Trinity Term
[2022] UKSC 24
On appeal from: Court of Appeal (Criminal Division)

JUDGMENT

R *v* Andrewes (Respondent)

before

Lord Hodge, Deputy President
Lord Kitchin
Lord Hamblen
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
18 August 2022

Heard on 22 June 2022

Appellant
Martin Evans QC
Cameron Brown QC
(Instructed by CPS Appeals and Review Unit)

Respondent
Jonathan Ashley-Norman QC
Richard Reynolds
(Instructed by Harris Cuffaro & Nichols)

LORD HODGE AND LORD BURROWS (with whom Lord Kitchin, Lord Hamblen and Lord Stephens agree):

1. The question on this appeal

1. This appeal raises an important issue on the confiscation regime laid down by the Proceeds of Crime Act 2002 ("POCA"). It concerns what is often referred to as "cv fraud" ("cv" being shorthand for "curriculum vitae"). Typically, as in this case, this occurs where a fraudster includes lies on his or her application form for a job (for example, by including qualifications or experience which he or she does not have) and, as a result, is appointed to the job. The fraudster performs the agreed services satisfactorily and is paid the agreed salary until the fraud is discovered. On a conviction for fraud, should there be a confiscation order stripping the fraudster of his or her earnings (net of tax and national insurance)? In particular, would such a confiscation order be disproportionate under the proviso in section 6(5) of POCA?

2. The point of law certified by the Court of Appeal, which it is for this court to answer, is as follows:

> "Where a defendant obtains remuneration as a result of or in connection with an offence of fraud based upon the obtaining of employment by false representations or non-disclosure, in what circumstances (if any) will a confiscation order based on the wages earned be disproportionate within the terms of section 6(5) of the Proceeds of Crime Act 2002, or contrary to Article 1, Protocol 1 of the European Convention on Human Rights?"

2. The factual background

3. In September 2004 the post of Chief Executive Officer at St Margaret's Hospice, Taunton (a registered charity) was advertised. It was specified in the application pack that, as regards qualifications, a first degree was "essential" and an MBA "desirable". In terms of experience, ten years of management experience, with three years in a senior position, were specified as "essential" and five years in a senior appointment as "desirable".

4. In his application form, dated 3 October 2004, Jon Andrewes claimed to have obtained a first degree from Bristol University in Social Policy and Politics (1976-

1978) and an MPhil in Poverty and Social Justice from the same university. He claimed to have an MBA from Edinburgh University in Management Science (1982-1984) and to be in the course of studying for a PhD in Ethics and Management at Plymouth University (from 2003). Under the heading of Professional Qualifications, he claimed to have an Advanced Diploma in Management Accounting (CIMA). None of this was true.

5. As regards his employment history he stated that he had been on secondment at the Home Office between 1979 and 1982; chief executive of the Barand Partnership between 1985 and 1993; Managing Director of the Sydenham Charitable Trust between 1993 and 1998; Chief Executive of the Groundwork Devon and Cornwall charity between 1998 and 2002 and Chief Executive of Groundwork South West from 2002. The truth was very different. He had not been seconded to the Home Office. He had worked as a social worker between 1975 and 1984. Between 1990 and 1995 he had been employed by Somerset County Council and then by Plymouth Council. Between 1999 and 2000 he had been employed at Plymouth Groundwork Trust for one year, with no record of him being designated Chief Executive. He was then employed between 2003 and 2004 by Groundwork Plymouth (at a salary of £54,361). Although having claimed to be Chief Executive of the Groundwork Charity between 1998 and 2004, he was not registered with the Charity Commissioners until 2004. There was no record of him having worked at the Sydenham Charitable Trust. Overall, therefore, his representations as to the essential requirements of management experience were either false or inflated.

6. By signing his application form, Mr Andrewes confirmed that the information contained in it was correct. Mr Andrewes was one of two candidates to be interviewed. He was offered, and accepted, the post of Chief Executive Officer of the St Margaret's Hospice in December 2004 at an initial annual salary of £75,000. He remained in that post until March 2015 when his employment was terminated.

7. In 2006, he told staff that he had obtained the PhD from Plymouth University that he had been working towards. This was untrue. He insisted that he should thereafter be referred to as Dr Jon Andrewes, a title which in due course appeared in, for example, staff structure diagrams and his email footers.

8. In a witness statement dated 24 November 2016 Mr Michael Clark, Chair of the Trustees of St Margaret's Hospice at the time of Mr Andrewes' appointment, explained that significant relevant previous experience had been viewed as essential: had candidates not had such experience, the post would have been re-advertised. He confirmed that Mr Andrewes would not have been offered the role if it had been known that he was lying about his previous education and experience. The need for

integrity and honesty had been emphasised. However, Mr Clark did make clear that, at all events until Mr Clark himself retired in November 2008, the hospice had made significant progress and that he had never entertained any doubts about Mr Andrewes' ability to carry out his role as Chief Executive Officer. In annual reviews, Mr Andrewes was regularly appraised as either strong or outstanding.

