Neutral Citation Number: [2020] EWCA Crim 1455

Case No: 201803978 C5, 20183980 C5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK

HHJ ROBBINS T20147131

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 04/11/2020 **Before :**

LADY JUSTICE SIMLER MR JUSTICE EDIS

and

HIS HONOUR JUDGE EDMUNDS QC sitting as a Judge of the Court of Appeal

- -

Between :

(1) **MICHAEL ANTHONY FORTE**
(2) **EVELYN VALE** **Appellants**

- and -

THE QUEEN **Respondent**

- -

David Langwallner (assigned by the **Registrar**) for **Michael Forte**

George Carter-Stephenson QC (instructed by **Cartwright King**) for **Evelyn Vale**

Tom Nicholson instructed by the **Specialist Fraud Division of the CPS**

Hearing dates: 20 October 2020

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Approved Judgment

EDIS J:

1.
There are before the court appeals against (1) a confiscation order made against the First Appellant, Michael Forte, by HHJ Robbins in the Southwark Crown Court on

24th August 2018 and (2) a determination that the Second Appellant, Evelyn Vale's, beneficial interest in the matrimonial, or former matrimonial, home was limited to 50% despite the fact that she holds the legal interest in her sole name. The judge made a further finding that money held in a bank account in the name of Ms. Vale's mother was beneficially owned by Mr. Forte which is also

challenged. Mr. Forte had been convicted by a jury before the same judge of an offence of conspiracy to defraud on 19th December 2015, and sentenced to a term of 8 years imprisonment. The confiscation proceedings were held in July and August 2018 over a period of 5 days, and at their conclusion the judge made a confiscation order in the sum of £615,000 and fixed a term of imprisonment in default of payment of 5½ years. The order required payment of the sum due within 3 months. The judge also indicated that there would be a compensation order in the same sum met by the funds so paid which would be divided pro rata between the victims of the fraud.

2.
The order was made by reference to two assets whose ownership was disputed. The prosecution claimed that Mr. Forte had a 50% beneficial interest in the first and a 100% interest in the second.

i)
The first asset was a property called Hillside Lodge, Chislehurst, Kent which was valued at £1m, and Mr. Forte's alleged half share in the beneficial interest was therefore valued at £500,000. The legal title in the property was in the sole name of Evelyn Vale, who appeared at the confiscation hearing as an Interested Party. Both Appellants claimed that the beneficial interest was held entirely by her, and denied that Mr. Forte had any interest at all.

ii)
The second asset was a sum of money which was £112,874, but rounded up to include some interest by the judge to the sum of £115,000. This rounding up also presumably included the only asset which Mr. Forte accepted he owned, namely £37. The £112,874 was held in a Lloyds bank account numbered 83764268 in the name of Ms. Vale's mother, Jean Walters. Ms. Vale was a signatory on that account, as was her mother. It was not, though, a joint account. This sum represented 50% of the proceeds of sale of Eileen Forte's house, 14 Riverside Close, which was sold during her lifetime on 23 August 2013. Eileen Forte was the mother of two sons, Michael and Colin Forte. The other 50% was paid to an account held in the name of Eileen Forte, but Colin was a signatory on it. She died soon afterwards, but this was a lifetime transaction. The proceeds of sale were split equally by the solicitors who dealt with the sale and paid to these two accounts. The legal entitlement to the money held in a bank account is vested in the account holder. The Crown contended that the money in that bank account belonged beneficially to Mr. Michael Forte. Jean Walters did not seek to play any part in the proceedings in order to assert any beneficial interest. Mr. Michael Chambers, counsel who appeared for Ms. Vale at the confiscation proceedings before the judge, crossexamined Detective Constable Ingram about this sum of money, and put her case which was, apparently, that this money was not a realisable asset of Mr. Forte. No evidence was called from anyone with any personal knowledge of these transactions.

3.
The fraud which gave rise to these proceedings resulted in sums of at least £2,067,224.37 being obtained from a number of victims. Some expenses had been incurred in creating the trappings of a legitimate business in order to defraud these people, but no books of account were kept. This was the agreed benefit figure. The onus therefore shifted to Mr. Forte to prove that the available amount was less than this, and, to the extent that he succeeded, the confiscation/compensation order would reflect that success. No doubt if he had not attempted this in detail, but argued that proportionality in assessing the recoverable amount required a reduction to reflect the high overheads of running frauds or the shares of other criminals, then such arguments would have been considered, but he did not. His case was that he could prove that the available amount was £37. During the two years of the fraud, he agreed that he had withdrawn £680,000 from the company bank account in cash. The police

investigation has not located this money, and, since he did not give evidence in the confiscation proceedings, Mr. Forte has not said what happened to it. At trial its whereabouts was not a central matter for the jury to consider: in his evidence at trial he accepted that he had had this money and was vague about where it had gone.

4.
Mr. Forte, as we have said, did not give evidence in the confiscation proceedings but Mr. David Langwallner appeared on his behalf and cross-examined Detective Constable Ingram and called a forensic account to support his case which was that he had no interest in the two assets described above, the first of which belonged entirely to Ms. Vale and the second to her mother. The forensic accountant, Mr. Phil Southall, had no personal knowledge of any of the relevant events, but brought his expertise to the examination of documents produced to him by the prosecution, by Mr. Forte and by Ms. Vale. There was no challenge to the admissibility of his evidence, although the nature of the issues about the beneficial interests in a property and in a bank account was not such as obviously to require the expertise of an accountant.

