

ENGLAND AND WALES / JUDGMENT

Godley, R v

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Neutral Citation Number: [2014] EWHC 2343 (QB) IN THE HIGH COURT OF JUSTICE
BLACKFRIARS CROWN COURT Before : LADY JUSTICE GLOSTER

- ----- Between : REGINA

- and - WILLIAM GODLEY

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- ----- Case No: T2006-7525 Royal Courts of Justice Strand, London, WC2A
2LL Date: 14/11/2014 Claimant Defendant Mrs Alison Clare and Ms Lisa Freeman (instructed
by the Serious Fraud Office) for the Prosecution Mr Simon Csoka QC (instructed by Rahman
Ravelli Solicitors) for the Defendant Hearing dates: Monday 14 April 2014

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Judgment

Gloster LJ :

Background

1. 2. This is my judgment in relation to confiscation proceedings brought by the Crown against William Godley ("Mr Godley") and heard by me in April 2014. Mr Godley was born on 10 February 1948. He is married to Anne Godley. They have four children: David Godley, Christopher Godley, Kevin Godley and Kim Taylor. Both Mr and Mrs Godley resided in Portugal at the date of the confiscation hearing. On 27 June 2007 in the Crown Court at Blackfriars William Godley represented at that time by Mr James Sturman QC, leading Mr Edward Henry, pleaded guilty before me to one offence of conspiracy to defraud contrary to common law. The particulars of that offence were that Mr Godley together with Jared Brook, Lincoln Fraser, Nicholas Fraser and Robert Raven (who was subsequently severed from the indictment) conspired between 1 January 1998 and 30 June 2002 to defraud investors in investments schemes established, promoted and operated by the Imperial Consolidated Group of companies ("Imperial"). The conspiracy was what is commonly known as a Ponzi scheme and, as a result of the scheme, investors from around the world were defrauded of millions of pounds. 3. The prosecution's case against Mr Godley which led to his conviction was as follows: i) ii) iii) iv) From 1997 to June 2002 Imperial promoted numerous offshore investment funds through a worldwide group of companies from its headquarters at

Binbrook in Lincolnshire. The products promoted were offshore investments based in Caribbean jurisdictions. Sales offices, introducers and financial advisors promoted these schemes worldwide and investors often invested life savings on the promise of guaranteed high returns with no risk to the capital invested. Investors in Imperial were assured that their investment was deployed into secure and highly profitable lending businesses run by Imperial mainly in the UK. Monthly statements were sent to investors purporting to show that their investment had grown as promised. In reality less than half of the investor funds received by Imperial were loaned out by the UK businesses and those businesses were not generating profits. Investors' funds were dissipated on the costs of running the Imperial network of companies, large commissions paid to introducers, continued subsidising of unsuccessful businesses and high salaries and benefits paid to management. The prosecution alleged that the Imperial scheme could therefore only continue if investors retained their confidence in it and continued to invest. Once this confidence was lost large numbers of investors sought to redeem their investment and the scheme collapsed in June 2002. The administrators of Imperial estimate that only a tiny percentage of investors' funds will be recovered. The prosecution alleged that Mr Brook and Mr Fraser were the controlling minds of the fraud. Mr Godley was at the next rank of seniority. He was a director of the principal fund raising companies in the Bahamas and was Head of International Sales. With a large network of contacts in the financial services industry worldwide, he facilitated the successful sale of Imperial investments to hundreds of wealthy clients, particularly in the USA and Commonwealth countries. v) vi) In April 2001 Mr Godley moved to Imperial's new office in Mayfair and became chief executive officer. Imperial continued to solicit investment with promises of high yields. The UK companies continued to run at a loss. Meanwhile, the Grenadian authorities had found Imperium Bank, a related Imperial company, to be insolvent. The Caribbean fund raising companies were placed into liquidation in July