9. In July 2007 Mr Andrewes applied for the additional role of non-executive director (a remunerated office) at Torbay NHS Care Trust. His application form was certified by him to be complete and correct. It contained the same false academic qualifications as he had used in relation to the application to St Margaret's Hospice. But now he added a PhD qualification and styled himself "Dr." His application also contained the same falsehoods as to his employment history. He was appointed on 19 September 2007 for an initial term of four years which was subsequently extended and, from February 2012, he was appointed Chair. When reappointed in March 2015, he was told that his continued appointment was conditional on his being a "fit and proper person" and in an email in the previous month he had given his assurance that he complied with the fit and proper person criteria.

10. On 1 July 2015 Mr Andrewes was additionally appointed as Chair of the Royal Cornwall NHS Hospital Trust, which was another remunerated office. His application for that position had included corresponding (albeit not identical) lies as to his academic qualifications and employment history. Five candidates had been interviewed. Requirements of honesty and integrity were explicit requirements for the post. As part of the "fit and proper person" self-declaration, he confirmed that he had the necessary qualifications, competence, skills and experience and there were no other grounds under which he would be ineligible for appointment. A review of Mr Andrewes' work in this role, conducted approximately a month before the termination of his appointment, gave a glowing account of his skills in all areas.

11. Mr Andrewes' employment by St Margaret's Hospice, and his two appointments at Torbay NHS Care Trust and the Royal Cornwall NHS Hospital Trust, came to an end in 2015 when the truth started to emerge.

12. It should be noted that the certified question, in para 2, refers to employment only. But while Mr Andrewes was an employee of the hospice, he was not an employee, but rather a remunerated office-holder, of the two trusts. Nothing of any significance turns on that distinction in this case.

3. The Crown Court proceedings prior to the confiscation hearing

13. In January 2017 Mr Andrewes pleaded guilty to one count of obtaining a pecuniary advantage by deception under section 16 of the Theft Act 1968 (as regards his position at St Margaret's Hospice) and two counts of fraud under section 1 of the Fraud Act 2006 (as regards his appointments at, respectively, the Torbay NHS Care Trust and the Royal Cornwall NHS Hospital Trust). The explanation for why the first count was based on the Theft Act 1968, whereas the second and third counts were based on the Fraud Act 2006, is that the Fraud Act 2006 came into effect, and repealed section 16 of the Theft Act 1968, after the appointment in 2004 of Mr Andrewes to St Margaret's Hospice.

14. Mr Andrewes was sentenced at Exeter Crown Court on 6 March 2017 by His Honour Judge Mercer QC. Mr Andrewes was 63 years old at the time and had no previous convictions. The judge remarked that for a period of over 10 years his "outwardly prestigious life" had been based on "a series of staggering lies". The judge said that it was by reason of those lies that Mr Andrewes had secured responsible positions, in which honesty and integrity were essential qualities: positions which he "at least probably, if not certainly, would not otherwise have obtained". While HHJ Mercer QC was prepared to assume that Mr Andrewes had worked hard in all the dishonestly obtained posts and had achieved success, his appointments meant, "of course", that he had received income which he should not have received and that his dishonesty had denied others the positions which he had obtained. The judge went on to stress that his performing of roles that he should not have been performing would inevitably have caused damage to the public's confidence in the organisations which he deceived.

15. Giving full credit for the guilty pleas, and having regard to other mitigation, the judge imposed a sentence of two years' imprisonment. HHJ Mercer QC then set a timetable for the confiscation proceedings, as requested by the prosecution. In the event, the judge was not available to conduct the confiscation hearings which were instead dealt with by Recorder Meeke QC. Before looking at what was decided on confiscation, it is helpful to refer to the relevant provisions of POCA.

4. The relevant provisions of POCA

16. Where a person has been convicted of an offence in the Crown Court (or is committed to the Crown Court for sentence) and the prosecution asks for a confiscation order to be considered, or the court believes that it is appropriate to do so, section 6(4) and (5) of POCA apply. By those subsections:

"(4) The court must proceed as follows—

(a) it must decide whether the defendant has a criminal lifestyle;

(b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;

(c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.

(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) applies only if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount."

17. That last provision on proportionality, which can be referred to as the "proviso" in section 6(5), was inserted by the Serious Crime Act 2015 (Sch 4 para 19) in the light of the decision of the Supreme Court in *R v Waya* [2012] UKSC 51, [2013] 1 AC 294, which is examined in paras 28-29 below.

18. Section 7 is concerned with the "recoverable amount" and principally lays down that the recoverable amount is the lower of the defendant's benefit from the conduct concerned or "the available amount". Section 8 (and section 76: see para 20 below) then deals with the defendant's benefit and section 9 with the available amount. By section 9(1):

> "(1) For the purposes of deciding the recoverable amount, the available amount is the aggregate of—
>
> (a) the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and
>
> (b) the total of the values (at that time) of all tainted gifts."

19. Section 10 turns to the assumptions to be made in criminal lifestyle cases. Those provisions are not in issue in this case because it was accepted by the prosecution that the defendant did not have a criminal lifestyle.

20. Finally, under the heading "conduct and benefit", section 76 includes the following subsections:

> "(4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.
>
> (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."