5.
The proceedings before the judge were, therefore, in two parts. Part 1 was the assessment of the available amount. The prosecution put its case on the basis that this should be the combined value of the two assets identified above. This case, as we have said, prevailed before the judge. We were told by Mr. Nicholson that this approach was taken because the prosecution had decided that an order in that sum would be proportionate. Since, however, it was their case that the court should reject the evidence of Mr. Forte given in his s17 statement dated 27 August 2017, and since he did not give any evidence orally, the logical approach was to submit that he had failed to prove that the available amount was less than the benefit figure and the confiscation order should be made in the sum of £2,067,224.37, or perhaps (given their concern for proportionality) the sum of £680,000 being the cash which Mr. Forte had admitted taking at his trial. If the court had acceded to such a submission, it could have made a higher confiscation order against Mr. Forte than it did make, and it is hard to see how any arguable appeal could have been sustained by him against it.

6.
In fact, the court was really concerned with an enquiry under s10A of the Proceeds of Crime Act 2002 into the extent of Mr. Forte’s interest in the two assets. Since it had been decided to tie the confiscation order to the sum of those two interests, this was necessary. The exercise had consequences for enforcement and clearly concerned the potential interests of Ms. Vale, who claimed the whole beneficial interest in the property, and Mrs. Walters who did not stake a claim to the contents of the bank account but who, on the face of it, was entitled to the benefit of it as the account holder. It was contended on behalf of Ms. Vale that Mrs. Walters did own that money (or at least that Mr. Forte did not) and so the issue was before the court.

7.
S10A of the 2002 Act provides as follows:-

10A.— **Determination of extent of defendant's interest in property**

(1)
Where it appears to a court making a confiscation order that—

(a)

there is property held by the defendant that is likely to be realised or otherwise used to satisfy the order, and

(b)
a person other than the defendant holds, or may hold, an interest in the property,

the court may, if it thinks it appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant's interest in the property.

(2)
The court must not exercise the power conferred by subsection (1) unless it gives to anyone who the court thinks is or may be a person holding an interest in the property a reasonable opportunity to make representations to it.

(3)
A determination under this section is conclusive in relation to any question as to the extent of the defendant's interest in the property that arises in connection with—

(a)
the realisation of the property, or the transfer of an interest in the property, with a view to satisfying the confiscation order, or

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

(4)
Subsection (3)—

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

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

(5)
In this Part, the “extent” of the defendant's interest in property means the proportion that the value of the defendant's interest in it bears to the value of the property itself.

8.
S31 of the 2002 Act provides as follows:-

(4)
An appeal lies to the Court of Appeal against a determination, under section 10A, of the extent of the defendant's interest in property.

(5)
An appeal under subsection (4) lies at the instance of—

(a)
the prosecutor;

(b)

a person who the Court of Appeal thinks is or may be a person holding an interest in the property, if subsection (6) or (7) applies.

(6)
This subsection applies if the person was not given a reasonable opportunity to make representations when the determination was made.

(7)
This subsection applies if it appears to the Court of Appeal to be arguable that giving effect to the determination would result in a serious risk of injustice to the person.

9.
It is now common ground that both Ms. Vale and Mrs. Walters were given a reasonable opportunity to make representations when the determination was made. Ms. Vale has been given leave to appeal under s31(7). Mr. Forte has a right of appeal against sentence (which includes the confiscation order) under ss9 and 50 of the Criminal Appeal Act 1968, and leave has been granted to him to bring his appeal. The powers of the court in respect of each appeal are, essentially, the same. S32(2A) of the 2002 Act says that the court may confirm the determination or make such order as it believes is appropriate, in respect of an appeal under s31(4). S11(3) of the Criminal Appeal Act 1968 confers the same powers in respect of Mr. Forte's appeal, using somewhat different language. It might seem that the threshold for exercising those powers differs between the two types of appeal. S31(7), with its requirement for an arguable serious risk of injustice, is not replicated in the appeal process available to defendants in the 1968 Act. In our judgment, that provision relates to the criterion for granting leave to appeal because it requires a determination only as to what is "arguable" and not what is actually the case. Leave has been granted to Ms. Vale in this case, and it appears to us that it is not necessary to consider s31(7) further, except to resolve an issue as to the extent of that leave which we will explain below. We have considered her submissions in respect of both assets although there is no evidence that she, as opposed to her mother, has any interest in the bank account. It is hard to see how the "serious risk of injustice" to Ms. Vale was met in respect of that asset.

10.
It is necessary to observe the very significant difference conceptually between the position of a defendant and that of a "person" involved under s10A(1)(b) in the proceedings, and now appealing under s31(4) and (5)(b). The defendant is subject to the court's powers to sentence him and to deprive him of his property because he has been convicted of a serious criminal offence which has caused substantial loss to his victims. The Crown Court exercises its statutory powers to make the orders which it considers appropriate and in the public interest. His appeal can succeed only if the result is (a) manifestly excessive or (b) wrong in principle. It seems to us that these two broad tests capture the grounds on which sentence appeals are allowed, although it is possible to sub-divide them further, if desired, see Archbold 7-135. Ms. Vale, on the other hand, is in the same position as any litigant whose ownership of property is in issue. She has been convicted of nothing, and she is not exposed to any penal consequences. There is no finding that she was aware that Mr. Forte was committing fraud, but even if there was in the absence of any conviction her property rights would be unaffected, see R v. Bevan [2020] EWCA Crim 1345. Civil proceedings to determine the extent of her beneficial interest in Hillside Lodge, or her mother's interest in funds held in a bank account in her name, might arise in many ways. They would be differently constituted from these Crown Court proceedings, and governed by the Civil Procedure Rules, which require statements of case, service of witness statements and disclosure of documents and so on. The procedure in the present situation is different. Section 10A(2) of the 2002 Act requires that Ms. Vale must be given a reasonable opportunity to "make

representations" to the court. CrimPR 33.13(3)(a) repeats this requirement. 33.13(3)(b) gives the court a power to order Ms. Vale to give such information, in such manner and within such a period, as the court directs. Otherwise, the Crown Court procedure is not prescribed.

