; as in *R. v. Mackle*, it was not he who would have been liable for the amount of tax evaded as a result of the fraud. We cannot see any principled basis for measuring his benefit from

criminal conduct by reference to the amount of tax evaded, when it was not he but others who evaded it. The appellant did not, as he accepts, obtain a "pecuniary advantage" within section 76(5) of the 2002 Act.

75. The appellant's part in the conspiracy was to execute transactions intended to disguise the fraud and hide the proceeds of it, which took the form of evaded tax. By taking part in that conspiracy, he committed criminal conduct from which he benefited. The amount of the benefit he received depends on applying the ordinary language of section 76(4) and (7). The value of his benefit is the value of the property he obtained as a result of or in connection with the conduct.
76. It follows from this reasoning that the second ground of appeal adds nothing to the first. We do not accept that the intermediate position proposed by the appellant based on the amount of tax evaded, should be adopted as the measure of the appellant's benefit from his criminal conduct.
77. The nature of money laundering offences is such that those guilty of committing them, or conspiring to do so, may be found in confiscation proceedings to have derived greater benefits than those involved directly in cheating. We do not see this as anomalous; it is a consequence of the legislation, which we must apply, and flows from the nature of money laundering offences. The legislation also includes the safeguard that the amount confiscated must be no more than is compatible with the requirement of proportionality; see section 6(5) of the 2002 Act.
78. For those reasons, we reject the second ground of appeal and pass on to the third ground.

Ground 3 – proportionality

79. The appellant's third Ground of Appeal comprised three separate points subsumed within the single contention that the order made by the Judge was "disproportionate in all the circumstances".
80. Ms Eastwood's skeleton referred us to the majority judgment of the Supreme Court in *Waya* [2013] 1 AC 294, where the court considered the POCA confiscation regime against Article 1 of the First Protocol of the Convention. At [16] Lord Walker and Lord Hughes, with whom the majority of the court agreed, observed that an order under s.6(5)(b) POCA requiring a defendant to pay the recoverable amount must be read subject to the requirement that the amount should be proportionate. Ms Eastwood pointed out that Parliament has subsequently enacted that requirement as a rider to s6(5) POCA 2002. This section provides as follows:

> *(5) If the court decides under subsection 4(b) or (c) that the defendant has benefited from the conduct referred to it must*
> *(a) decide the recoverable amount, and*
>
> *(b) make an order (a confiscation order) requiring him to pay that amount.*
>
> *Paragraph (b) only applies if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount.*

81. Ms Eastwood contended that although the Supreme Court in *Waya* only expressly imposed the requirement of proportionality upon an order for payment of the recoverable amount, likewise the subsequent amendment to s6(5) POCA, the same requirement ought to apply also to the level of benefit found by the court. She argued that as s22 of POCA permits the available amount figure to be revisited without any limit of time, the valuation of the level of benefit has an enduring, and potentially very significant, adverse impact upon a defendant. A defendant in respect of whom the benefit figure far outstrips the amount of the order made (as is often the case)

remains exposed to further confiscation in future should his or her financial circumstances change.

82. We did not hear full argument on this point at the hearing, although we see force in these submissions. However, given our findings on proportionality, set out below, it is unnecessary for us to reach a concluded view as to whether courts should be required to address proportionality as a separate consideration when assessing the amount of the benefit in any case**.**
83. The first point relating to the amount of the benefit was in essence a repeat of the second ground of appeal: Ms Eastwood submitted that valuing the benefit in a sum greater than the amount of VAT evaded was disproportionate. In our view this argument fails, for the reasons we identify above.
84. Ms Eastwood's second point was that the value of the benefit was disproportionate in the context of the appellant's limited personal gain. Even if the appellant had "obtained" £17.6m, she submitted, valuing the benefit in this same amount was disproportionate. The true reflection of the appellant's financial gain, she contended, was no more than £9951.12, being the proportion of his overall salary and commission referable to the illegitimate deals which he made with the Operation Vista Companies.
85. In *Waya* at [26] the court said this:

> "It is apparent from the decision in *May* that a legitimate and proportionate confiscation order may have one or more of three effects:
>
> (a) It may require the defendant to pay the whole of a sum which he has obtained jointly with others;
>
> (b) similarly it may require several defendants each to pay a sum which has been obtained, successively, by each of them, as where one defendant pays for criminal property;
>
> (c) It may require a defendant to pay the whole of a sum which he has obtained by crime without enabling him to set off expenses of the crime.
>
> These propositions are not difficult to understand…To attempt to enquire into the financial dealings of criminals as between themselves would usually be equally impracticable and would lay the process of confiscation wide open to simple avoidance. Although these propositions involve the possibility of removing from the defendant by way of confiscation order a sum larger than may in fact represent his net proceeds of crime, they are consistent with the statute's objective and represent proportionate means of achieving it. *Nor, with great respect to the minority judgment, does the application of A1P1 amount to creating a new governing concept of "real benefit*"." (our emphasis)

86. The court in *Waya* accepted submissions of counsel in that case that "it would be very unusual for orders sought under the statute to be disproportionate" ([21]). Situations of disproportionality cited and discussed in *Waya* comprised two cases where defendants had fully restored to the loser any proceeds of crime (*R v. Morgan* [2008] EWCA Crim 1323 and *R v. Bygrave* [2009] 1 Cr App R (S) 60) EWCA Crim 1323), and one case where the defendant had obtained small overpayments on otherwise legitimate pharmaceutical orders.
87. The circumstances of the three cases discussed in *Waya* are plainly very different from those pertaining here, where large sums of money were laundered through repeated trading on the Omnis FX trading platform. As we have noted above, the benefits obtained through money laundering are necessarily diffuse, it is difficult to

isolate and identify specific sums; that is the criminality of the laundering activity, which specifically seeks to mix legitimately- and illegitimately- obtained monies together, thereby putting the latter beyond trace. As we have already said, the judge was entitled to find that the appellant had obtained the funds which he traded improperly. Accordingly it is not disproportionate to the purpose of the confiscation legislation to identify this figure as the amount of his benefit.

88. Finally, it is said to have been disproportionate to make an order in the sum of the available amount of £104,228 when considered next to the circumstances under which the appellant obtained the property assets whose value represents the largest part of this sum. We were told that the property was an investment purchased with compensation paid to the appellant following a road accident, designed to provide for his future financial security in circumstances where the accident had compromised his mobility and his employment prospects. Ms Eastwood submitted that where the property was held as an investment for these purposes, it would be unfair and disproportionate for an order to be made depriving the appellant of those assets.
89. We can deal with this point shortly. The available amount was agreed. As we have noted above, the matter of proportionality in relation to the recoverable amount is specifically addressed by the rider to s6(5)(b) POCA. The judge reminded herself of this provision (see p.4B-D). She heard and considered argument regarding proportionality in the light of the appellant's personal circumstances before reaching her conclusion as to the amount of the final order. We can see no error of principle in the approach which she adopted.
90. For these reasons we dismiss the appellant's third ground of appeal.
91. Accordingly, notwithstanding Ms Eastwood's submissions, this appeal is dismissed.