5. The confiscation hearing

21. The confiscation hearing was conducted in two stages on 8 June 2018 and 26 July 2018. The former dealt with the benefit made from the particular criminal

conduct. The latter dealt with the recoverable amount and the confiscation order that should be made including whether such an order was proportionate. Recorder Meeke QC decided that Mr Andrewes' benefit from his particular criminal conduct comprised the earnings he received from his employment and the two NHS appointments. The respective amounts under each of the three counts were ultimately not in dispute (and were based on Mr Andrewes' earnings net of income tax and national insurance contributions). They were on count 1 (St Margaret's Hospice) £547,758.86; on count 2 (Torbay NHS Care Trust) £62,156.42; and on count 3 (Royal Cornwall NHS Hospital Trust) £33,687.63. The total of his benefit was therefore £643,602.91. However, the available amount, and hence the recoverable amount, was agreed to be £96,737.24. A confiscation order was made for that sum.

22. Recorder Meeke QC rejected the submissions on behalf of Mr Andrewes that, first, he had not benefited from his particular criminal conduct because he had earned his remuneration from the work he did and that, at least later on, any benefit was too remote from the conduct; and, secondly, that it would be disproportionate under the proviso in section 6(5) to make any confiscation order. As regards the latter, he said (see his written ruling dated 1 August 2018 at para 50):

> "Given that the recoverable amount is £96,737.24, I have determined that it would not be disproportionate to order [Mr Andrewes] to pay a confiscation order in that sum and accordingly I make such an order. It represents less than 15% of the benefit figure as I have found it to be…."

23. Earlier at para 48 he said that, at the other extreme (ie had the recoverable amount exceeded the full net earnings), he would have regarded a confiscation order of the full net earnings as disproportionate:

> "[F]ew would regard as proportionate an order, were I in a position to make it, which deprived [Mr Andrewes] of the whole of his earnings for 10 years …."

24. Exercising a power provided for in section 13(6) of POCA, the Recorder also made a compensation order to be paid out of the sums recovered under the confiscation order in favour of the hospice and the two trusts pro-rated to the amounts of remuneration each had paid out. Under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 (and see now section 133 of the Sentencing Act 2020), a compensation order requires compensation to be paid, by the person convicted of an offence, for "any personal injury, loss or damage resulting from that offence". The loss or damage here may have been reputational damage and a fall off

of donations through having engaged a dishonest employee or office-holder in senior managerial positions but the Recorder did not set out the basis of the compensation order in his judgment.

6. The decision of the Court of Appeal in this case and the focus of the appeal to this court

25. Mr Andrewes appealed against the confiscation order made against him. Neither party supported the approach taken by Recorder Meeke QC of confiscating the recoverable amount of £96,737.24 because it was some 15% of the benefit figure. The submissions made were therefore for what may be termed the "take all" or "take nothing" approach, with counsel for the Crown arguing for the former and counsel for Mr Andrewes arguing for the latter.

26. The Court of Appeal (Davis LJ, Andrews J, and HHJ Marks QC) [2020] EWCA Crim 1055; [2020] Lloyd's Rep FC 557 allowed Mr Andrewes' appeal on the reasoning that the confiscation order was disproportionate under the proviso in section 6(5) of POCA. More specifically the reasoning was as follows:

> (i) The submissions on behalf of Mr Andrewes that he had not relevantly benefited from the criminal conduct failed because, on these facts, the remuneration from the employment and appointments clearly constituted benefit obtained "as a result of or in connection with the conduct" under section 76 of POCA. Those words imported a wide causation test. As found by the Recorder, but for the dishonest statements in the applications, Mr Andrewes would have been turned down for the posts. And, in relation to the submission that the benefit was too remote, it was significant that it had been conceded on behalf of Mr Andrewes that the false representations were continuing throughout the periods of employment or appointment.
>
> (ii) However, the confiscation order made was disproportionate under section 6(5) of POCA because Mr Andrewes, by performing the services, which it was lawful for him to carry out, had given full value for the remuneration he had received. The situation was therefore analogous to restoring the benefit received. And to confiscate the value of a benefit where the benefit had been restored amounted to "double recovery" which went beyond confiscation and amounted to a penalty. It was that element of "double recovery" amounting to a penalty that rendered the confiscation order disproportionate. This approach to the concept of proportionality was consistent with the leading case of *R v Waya* (which preceded the insertion of the disproportionality proviso to section 6(5)) and several subsequent cases. As it was

disproportionate to confiscate all the net earnings, and as neither counsel had supported the approach taken by Recorder Meeke QC, no confiscation order at all should be made. But the Court of Appeal certified as a point of law of general public importance the question set out in para 2 above.

27. In the appeal to this court, and in line with that certified point of law, counsel for Mr Andrewes conceded that Mr Andrewes had relevantly benefited from his criminal conduct to the sum of £643,602.91 (ie it was accepted that causation was here satisfied). Rather the focus was on disproportionality under the proviso in section 6(5) of POCA. As in the Court of Appeal, counsel for the Crown (the appellant) was advocating the "take all" approach while counsel for Mr Andrewes (the respondent) submitted that, as adopted by the Court of Appeal, the "take nothing" approach should be upheld.