11.
In R v. Hilton [2020] UKSC 29, at [24] the Supreme Court said that the purpose of s160A (which is in the same terms at s10A but applies in Northern Ireland) was to combine the confiscation and enforcement stages in simple cases where there could be no sensible debate about how the confiscation order should be enforced. If the court does not proceed under s10A, the confiscation order is still valid, but a third party asserting an interest in property can still make representations at the enforcement stage. There are no additional procedural safeguards for that person at that later stage, and it does not matter to the substance of the issue whether the determination is made at the confiscation stage or at the enforcement stage. We do not read the decision in Hilton as limiting the role of s10A to simple cases of the kind described by the Supreme Court when identifying the purpose of the new provisions. The effect of the new provisions is to give the court the power to make a determination of a defendant's interest in jointly owned or contested property at either the confiscation stage or the enforcement stage (but not, of course, both). Where, as here, the real issue at the confiscation stage is the third party's case, then it may be convenient to deal with it under s10A even if it is a significant issue. We doubt if the Supreme Court intended to give case management guidance to the Crown Court judges of England and Wales on the management of proceedings of this kind. Many of those judges will see an advantage in having one contested hearing at which all issues are resolved, rather than two contested hearings in each such case. If that is their view, then they are not inhibited from taking that course.

12.
The lack of a prescriptive procedural structure means that judges dealing with the determination of the property rights of non-parties to confiscation proceedings under s10A of the Act will be careful to ensure that the procedures adopted are fair and enable an accurate determination of the issue. Article 6 of the EHCR applies to protect the fair trial rights of such people. In this case Ms. Vale's appeal involves no criticism of the procedure. Her trial counsel confirms that she knew the case she had to meet. He says that she was given leave to take part in the proceedings on 26 February 2018, 6 months before the hearing. She had the written evidence of the prosecution and Mr. Southall in good time. She attended the hearings throughout. She was represented by counsel. She did not give evidence, but she does not say that this was because she was denied the opportunity to do so by the court. She says it was because her counsel failed to call her as a witness, and that this was incompetence which should lead the Court of Appeal to allow the appeal. It is, nevertheless, important to be clear about the nature of the proceedings so far as Ms. Vale is concerned for two reasons:-

i)
She claims that she was incompetently represented and that the outcome represents a serious injustice to her which this court should correct. She relies on the well-known series of decisions of this court about how that argument should be approached when it is advanced by a convicted defendant who submits that the conviction is unsafe for that reason.

ii)
She seeks to adduce fresh evidence and has relied upon s23 of the Criminal Appeal Act 1968.

13.

The approach in civil cases to fresh evidence is not the same as it is in criminal cases, see Ladd v Marshall [1954] EWCA Civ 1, and CPR 52.21(2). Section 23 of the

Criminal Appeal Act 1968 applies only to “an appeal or an application for leave to appeal under this Part of this Act”. The appeal of Ms. Vale lies under Part 2 of the Proceeds of Crime Act 2002. The fresh evidence provision which applies appears in her appeal is that at paragraph 7 of the Proceeds of Crime Act 2002 (Appeals under Part 2) Order 2003, SI 2003/82, Archbold paragraph 5B-262. This is in identical terms to s23(2) of the Criminal Appeal Act 1968, but it does not follow that in balancing the factors there set out in a fresh evidence appeal by an interested party against a s10A determination the court should ignore the different context. That also applies to the approach to suggestions that the appellant’s representation at trial was sub-standard. This is because an unsafe criminal conviction cannot be allowed to stand, whereas the consequences of a determination as to property rights which is said to have been in error because of the alleged failure of legal professionals to deploy all relevant material at the trial may be better addressed by a negligence claim against those advisers at which their fault and its consequences can be fairly determined. The overriding objectives in the Civil Procedure Rules and the Criminal Procedure Rules are in very different terms to reflect these considerations, among other things. The issues were fully canvassed by the House of Lords in Arthur JS Hall v. Simons [2002] 1 AC 615. Since that decision it has been possible to sue advocates for incompetence in their work in, and in immediate preparation for, advocacy.

14.
The proper classification of proceedings under s10A of the 2002 Act is also relevant to some basic legal issues, namely

i)
The burden of proof; ii) The standard of proof; and

iii) What the proper approach should be where a person could have given evidence in her own case, but elected not to.

15.
In our judgment the law in relation to the matters identified at paragraph 14 above should be that which applies to civil proceedings. The prosecution claims that Ms. Vale owns only a 50% interest in Hillside Lodge, and that her mother holds the funds in the bank entirely to the order of Mr. Forte who is the actual beneficial owner of them. As the party making the assertion, it falls to the prosecution to prove it. The standard of proof is the civil standard.

16.
The position so far as adverse inferences from the decision of a party not to give or call evidence from any witness of fact with personal knowledge of the events is not governed by statute. S35 of the Criminal Procedure and Public Order Act 1994 does not apply to confiscation proceedings, even as against the convicted defendant. In his case, the burden of proving that the available amount is less than the benefit falls on him and if he does not give evidence he will encounter difficulties even in the absence of an adverse inference. In civil cases there is no statutory rule to guide the judge when deciding the facts. In Prest v. Petrodel [2013] 2 AC 415, at [44] Lord Sumption JSC said this:-

There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it. For my part I would adopt, with a modification which I shall come to, the more balanced [than that of Lord Diplock in Herrington v.

BRB] view expressed by Lord Lowry with the support of the rest of the committee in R v Inland Revenue Comrs., Ex p TC Coombs & Co [1991] 2 AC 283, 300:

“In our legal system generally, the silence of one party in face of the other party’s evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party’s failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified.”

Cf Wisniewski v Central Manchester Health Authority [1998] PIQR P324, P 340.

17. Thus, in civil proceedings, there is no free-standing adverse inference which may support the opposing party’s case in certain specific circumstances. The civil judge is required to decide the case on the evidence which there is, but is entitled to have regard to the fact that a party who could have contradicted the opposing case has not chosen to do so.

The Confiscation Proceedings in this case

18.
Having reviewed the background and the legal context, we now turn to the evidence and rival contentions in this case.

19.
The prosecution case before the judge was, in summary:-

i) That Hillside Lodge was the matrimonial home of Mr. Forte and Ms. Vale.

They had been married in 2001 and a divorce petition was issued on 13th January 2006, the decree being made absolute in 2008. There was no order for financial relief in the matrimonial proceedings. The prosecution contended that the divorce was a sham designed to protect Mr. Forte’s assets by placing them in the name of his ex-wife, and shielding them from any claim such as is now being advanced. This case was based on the evidence which Mr. Forte gave at his trial. It was submitted that inevitably the beneficial interest in Hillside Lodge, as the matrimonial home, would be held to be jointly owned and Mr. Forte’s share would be available to any court when considering confiscation proceedings. A letter purporting to record an agreement between Mr. Forte and Mrs. Walters bears the same date as the divorce petition. It refers to the continuing effects of an earlier confiscation order against Mr. Forte, following a conviction for fraud in 2003, which was obviously on his mind. It is not known when planning for the fraud in the present case began, but overt acts in furtherance in the conspiracy took place later in 2006. The corporate vehicle for the fraud was incorporated on 31st May 2006. The letter, which the judge found was a forgery, said:-

“Just to regularise our financial agreement, I would like to put into writing that I have loaned you the sum of £110,000 from Frank’s Trust Fund [her deceased husband, Frank Waters].

This loan is on the condition that when the property currently held by a restraining order is released the car LV54 UNG and the boat, Earl Grey, are solely owned by me.

Obviously, I realise that in your current position you will not be able to satisfy this debt in the foreseeable future, however I would like to make it clear that this money will remain owed and that, should you be in a position at any time to pay me any sums towards it, I expect you to do so.

I am willing to advance this loan without interest."

ii) The money in the bank account in the name of Mrs. Walters was Mr. Forte's share of the sale of his mother's house and belonged to him. It was held on his behalf by Mrs. Walter's to shield it from this confiscation order. Mr. Forte was arrested in respect of the fraud which is the reason for these proceedings on 3rd May 2012 at the home which he was then apparently sharing with Ms. Vale. In August 2013 when his mother's home came to be sold, he knew that the investigation was continuing. Given his experience from his conviction in 2003 he knew that a confiscation order in respect of his money was on the cards. The letter quoted above was designed to show that there was a debt which would provide a motive for his payment of these funds to Mrs. Walters. However, Mr. Forte's s17 statement did not say that he had used his share of the proceeds of sale of his mother's house to repay Mrs. Walters. That would require the money to have been his, and to have been paid to Mrs. Walters on his instructions. The statement says this:-

"…Nor did I benefit from the sale of 14 Riverside Close. Orpington, BR5 3HJ. It is my understanding that the property in question was sold prior to my mother's death and I did not receive a financial legacy following my mother's death. I had no real or beneficial interest in my mother's property and did not benefit from its sale."

20.
The boat referred to in the letter set out above, Earl Grey, was valued at £100,000 in the 2003 confiscation proceedings. It appears therefore that the assets which were to be transferred to Mrs. Walters on release from the restraint order were approximately worth the same as the loan and their transfer would repay it. There is a document now before the court which was prepared by Mr. Chambers as a record of the instructions which Ms. Vale gave to him as they prepared for the s10A determination. This was not before the judge, but it says

"50. My mother paid his confiscation order and had the boat as security. Michael subsequently sold the boat and the money for it went back to my mother in dribs and drabs over time."

21.
If that had been in evidence before the judge, it would have reinforced his scepticism about the forged letter, because it is quite inconsistent with it.

22.
As we have said, Mr. Forte, Ms. Vale and Mrs. Walters did not give evidence to rebut this case. Mr. Forte called Mr. Southall on his behalf and Ms. Vale called no evidence. Mr. Southall said, in his summary:

i)
In my opinion it is not appropriate to include Hillside Lodge which was purchased from the proceeds of 28 Ashfield Lane as an asset that is available to Mr. Forte on the basis that it was purchased by Ms. Vale from a legitimate source of income.

ii)
Funds transferred by Mr. Forte to either Ms. Vale or Mrs. Jean Walters appear to me to represent repayments by Mr. Forte of sums owed pursuant to loan agreements which pre-date the Relevant Date, rather than an attempt to conceal his personal assets from the Crown.

23.

Central to these factual conclusions reached by this accountant were two documents which the judge found had been forged. One is at 19(i) above, and the second carries the date 3rd December 2004 and is purportedly signed by Frank Walters, Ms. Vale's father. It reads

"The purpose of this letter is to put into writing that which we have all agreed verbally.

As you are aware, Lyn is in the process of buying 28 Ashfield Lane. Lyn and I decided that she should buy the property on the basis that she will stay in it until such time as Jean needs caring for. The property is large enough for Jean and, if needed, a carer to move into.

I have no idea if this will be in the next year or so but, as you are aware, I have been given a very short time to live and I feel it is imperative that all matters are resolved as soon as possible to protect jean's future welfare.

The property is to be funded by family money set up in trust by my Solicitor.

I regret that your marriage to Lyn has not worked out and that you have agreed to divorce. I do not apportion blame, the only feeling I have is that it was too soon for Lyn to move on after the death of her husband.

I do not feel that you should simply walk away from the marriage with nothing, but equally I do not want Lyn to line the pockets of solicitors with protracted court hearings. Therefore I have given you the sum of £50,000 on the complete understanding that when the divorce goes through you do not make any claim on Lyn's property. By cashing my cheque you agree to these conditions.

Also I am aware that you have been earning your living with Lyn and this will not be able to continue. Therefore, I am also advancing to you the sum of £120,000.00 from family money, which you have estimated that you will need to re-establish yourself in the car trade with reasonable premises and stock.