7. Some past cases

28. In deciding on the correct approach to disproportionality it is helpful to look at a number of past cases albeit that none of them has dealt directly with cv fraud. The most significant is *R v Waya* [2012] UKSC 51; [2013] 1 AC 294, which concerned a mortgage loan obtained by fraud, in which the Supreme Court, in a judgment delivered by Lord Walker and Hughes LJ, laid down the following points:

(i) Most importantly, prior to the insertion of the proviso in section 6(5), it was accepted that, in order not to infringe Article 1 Protocol 1 ("A1P1") of the European Convention on Human Rights ("ECHR"), the confiscation order had to be proportionate to the legislative objective of removing the fruits of crime. Proportionality was laid down as the correct principle to apply in preference to the previous judicial approach to POCA of examining whether, as a matter of discretion, there had been an abuse of process (see paras 18, 21 and 24).

(ii) In a criminal lifestyle case, because of the assumptions as to the criminal source of assets that are required to be made under section 10 of POCA, it will be rare for a confiscation order to be disproportionate (para 25).

(iii) In deciding on the amount of the confiscation order, the criminal is not entitled to set off against the benefit obtained the cost of committing the crime (eg a bribe paid to an official) because that would be to treat the criminal enterprise as if it were a legitimate business (para 26).

(iv) As the focus of a confiscation order is on the value of the benefits obtained, it is irrelevant in assessing the value of the benefits that the benefits are no longer retained, as where money obtained by committing an offence has been spent (para 27).

(v) It would be disproportionate to make a confiscation order where the criminal has wholly restored the benefit to the loser. That would constitute double recovery which would therefore go beyond confiscation and would constitute an unacceptable penalty (paras 28-29).

(vi) There may be other cases of disproportionality analogous to that of goods or money being entirely restored to the loser. An example is where the defendant, by deception, induces someone else to trade with him or to employ him in a manner otherwise lawful and gives full value for goods or services obtained (para 34). This point bears directly on the facts of this case. It is therefore helpful to set out precisely what Lord Walker and Hughes LJ said in para 34:

> "There may be other cases of disproportion analogous to that of goods or money entirely restored to the loser. That will have to be resolved case by case as the need arises. Such a case might include, for example, the defendant who, by deception, induces someone else to trade with him in a manner otherwise lawful, and who gives full value for goods or services obtained. He ought no doubt to be punished and, depending on the harm done and the culpability demonstrated, maybe severely, but whether a confiscation order is proportionate for any sum beyond profit made may need careful consideration. Counsel's submissions also touched very lightly on cases of employment obtained by deception, where it may well be that difficult questions of causation may arise, quite apart from any argument based upon disproportion. Those issues were not the subject of argument in this case and must await an appeal in which they directly arise…"

This case is, of course, one in which those issues directly arise.

29. On the facts of *R v Waya*, money lent and secured because of a mortgage fraud had been fully repaid. It was held that a proportionate confiscation order would have been one confiscating not the money lent (because that had been repaid

in full) but rather the benefit derived from the use of the loan ie the increase in value of the real property acquired by the loan. This was assessed as the proportion of the appreciation in value of the flat that was attributable to the dishonestly obtained mortgage (paras 41 and 79).

30. Several other cases merit mention. *R v Carter* [2006] EWCA Crim 416 was a case under section 71 of the Criminal Justice Act 1988, a precursor of POCA, and predated *Waya*. In that case the Court of Appeal addressed the identification of the benefit which a defendant has obtained from criminal conduct when the business which he was conducting was a criminal enterprise. One of the defendants, Ruslan Kulish, operated a gang mastering business, which provided casual labour to farmers and others in East Anglia. Gang mastering was not of itself an illegal business but the casual labourers, whom the business provided, were illegal immigrants and asylum seekers who had no right to work in the United Kingdom. The business was therefore engaged in the supply of illegal labour. The court assessed the benefit obtained by the defendant's criminal conduct as the turnover received from the businesses to whom the labour was provided and did not allow any deduction for the wages paid to the labourers because those wage payments were furthering a criminal enterprise.

31. In *R v Sale* [2013] EWCA Crim 1306; [2014] 1 WLR 663, the Court of Appeal applied the judgment in *Waya* in circumstances in which the defendant's company had provided services which were value for money. The Court equated the defendant, Mr Sale, with the company. He was its sole shareholder and sole director. The company had carried on a legitimate business for several years and then obtained valuable contracts from Network Rail by giving corrupt financial inducements to a manager employed by Network Rail. The company achieved turnover of about £1.9 million from those contracts and made a profit before tax of about £200,000 from them. The Court of Appeal overturned the judge's order which assessed the benefit from criminal conduct at £1.9 million. The court accepted that the contracts were all contracts which the company could legally undertake and that the company had given value for money to Network Rail as the contracts had been performed efficiently and at a market price. Applying the proportionality test set out in *Waya*, it considered that it would be proportionate to limit the confiscation order to (a) the profits earned on the contracts and (b) in principle the pecuniary advantage which the company obtained from gaining market share at the expense of its competitors. But as there were no findings in relation to the latter benefit which could therefore not be quantified, the court substituted the profit figure of £200,000 for the turnover figure which the judge had adopted.

32. In *Paulet v United Kingdom* (2015) 61 EHRR 39 the Strasbourg Court addressed a challenge to a confiscation order under A1P1 of the ECHR. The defendant was an illegal immigrant who was not eligible to work in the United Kingdom but who falsely

represented that he was lawfully entitled to undertake employment. The Court of Appeal, in an appeal decided before *Waya* (*R v Nelson, Pathak and Paulet* [2009] EWCA Crim 1573, [2010] QB 678), had followed *Carter* in holding that the defendant had made a continuing false representation and assessed the benefit which he received from his illegal employment as his earnings after deduction of tax and national insurance payments. When the matter reached the Strasbourg Court, the majority held that the approach of the Court of Appeal, which had addressed tests of oppression and abuse of process, had been too narrow and that it had not taken A1P1 sufficiently into account. The Strasbourg Court held that there had been a procedural breach of A1P1 in the failure to adopt an assessment of proportionality. The court awarded 2000 Euros as just satisfaction but did not make any ruling on the proportionality of the confiscation order.

33. The next case which we address is *R v King (Scott)* [2014] EWCA Crim 621; [2014] 2 Crim App R (S) 54. In this case a trader, who bought and sold used cars represented himself to his customers as a private seller to avoid having to give guarantees or warranties. He pleaded guilty to a consumer protection offence of falsely claiming or creating the appearance that he was not acting for the purpose of his trade. His turnover from this illegal trading was about £110,000 and his profit about £11,000. The Court of Appeal upheld as proportionate the judge's order which was based on the benefit from criminal conduct being the turnover figure rather than the profit figure. The court held that the entire business enterprise was founded on illegality which comprised the deliberate misrepresentations that he was a private seller. The court also recognised that a different approach may be appropriate where the business is merely tainted by illegality rather than being entirely based on illegality. At para 32, Fulford LJ, giving the judgment of the Court of Appeal (Fulford LJ, Holroyde J and Judge Lakin) said:

> "The authorities reveal [that] there is a clear distinction to be drawn between cases in which the goods or services are provided by way of a lawful contract (or when payment is properly paid for legitimate services) but the transaction is tainted by associated illegality (eg … the bribery in *Sale*), and cases in which the entire undertaking is unlawful (eg a business which is conducted illegally …). When making a confiscation order, the court will need to consider, amongst other things, the difference between these two types of cases. It is to be stressed, however, that this divide is not necessarily determinative because cases differ to a great extent, but it is a relevant factor to be taken into account when deciding whether to make an order that reflects the gross takings of the business."

For that distinction see also *R v Reynolds* [2017] EWCA Crim 1455; [2018] 4 WLR 33, at para 58(iv).

34. The Supreme Court again addressed the question of the proportionality of a confiscation order in *R v Harvey (Jack)* [2015] UKSC 73; [2017] AC 105. This was a case involving a criminal lifestyle to which the assumptions in section 10 of POCA applied. The court held that the trader had obtained the VAT element in the sums he obtained by fraud even where he had accounted to HM Revenue and Customs for those sums. Nevertheless, it was decided that, in order to make the confiscation order proportionate, the VAT element should be removed from the amount to be paid under the confiscation order.

35. In *R v Morrison (Peter)* [2019] EWCA Crim 351; [2019] 4 All ER 181 the Court of Appeal was concerned with a money-laundering offence resulting from the defendant's failure to declare and pay income tax over ten years, having traded for "cash in hand" and derived income from two businesses in his control. It also involved a tainted gift which the defendant made to his partner to enable her to purchase a home, the recovery of which might render the partner homeless. The court, in setting out principles which it derived from the authorities, stated that the proportionality exercise required under section 6(5) of POCA was not to be equated with a general discretion in the court. It did not permit a general balancing exercise in which various interests were to be weighed on each side of the balance, including the potential hardship or injustice which a confiscation order involving a tainted gift might cause to third parties. The proportionality proviso in section 6(5) of POCA had a more limited scope (although the Court of Appeal in this case did not go on to clarify that that more limited scope is principally designed to avoid penalising the defendant by double recovery).

36. Finally, in *R v Asplin* [2021] EWCA Crim 1313 two senior employees of an insurance company and one other were convicted of conspiracy to defraud the insurance company. The defendants secretly controlled a company which organised the production of medical reports and arranged for the insurance company to contract with their company to obtain such reports. Two of the defendants, who were employed by the insurance company when they committed the fraud, challenged as disproportionate a calculation of the benefit they had obtained from their criminal activity as including the substantial salary and bonuses which they had received from the insurance company. The Court of Appeal rejected that challenge and a similar challenge by the third defendant, who had formerly been an employee of the insurance company, in relation to her salary from the medical report company. The court held that if full value had been given for the benefit received, it would be disproportionate to make a confiscation order. But, if a defendant had given some value, even significant value, but less than full value, it would not be

disproportionate to make a confiscation order based on the full amount of benefit obtained unless the partial restoration of value were readily quantifiable. The salaries etc of each of the defendants, net of tax, were therefore to be treated as part of the benefit of their fraud.