I must stress that this is a loan and not a gift. I believe you to be an honourable man and I expect you to repay the money in instalments as and when you are able."

The Ruling

24.
The judge recorded the agreed benefit figure of £2,067,224.37. He referred to the skeleton arguments he had received and set out the background facts of the fraud.

25.
He then set out the nature of the decisions he had to make, which were

i)
To what extent if at all has Mr. Forte proved that the available amount is less than the benefit? This is the confiscation order question.

ii)
What determinations under s10A should be made in respect of the two assets which were said to be jointly owned, namely Hillside Lodge and the Walters bank account?

26.
The judge referred to the different burdens of proof in respect of the confiscation proceedings and in respect of the s10A determination proceedings, and said that it was common ground that he "should

take a holistic approach, taking into account the behaviour of both Mr. Forte and Ms. Vale." This is a reference to Stack v Dowden [2007] UKHL 17, [2007] 2 AC 432, 456 C-D per Baroness Hale where she cites an extract from a Discussion Paper from the Law Commission to that effect. It refers to the way in which courts seek to determine whether the beneficial interest in a matrimonial home is held in the same way as the legal interest.

27.
In relation to the decisions of Mr. Forte, Ms. Vale not to give evidence, the judge said

"The court is entitled to draw whatever inference the court considers proper, and, in particular, whether as a consequence the defendant has discharged the burden of proof upon him to show that the available amount is less than his benefit. Equally, neither of them has called any evidence which might disprove inferences sought by the prosecution that their divorce was a sham, that the defendant's bankruptcy was a way of protecting his assets from creditors and/or confiscation, he having previously sought to hide assets it is said very quickly in the name of family members."

28.
The judge said that he preferred the methodology of Detective Constable Ingrams to that of Mr. Southall. He said:-

"That is no criticism of him, as he can only base his conclusions on the material that he is provided with. As I say the jury decided that so far as Mr. Forte is concerned, he was a dishonest man who milked many people, many investors, and forged many documents, and forgery is a relevant aspect when one comes to look at these proceedings."

29.
He also said that his evidence has

"little or no impact upon either of the key issues that the court has to determine, namely the extent of the defendant's interest in Hillside Lodge and, secondly, the extent of the defendant's interest in the £112,000 transferred after the same of his mother's house."

30.
He then considered the two letters set out above and found that on the balance of probability they were forgeries. By this time, Ms. Vale had disavowed any reliance on the December 2004 letter said to be from her father because he had been on a life support machine in hospital on the date which it bears. She did, and does, however, continue to say that the arrangements it purports to record were genuine. We observe that that claim, undermined by her failure to give evidence about it, was seriously further weakened by the finding that the only evidence in support of it had been forged. The finding also significantly undermines the evidence of Mr. Southall who accepted the documents as genuine without apparently contemplating even the possibility that they might not be. Given that his client is a convicted fraudster who has forged documents in the past this was not a properly objective approach.

31.
The judge then held that both the 50% interest in Hillside Lodge and the proceeds of sale of his mother's house were tainted gifts even if he had effectively disposed of them. They should therefore be included in the available amount on one basis or the other.

32.

The judge then set out in summary the submissions made in skeleton arguments by counsel for Mr. Forte and Ms. Vale respectively and stated his conclusions as follows:-

“In round terms I reject the submissions made on behalf of the defendant and third party, Miss Vale, as being against the weight of the evidence that has otherwise been heard and considered both in the course of the trial and also, more pertinently, in this confiscation hearing. The court has, therefore, to consider very carefully what has been described as the experts’ evidence [DC Ingram and Mr. Southall] on both sides, and the defence submissions and skeleton arguments to which I have referred, but the findings that this court makes are as follows.

The court makes a declaration that this defendant Michael Forte has a criminal lifestyle in accordance with section 6(4) of POCA. The court finds that the defendant’s benefit from criminal conduct as a general particular was a figure over £2,067,124.37. The available amount, of which the defendant has a 50% beneficial interest, the court finds, in Hillside Lodge under section 10 of the Act. The court declares that he does have a 100% interest in the sum coming into Jean Walters’ bank account from the sale of Forte’s mother’s house, totalling £115,000 with interest, again under section 10 of the Act.

The court therefore orders that the defendant should pay a total of £615,000 within three months or face an appropriate default sentence.”

Mr. Forte’s Appeal

33.
The reasoning of the judge is exiguous. However, the appeal of Mr. Forte is hopeless. If Ms. Vale’s appeal succeeds, then Hillside Lodge will not be available to satisfy the confiscation order, but we have pointed out at [3] and [5] above that on the state of the evidence before the judge the order should have been higher. He could not possibly

have complained about an order in the sum of £680,000. An order in a greater sum than that could have also been justified.

34.
This error appears to have followed from the approach of the prosecution which conflated the fixing of the available amount with the s10A determination of the extent of the defendant’s interest in the two disputed assets. These are separate exercises, and Mr. Forte was the beneficiary of that conflation.

35.
Although he may stand to benefit from Ms. Vale’s appeal, Mr. Forte has no separate or free-standing complaint against this order. The beneficial interest is either entirely held by her, or each has a 50% share. We have heard submissions on behalf of Mr. Forte on the s10A determination, but in reality he cannot succeed unless she does. She is in a much stronger position than he is, because he bears the burden of proof and she does not.

36.
It is not clear to us on what basis the judge decided that if Mr. Forte had no 50% beneficial interest in Hillside Lodge, the value of that interest should be treated as a tainted gift. The issue is irrelevant to his appeal for the reasons set out above and we need say no more about it.

37.
So far as Mr. Forte’s appeal in relation to the Walters bank account is concerned, it is pertinent to observe that Ms. Vale has no claim to any interest in the money in her mother’s bank account, and Mr.

Forte, whose money the judge found it was, does not assert any claim. The judge did not articulate any finding about how the money was held, but it is clear that he must have held that Mrs. Walters sheltered Mr. Forte's money by holding it as a bare trustee or nominee. The fact that Ms. Vale was a

signatory on the account gave her control over the money, but no interest in it. She submits, as set out below, that her finances were entirely separate from Mr. Forte's. It is of real significance to that submission that she had control over this very large sum of cash which belonged to him. Given that neither Mr. Forte nor Ms. Vale asserts any interest in this money, neither of them is at a serious risk of injustice if no appeal against the judge's finding about it is allowed to stand. Neither of them should have been granted leave to appeal against that finding. It is not entirely clear that they were, see [38(ii)] below. The appeal, if that is what it is, is dismissed. That money will be applied in part satisfaction of the confiscation order, as ordered by the judge.

Ms Vale's Appeal

38. Mr. Carter-Stephenson Q.C seeks to advance seven Grounds of Appeal having been instructed since the hearing to act on her behalf. His new Grounds document is dated 13th October 2020. He has leave only for his first ground, and, perhaps, his second.

In summary, the seven grounds are as follows:-

i)
The judge erred in finding that Mr. Forte had a beneficial interest in Hillside Lodge. This submits that by reason of Stack v. Dowden at paragraph [56], cited above, the starting point is that the beneficial interest is held in the same way as the legal ownership. Here it is sole legal ownership and the starting point is that the beneficial interest is held by Ms. Vale alone. It is submitted that there was no proper evidential basis for moving from that starting point to find a common intention that the beneficial interest should be held jointly by reason of their marriage. It is said that the evidence shows that Ms. Vale did have the funds to buy the property with "family money" and that the finding that their divorce was a sham was not properly open to the judge. It is said that Mr. Forte and Ms. Vale went to great lengths to keep their financial affairs separate. It is pointed out that the judge's conclusion on these issues is not fully reasoned.

ii)
This attacks the judge's finding that the money in the Bank account belonged to Mr. Forte. It sets out a good deal of evidence which was not before the trial judge about how it came about that the proceeds of sale of Mr. Forte's mother's house were given to Jean Walters. This evidence is not set out before us either in any witness statement, and no-one has been cross-examined about it. That fact would have doomed this appeal to failure, but actually does not matter because, as we have pointed out, Ms. Vale does not assert any interest in this money, and never has. She is a signatory on her mother's account, but she is not the account holder. She has no interest in the s10A finding on this issue which was made, and should not have been given leave to appeal against it, if indeed she was. The Single Judge gave leave against the "determination under s10A" without distinguishing between the two assets which were the subject of that determination. This appeal, if that is what it is, is dismissed.

iii)
This ground relies on serious failings by counsel who represented Ms. Vale at the Crown Court. It is said that he

a)
Failed to appreciate that there was a conflict between Mr. Forte and Ms. Vale.

b)
Failed to prepare and serve a witness statement from Ms. Vale to deal with the allegations made against her.

c)
Failed to supply documents to the court which were available to him which would have supported her case. We have been supplied with a bundle of 367 pages of materials containing this new evidence.

d)
Failed to instruct an expert on her behalf and instead relied on Mr. Southall.

e)
Failed properly to cross-examine DC Ingram about 8 matters which arise from the new documents and the instructions he had received, as set out in the Instructions Document referred to above.

f)
This is the same as (c) above, but relates to other documents.

iv)
Counsel refused to call his client despite her clearly expressed wish to give evidence. This ground includes an application to adduce fresh evidence under s23(1)(c) of the Criminal Appeal Act 1968 to put in the documents referred to at (c) and (f) above.

v)
The judge is said to have wrongly rejected the evidence of Mr. Southall having questioned him in evidence about his qualifications in a way which demonstrated bias. He is also said to have wrongly accepted the evidence of DC Ingram which is criticised on the basis of a failure to understand and accept the points now made on behalf of Ms. Vale largely by reference to the new documents.

vi)
This ground attacks the finding that the divorce was a sham.

vii)
Finally, it is said that the judge failed to consider the inter relationship between marriage, divorce, bankruptcy, and confiscation in drawing adverse inferences against Ms. Vale in respect of Hillside Lodge.

Ms. Vale’s appeal against the determination in relation to Hillside Lodge

39.
Mr. Carter-Stephenson is entitled to complain that the judge’s conclusions are not fully reasoned. He made some clear findings of fact on some of the important issues, but did not explain exactly how he arrived at them. He did not then explain the legal route by which those findings of fact led to the resulting determination. This means that this court should not simply ask whether the outcome was one which was properly open to the judge, but should investigate the evidence and legal issues to ensure that his conclusion was sound.

40.

It appears to us that in carrying out that exercise, the judgment of Lord Sumption JSC at paragraphs [43], [47], and especially [52] in Prest v. Prestodel Resources Ltd [2013] 2 AC 415 is of particular significance.

Whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue. It is not possible to give general guidance going beyond the ordinary principles and presumptions of equity, especially those relating to gifts and resulting trusts. But I venture to suggest, however tentatively, that in the case of the matrimonial home, the facts are quite likely to justify the inference that the property was held on trust for a spouse who owned and controlled the company. In many, perhaps most cases, the occupation of the company's property as the matrimonial home of its controller will not be easily justified in the company's interest, especially if it is gratuitous. The intention will normally be that the spouse in control of the company intends to retain a degree of control over the matrimonial home which is not consistent with the company's beneficial ownership. Of course, structures can be devised which give a different impression, and some of them will be entirely genuine. But where, say, the terms of acquisition and occupation of the matrimonial home are arranged between the husband in his personal capacity and the husband in his capacity as the sole effective agent of the company (or someone else acting at his direction), judges exercising family jurisdiction are entitled to be sceptical about whether the terms of occupation are really what they are said to be, or are simply a sham to conceal the reality of the husband's beneficial ownership.