37. These cases illustrate some of the central points made in *Waya* (see para 28 above). They confirm, for example, that the courts have recognised a difference between, on the one hand, a business which itself is a criminal enterprise, such as in *Carter*, *Paulet* and *King (Scott*) and, on the other hand, a business which is not a criminal enterprise but which involves transactions tainted by criminality, such as the contracts obtained by corrupt payments in *Sale*. In the criminal enterprise cases, in deciding on the benefit from the criminal conduct, no deduction is to be made for the expenses of running the criminal enterprise and, in deciding on proportionality, the provision of illegal labour does not constitute restoration of value. The cases also suggest that there must be full restoration of value by the defendant before it is disproportionate to make any confiscation order. As the *Asplin* judgment demonstrates, more difficult issues may arise where there has been a partial restoration of value by a defendant, if the employment were not itself a criminal enterprise. The *Morrison* case confirms that the proportionality proviso does not import a general discretion on the courts to balance a range of factors: it has a narrower focus.

8. The proviso in section 6(5) of POCA and A1P1 of the ECHR

38. Although the certified question set out in para 2 refers to both section 6(5) of POCA and A1P1 of the ECHR, it is clear that the proviso in section 6(5) embraces A1P1. They are not laying down two independent tests. We can therefore focus simply on the proviso in section 6(5). Put another way, if one thinks in terms of the traditional four-step analysis of proportionality that was applied (in the context of the application of non-absolute Convention rights and judicial review) in, for example, *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, especially at pp 770-771 and 790-791, paras 20 and 74, the first three steps are plainly satisfied. There is the legitimate aim of stripping a criminal of the fruits of crime, confiscation is a rational means of achieving that aim, and there are no less intrusive means of doing so. It follows that the sole step in issue is the fourth step – often referred to as "proportionality stricto sensu" – which asks whether the measure is a proportionate means of achieving the legitimate aim, here of stripping the criminal of the fruits of crime. The disproportionality proviso to section 6(5) is focused on that crucial issue and is asking precisely the same question. Is the confiscation of the sum in question (the recoverable amount) a proportionate means of stripping the criminal of the fruits of crime?

39. Although there appears to be no direct authority on the point, it is clear that, given the criminal context, the legal burden of proof in respect of the proviso in section 6(5) is on the prosecution. That is, it is for the prosecution to establish that it would not be disproportionate to require the defendant to pay the recoverable amount.

9. Why it would be disproportionate to make a confiscation order of the full net earnings in this case (putting to one side the available, and hence recoverable, amount)

40. The primary submission of counsel for the Crown was that, putting to one side the available, and hence recoverable, amount, Mr Andrewes' full net earnings of £643,602.91 during the whole period of over 10 years (Dec 2004 – March 2015) should be confiscated. It was only because the available, and hence recoverable, amount - £96,737.24 - was lower than that sum that £96,737.24 was the correct sum to be confiscated. It would not have been disproportionate to take the full net earnings had they not exceeded the recoverable amount. The value of the services performed should not be offset because they were equivalent to the costs of the criminal enterprise. They did not constitute restoration and were not analogous to restoration. This is the submission which we have referred to as advocating the "take all" approach.

41. We reject this approach. Although the performance of the services was not restoration as such – services can never be restored in the same way as money or goods (ie specific restoration of services is impossible) and, in any event, the services have normally been performed prior to the receipt of earnings so that the language of restoration is inapt – the position is analogous. If the confiscation order did not reflect a deduction for the value of the services rendered, while requiring the defendant to repay the net earnings, the order would constitute double recovery or what can most accurately be labelled "double disgorgement". Double disgorgement goes beyond disgorgement and constitutes a penalty. That would be disproportionate. In this respect, we agree with the reasoning of the Court of Appeal.

42. It is very important to add that we put to one side cases where the performance of the services is illegal. Say, for example, a person is appointed to a job as a surgeon or airline pilot or HGV driver because he or she has lied in the job application about having the necessary qualifications or licence to be appointed to that job. In that situation, the performance of the services by that person would constitute a criminal offence and it would not be disproportionate to confiscate the full net earnings because the performance of those services has no value that the law should recognise as valid. There is no lawful market for the performance of those

services by that person. Confiscation of the full net earnings would not therefore constitute double disgorgement. Indeed, this can be regarded as the equivalent to the confiscation of the turnover from the illegal sale of goods such as criminal drug dealing or arms dealing. Confiscation of the turnover from the illicit drugs or arms dealing is proportionate without making any deduction for the (illicit) value of the drugs or arms supplied. Further, as was said in *Waya* (see para 28(iii) above), the costs of acquiring or manufacturing the drugs or arms are the non-deductible costs of carrying on an unlawful business. The same applies analogously to the value of services that it is illegal for the defendant to perform.