41.
That was specifically said in the context of a matrimonial home where the legal interest was held by a company, but it contains statements of principle, namely

i)
that the issue before the court will be resolved by a careful analysis of the facts, and

ii)
that the fact that the property concerned was a matrimonial home is highly relevant to ascertaining the beneficial ownership.

42.
This is why the judge's finding that the divorce was a sham is of central importance.

That finding has two necessary elements, not expressly identified by the judge. First, Ms. Vale was actually a party to the concealment which was achieved by the sham divorce. Why was it necessary for her to create the sham divorce unless their assets were jointly owned in the same way as those of many married couples are? She issued the dishonest divorce petition on the same day as one of her husband's forgeries was apparently dated, 13th January 2006. This generates an inference of joint activity towards a common goal, namely protecting their assets. We have recorded above that this was done before the fraud started, but not very long before that date. It was certainly within the time when it could have been an act in preparation for it. Secondly, the finding means that Mr. Forte and Ms. Vale were living together as man and wife in Hillside Lodge at all times after its acquisition.

43.
Neither Ms. Vale nor Mr. Forte gave evidence at the confiscation proceedings to refute these inferences, although they were both on notice that the prosecution case was that the divorce was a sham and that, at the time of the acquisition of Hillside Lodge, they were living together. Mr. Forte had given evidence about that at his trial, before the same judge.

Q You began divorce proceedings I think at the end of 2006 or thereabouts and those proceedings were finalised in 2008?

A Yes.

Q. Thereafter, you've had an on-off relationship, if I can call it that, and you have recently [as at December 2015] been properly reconciled and now cohabit with her at Hillside Lodge which is the first address you gave the jury today.

A Yes.

Q So your history of habitation in the last 10 years or so has been a bit chequered but that's I think it was fair and accurate, as good as it gets, all right?

44.
On this state of the evidence, we have no doubt that the judge was entitled to find that the divorce was a sham. The sham issue was not, though, the most important point. The most important point was that they were cohabiting in Hillside Lodge as man and wife when it was acquired. Mr. Forte had admitted that, and no witness ever denied it. It was confirmed by the evidence of the police officer about the arrangements at the previous address, 28 Ashfield Lane, at the time when she examined it that the same situation had applied in respect of their previous matrimonial home.

45.
It is also why the source of the funds with which the property was bought is not the critical issue. It is not necessary to establish that any of those funds were the proceeds of crime, or emanated from Mr. Forte. What is required is that the evidence shows that Mr. Forte and Ms. Vale were at all times living as a married couple and sharing their property. He brought £680,000 of cash out of his fraud and may have had other assets and sources of income as well. She had some income of her own, although it is agreed she could not have funded the purchase herself. That is why the reference to "family money" from her father is made. Although she was at pains to claim that their finances were kept separate she never gave that evidence on oath. In that context we refer back to the point made above about the fact that Mr. Forte allowed Ms. Vale to control the £112,000 which belonged to him which rested in her mother's bank account.

46.
The finding of fact about the two forged letters is also one which was fully justified on the evidence. Ms. Vale accepts it in respect of the letter allegedly written by her father, but it is suggested on her behalf (not by her in evidence) that the transactions it

records did take place. In respect of the forgery of a letter said to have been written by her mother, she claims through Mr. Carter-Stephenson and in her instructions to Mr. Chambers that her mother held the yacht as security for a loan and that the letter, which says something quite different, is genuine and records that transaction. If her mother had held the yacht as security and the loan had been repaid out of the proceeds of sale of Mr. Forte's mother's house, the yacht should have been returned to Mr. Forte at that time. In fact, as appears above she gave Mr. Chambers instructions that he had already sold it by then and had used the proceeds to repay her mother "in dribs and drabs". This incoherent case about a forged letter, if unexplained in evidence, generates a strong inference that so far from keeping their financial affairs entirely separate Mr. Forte and Ms. Vale were in fact co-operating in protecting their joint assets. These two letters involved Ms. Vale's parents, after all. Although it is true that she told the judge through counsel that the first forgery, of a letter from her

father, bore a date during the time when he was on a life support machine, it is also true that in her instructions document drawn up by Mr. Chambers she indicated reliance on it. She said

“There is a letter from my Dad in which Michael agreed to accept £50,000 to walk away from the marriage when we divorced.”

47.
The fraud was funded with £54,830.51 which came from Ms. Vale. There is no evidence that she knew that the money was going to be used for a fraud, but that is a further respect in which the finances of Ms. Vale and Mr. Forte were not, in fact, separate. Her son was involved in the fraud with Mr. Forte which is a fact relied upon by Ms. Vale, but which is actually another connection between her and his business.

48.
In effect, the judge concluded that Mr. Forte and Ms. Vale were to be treated as husband and wife and inferred that it was their common intention that the matrimonial home should be jointly owned between them. He inferred that the beneficial interest was not held in the same as the legal title, which is only the starting point. We consider that there was ample material to support that finding, and that since it was unanswered in evidence by either of them the judge was entitled to confirm that conclusion by adopting the approach affirmed by Lord Sumption JSC in the passage set out at [16] above and to treat the silence of those parties in face of the prosecution’s evidence as confirming that evidence into proof in relation to matters which were entirely within the knowledge of the silent parties and about which they could be expected to give evidence. For these reasons the appeal is dismissed. We have dealt with the appeal or application which is ground 2 of the Grounds of Appeal document (the money in Mrs. Walters’ bank account) already.

Ms. Vale’s applications

49.
The applications for leave overlap to some extent with each other, and also with the appeal. The ground alleging incompetence of counsel (ground 3) relies on the proposition that there is fresh evidence which we should receive and is said to be the explanation why it was not before the trial court. It is said also to be the explanation of why Ms. Vale did not give evidence (ground 4). Grounds 5, 6 and 7 do not overlap, but challenge the judge’s findings of fact. We have had regard to them in reaching our conclusions as to the fact-finding process in relation to the appeal and need only say a little about them now. It is convenient to take them in a different order from that in which they are set out.