10. Why it would be unsatisfactory to make no confiscation order in this case and the correct "middle way"

43. At the other extreme, the submission made by counsel on behalf of Mr Andrewes was that, in line with the decision of the Court of Appeal, any confiscation order would here be disproportionate. This is the submission that we have referred to as advocating the "take nothing" approach.

44. We reject this approach as well. Mr Andrewes has performed valuable services for the hospice and the two trusts in return for the net earnings and, if one were to focus solely on his performance of the services (before his fraud was uncovered), it would be hard to deny that the hospice and the two trusts were receiving full value in exchange for the salary paid. But the hospice and the two trusts sought to employ or engage in a senior managerial position a person of honesty and integrity and Mr Andrewes would not have obtained the employment or office, which would have gone to another candidate, if the truth about his qualifications had been known. In that sense, the fraudster would be profiting from his crime if no confiscation order were made. How then should the proportionality proviso be interpreted so as to take into account the analogy to restoration while ensuring that the fraudster does not profit from his criminal conduct?

45. In our view, the answer in principle is that, at this stage in the analysis, where one is considering proportionality, the relevant benefit from the fraud that it is proportionate to disgorge is not the full net earnings but rather the difference between the higher earnings that Mr Andrewes has obtained and the lower earnings that he would have obtained had he not used fraud and hence had not been offered the particular job. This is to take away the "profit" made by the fraud (analogously to the reasoning adopted in *R v Sale*). This approach provides a principled "middle way" (or "halfway house") between the take all or take nothing approaches to confiscation in cv fraud cases.

46. Following the hearing, we asked counsel for the Crown to make supplemental submissions in relation to a possible middle way if we were to reject the Crown's primary submission favouring a "take all" approach. In those further submissions the Crown precisely argued that a "half way house" was to make a confiscation order based on the difference between Mr Andrewes' earnings pre and post the employment that he had obtained by his fraud. That is in line with the middle way that we have set out in the previous paragraph. However, the Crown's explanation, as a matter of principle, for that "half way house" is not precisely the same as the one we have adopted. The Crown submits that in deciding whether the employer received full value by Mr Andrewes' performance of the services – and hence whether there was the equivalent of full restoration – one should not ignore the fact that the hospice and two trusts bargained for, but did not obtain, an employee or office-holder with the necessary qualifications and experience. The difference between the value of the contracted for employee or office-holder and the value of the actual employee or officer-holder (and hence the shortfall in the restoration) can be roughly assessed according to the difference between the earnings paid to Mr Andrewes and the earnings of someone with his actual qualifications and experience, which can be taken to be his earnings in his previous job. Put another way, one may regard the true value as an employee or office-holder of Mr Andrewes as being measured by his previous earnings not by the higher earnings in the new job. Counsel for the Crown submitted that this approach - of taking the difference between pre and post earnings as the shortfall in the value provided by the employee or office-holder - is apt wherever a defendant secures an increase in his earnings as a consequence of false statements.

47. While we accept that that is a possible alternative explanation for the middle way, we prefer the explanation that we have put forward in para 45 above which focuses on the profit obtained from the fraud even if one were to assume that the defendant had given full value for his or her salary in the performance of the services. However, as a practical matter, it would appear that the same outcome is reached whichever of the two explanations is adopted.

48. The principled middle way, which we consider to be appropriate, does not involve plucking a figure out of the air or a discretionary multi-factorial approach. On the contrary, it does require some evidential basis for comparing earnings with and without the cv fraud (and, as we have said at para 39 above, the legal burden of proof is on the prosecution). However, it is important to emphasise that we are not suggesting that a detailed or precise evidential or accounting exercise is needed. That would be inappropriate for confiscation orders where clear rules and a broad-brush approach are necessary so as to avoid complicating the administration of justice in the Crown Courts. In many and perhaps most situations of cv fraud, it will be appropriate, as a pragmatic approximation of the relevant profit, simply to take the

difference between the fraudster's initial salary in the new job obtained by fraud and the fraudster's salary in his or her prior job.

49. In the Court of Appeal this middle way was briefly mentioned but rejected by Davis LJ at para 99 primarily because it was thought to be "arbitrary in its outcome". As an indication of that arbitrariness, Davis LJ asked "Why, for example, should the outcome … be different simply because he may have been unemployed before he gained the post?" Similar objections were put by counsel for Mr Andrewes in his response to the Crown's supplemental submissions. He suggested, for example, that there would be problems applying the middle way where the fraudster was previously working only part-time or in a lowly paid job (such as a shelf-stacker) or was previously working, without remuneration, as a carer for an unwell relative. But the principle that is being applied is that one is confiscating the profit measured by the difference between the net earnings that the defendant would have had if he or she had not fraudulently obtained this job and the defendant's actual higher net earnings so that prior *temporary* unemployment (or a temporary period being unremunerated or working part-time) would not be the correct touchstone. There is similarly no problem about the lowly paid worker. If that person would otherwise have continued to be a lowly-paid worker, it is appropriate to confiscate the difference between the higher net earnings obtained by the fraud and the lower earnings that the defendant would otherwise have continued to earn. In our view, with respect, the middle way, if correctly applied, does not produce arbitrary outcomes and, on the contrary, it reflects a principled way of determining the defendant's profit from the fraud.