50.
As to Ground 4, failing to call Ms. Vale to give evidence, counsel, Mr. Chambers, says in his McCook response that he took instructions from Ms. Vale in detail during a number of conferences and created a document, which we have seen and which we refer to above. He said that he invited the prosecution to indicate what further material they wanted from her and, when they did not do so decided that he should not serve a witness statement, but use his document as a proof of evidence. He says that the suggestion that he refused to allow her to give evidence is absurd. He says:-

“In discussing this issue, she was taken through the ambit of topics which she would be asked to comment on, as she had been in several conferences during the previous months. The ambit included her financial affairs and source of income and the “sham divorce”. It also included the nature of her relationship with the appellant and what she knew about his finances, criminal activity, which also

involved her son, where she understood his money (£2m+) to come from and go, how he funded his helicopter lessons, and what their financial intentions together were. The prosecution also relied on documents that they asserted were false including one said to be written by Ms. Vale's father shortly before his death. ……..I gave realistic and objective advice to help Ms. Vale make an important decision. Ms. Vale made a voluntary and informed decision not to give evidence….Her position was confirmed during the lunchtime adjournment on 27 July 2018."

51.
It is certain that Ms. Vale knew she was entitled to give evidence. During the prosecution case the judge expressly referred to the fact that evidence may be given on behalf of the other parties. In any event, it is inconceivable that she would not know this and that there were no discussions between her and her counsel about this. If she had expressed a clear conclusion that she did want to give evidence we have no doubt that counsel would have called her. Why would he not? We do not consider that the absence of a signed endorsement recording her decision in this regard is of any real relevance in this situation. The practice of recording such endorsements applies in criminal trials where it is extremely important that the statutory consequences of a decision not to give evidence are clearly understood by the defendant. It is not invariably followed in civil cases where the consequences of such a decision are different, and are as we have explained above. It is a fair criticism to make that there is no conference note recording the advice given, but that is outweighed by the fact that, even now, we have no witness statement from Ms. Vale setting out the reasons why she did not give evidence and what she would have said. The response to her counsel's observations to the Registrar is a written submission by her current counsel, and it contains some assertions of fact which are not in evidence. There is a short, unsigned, statement in the "Fresh Evidence Bundle" prepared for Ms. Vale which says that she provided all the documents which Mr. Southall asked for to him, and that the prosecution did not ask for anything from her beyond what she had provided. It does not say why she did not give evidence. It was submitted to this court on 14th November 2018 and does not deal with or in any way support the new applications for leave. The only material we have about her decision not to give evidence is the McCook response of counsel. That is fatal to this ground of appeal which is unarguable.

52.
Once we have concluded that Ms. Vale took a decision to not give evidence, the rest of the complaints about counsel have less significance. For example, his alleged failure to prepare a bundle of documents which would support the case to be advanced by Ms. Vale falls away once it appears that there is not going to be any such case. We do not consider that it is likely that an expert witness could have given any useful evidence which would have changed the outcome of the case, and no such evidence has been placed before us. The decision made before trial not to seek any, on this basis, was perfectly sensible. There are criticisms of the cross-examination of DC Ingram. We have read that cross-examination with those criticisms in mind and consider that they do not amount to an arguable ground of appeal. The points raised by Mr. Carter-Stephenson were adequately covered, except one. An assertion that Mr. Forte had said at his trial in 2015 that he had dealt in cash but used Ms. Vale's bank accounts was not true, but not contradicted. He had certainly said that he dealt in cash, but he did not say that he used her accounts. That was a relatively small point. Most of the points now raised played no part in the judge's determination, as far as we can see. He found that the divorce was a sham and the two documents at the heart of the defence case were forgeries and those findings have been upheld by this court. The other matters which should allegedly have been more thoroughly explored were, in comparison, matters of detail.

53.
This is also the answer to the application to put in fresh evidence. We consider that it is appropriate in these essentially civil proceedings to apply a strict test for the admission of fresh evidence. All the documents which Mr. Carter-Stephenson now seeks to adduce could, with reasonable diligence, have been adduced before the judge. They would not provide a ground for allowing the appeal, certainly in the absence of evidence from Ms. Vale. They fall into the category of documents which mean little on their own without evidence from Ms. Vale about them. We have read them de bene esse but do not consider that they afford a ground for allowing the appeal and decline to admit them.

54.
Ground 5 criticises the judge for apparent bias in his questioning of Mr. Southall about his experience and qualifications. Mr. Southall was asked to produce the original of his qualifications and did so. The curriculum vitae provided by Mr. Southall was in very general terms and we consider that it was not evidence of bias for the judge to seek further reassurance. In his ruling he did not reject the evidence of the expert, but said only that, in effect, it was only as good as his instructions. Given Mr. Southall's uncritical acceptance of two forged documents and freely expressed opinions on matters of fact, this was both kind and fair. It was certainly not evidence of any bias.

55.
Ground 6 deals with the judge's finding on the sham divorce. This is an essential part of the ground of appeal and we have dealt with it above. By way of example, one of the matters which it is suggested the judge ought to have relied upon in support of Ms. Vale's case in this respect was "the complexity of human emotions and behaviour as between ex partners." In the absence of evidence from either of them the judge would have been simply speculating had he allowed himself to express views about this subject, and that would have been quite wrong. The need for oral evidence to support other matters now relied upon is equally obvious.

56.
Ground 7 contends that the judge should have taken various matters into account when drawing an adverse inference against Ms. Vale from the fact that she did not give evidence. It is enough to say that this is very circular. The relevance of the

matters the judge should allegedly have taken into account, such as it is, clearly requires evidence to support it.

57.
For these reasons we consider that none of the additional grounds is arguable and we refuse leave.