50. It is important to recall that the proviso in section 6(5) of POCA instructs the court to address the proportionality question in relation to the recoverable amount rather than the benefit obtained (see para 16 above). This will sometimes operate to simplify the task of the Crown Court judge. Indeed, that is the position on the facts of this case. There is no need for much time and effort to be expended in assessing, even in a broad-brush way, the difference between the earnings with and without the cv fraud if it is clear (as on the facts of this case) that, in any event, that difference will exceed the recoverable amount. Where that is so, the confiscation order of the recoverable amount should be made.

51. Applying this middle way to the facts of the present case, one can compare the salary of Mr Andrewes in the new job and the salary that he was already earning. He was earning £54,361 gross in 2004 (see para 11 of the Court of Appeal's judgment which is based on HMRC records). The higher initial salary he obtained by reason of his fraud was £75,000 gross. The contrast between the two is 38%. On a broad-brush basis (and assuming, simplistically, that one can simply add in the earnings made in the two subsequent additional posts to which he was appointed) a proportionate

confiscation order (assuming not exceeding the recoverable amount) would therefore be 38% of £643,602.91 which amounts to £244,569. That is the profit he has made from his cv fraud. It is important to stress again that the underlying principle is to take the difference between the net earnings the defendant would otherwise have made and the actual earnings the defendant has made by reason of obtaining the job by fraud. It may be that on particular facts there is evidence allowing a court to finely-tune the amount of that difference in net earnings. But, in general, a pragmatic broad-brush approach will be appropriate so as not to ensnare the courts in complex assessments requiring detailed evidential enquiries.

52. On the facts of this case, as the recoverable amount (£96,737.24) is far lower than £244,569, confiscating £96,737.24 is proportionate applying the proviso in section 6(5) of POCA. That was the amount of the confiscation order made by Recorder Meeke QC albeit that, as both parties accepted, his reasoning that that was not disproportionate because it was no more than 15% of the full earnings cannot stand because he did not explain why a 15% figure was appropriate. Nevertheless, based on our different reasoning, we would restore his confiscation order.

53. However, the middle way we are adopting would not, at least as a general rule, be appropriate where the performance of the services constitutes a criminal offence. This is because, as explained in para 42 above, the employee or office-holder in that situation has not provided restoration by performing valuable services. In at least most cases, performance of those services has no value that the law should recognise as valid. In that situation confiscation of the full net earnings would not be disproportionate. That is, the take all approach is a proportionate approach in that situation and there is no justification for taking the middle way leading to a lower confiscation order.

54. Counsel for the Crown in their supplemental submissions argued that confiscation of the full net earnings would also not be disproportionate where there is a "legal bar" to a person being appointed to a particular office or job; and they argued that the "fit and proper person" requirements set out in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 meant that, after those Regulations came into force, Mr Andrewes' appointment at the Royal Cornwall NHS Hospital Trust and his reappointment (after 2014) to the Torbay NHS Care Trust were caught by that legal bar. A confiscation order of Mr Andrewes' full net earnings in that appointment or reappointment would therefore not be disproportionate. We disagree. The fact that there was a legal bar to the appointment does not mean that the law cannot place a value on the services provided. In our view, the appropriate line to draw is marked by where the performance of the services would be a criminal offence and that is not the case in relation to the services performed by Mr Andrewes in his roles for the two health authority trusts.

55. In contrast, it may be that the middle way we have adopted would not be appropriate (or would need modification) where, even though the performance of the services is lawful, there has been no equivalent to restoration because, for example, the defendant has been paid a large sum upfront (or has received a “golden handshake”) so that one cannot say that performance of the services by the fraudster constitutes the equivalent to restoration of what has been paid. But we prefer to leave that question open to be determined as and when it arises.

11. Conclusion

56. Although we are not attempting to deal with all possible circumstances, the answer to the question certified (see para 2) is that in cv fraud cases, where, focusing solely on the performance of services, the fraudster has given full value for the earnings received — and putting to one side where the performance of the services constitutes a criminal offence — it will normally be disproportionate under the proviso in section 6(5) to confiscate all the net earnings made. But it will be proportionate to confiscate the difference between the higher earnings made as a result of the cv fraud and the lower earnings that the defendant would have made had he or she not committed the cv fraud. In many situations of cv fraud, it will be appropriate, as a pragmatic approximation of that profit, simply to base it on the percentage difference between the fraudster’s initial salary in the new job obtained by fraud and the fraudster’s salary in his or her prior job. Moreover, there is no need for much time and effort to be expended in assessing, even in a broad-brush way, the difference between the earnings with and without the cv fraud if it is clear that, in any event, that difference will exceed the recoverable amount.

57. For all these reasons, we would allow the appeal and restore the confiscation order made by Recorder Meeke QC.

58. Neither party sought to uphold the linked compensation order made by Recorder Meeke QC and, as he did not set out the basis for that compensation order (see para 24 above) and as there is no clear evidence as to relevant loss, no compensation order should be made.