2002. The UK companies went into voluntary administration on 10 June 2002. Over £150 million was owing to investors. At the time Mr Godley entered his plea of guilty in April 2007, leading counsel then acting on his behalf, with the agreement of the prosecution, invited the court to adjourn his sentencing hearing until completion of the trial on the basis that, as stated by Mr Godley's counsel he understood that he would be sentenced, ultimately, according to the evidence given at the trial and, in particular, that any issue in relation to the extent of his involvement in the conspiracy would be resolved by reference to the evidence and used at trial. The first trial concluded in October 2008. Mr Nicholas Fraser was acquitted on the one charge then before the jury, but the jury failed to agree on their verdicts in relation to Mr Brook and Mr Fraser. On 30 April 2009, at a preparatory hearing before the re-trial of Mr Brook and Mr Fraser, leading counsel then acting on Mr Godley's behalf, Mr Peter Doyle QC invited the court to defer sentencing of Mr Godley until after the re-trial. The basis upon which that submission was made was, once again, that it was only after hearing the evidence in the first trial that the court would be in an informed position to assess Mr Godley's culpability and the extent of his involvement in the fraud over the

indictment period, namely January 1998 to June 2002. The prosecution, however, opposed any delay in Mr Godley's sentencing. Nonetheless I acceded to Mr Doyle's submissions and adjourned Mr Godley sentencing to the conclusion of the re-trial. By that stage the original indictment was amended so that the original single conspiracy count was expanded into two counts: the first to reflect the alleged criminal conduct over the entire period of the indictment from January 1998 to June 2002 and the second conspiracy count to reflect a conspiracy running from a later inception date of 1 May 2000 to an end date of June 2002. The retrial concluded at the end of June 2010. The jury acquitted Mr Brook and Mr Fraser of count one (namely the original single conspiracy count reflecting the alleged criminal conduct over the entire period of the indictment from January 1998 to June

2002) but could not agree in relation to their guilt in relation to the later period (namely from the later inception date of 1 May 2000 to June 2002. On 5 August 2010 I sentenced Mr Godley to a term of three-and-a-half years' imprisonment and disqualified him from being a company director for six years. At the time of sentence he was represented by Mr Doyle QC and his junior, Mr Keating 4. 5. 6. 7. 8. 9. 10. 11. and different solicitors, Messrs Hodge Jones and Allen. Although at the time of pleading guilty in April 2007, Mr Godley had pleaded guilty to an offence with a date range of 1 January 1998 to 30 June 2002, at the point of sentencing on 5 August 2010, having heard the evidence in the trials as against his co-accused, I was not satisfied to the criminal standard that Mr Godley had been party to a criminal conspiracy within Imperial from as early 1 January 1998. However I was satisfied to the criminal standard that from at the latest, by "November or December 1999, early 2000", Mr Godley had conspired with his co-defendants to defraud investors. In my lengthy sentencing remarks, which followed detailed submissions both by Mr Doyle and by the prosecution in relation to Mr Godley's involvement, I set out my conclusions on the evidence which I had heard in both trials as to the extent of Mr Godley's role and as to the period during which I found him to have been involved in the conspiracy. I refer below in greater detail to what I concluded. Shortly after his conviction 27 June 2007, the prosecution issued confiscation proceedings against Mr Godley under section 71 of the Criminal Justice Act 1988 (as amended by the Criminal Justice Act 1993 and the Proceeds of Crime Act 1995) ("the 1988 Act"). For various reasons it was common ground that these could not take place pending the outstanding trial against his co-defendants. The relevant provisions of the 1988 Act to which I refer in this judgment are those which were in force at the relevant time in relation to these confiscation proceedings. Following various delays thereafter, the reasons for which it is not necessary to rehearse, the confiscation hearing was finally fixed to take place in June 2011. In his response dated 25 March 2011 to the prosecution's statement of information made in accordance with section 73 of the 1988 Act dated 22 November 2010, Mr Godley accepted that he had benefited as a result of or in connection with the commission of the index offence pursuant to section 71(1A) of the 1988 Act in the sum of £1,811,899.30. However, shortly before the hearing, the prosecution were informed that Mr Doyle QC and Mr Keating had withdrawn from the case. They had apparently been asked to advise as to whether Mr Godley had received incorrect advice to

plead guilty on the issue of mens rea and also as to whether there was any reason to query his plea of guilty on the basis that, in the light of discussions in which had place at a meeting between representatives from the prosecution, the Serious Fraud Office, and those previously representing Mr Godley, there was an agreement with the SFO to preserve his home from the confiscation proceedings. Mr Doyle QC and Mr Keating advised Mr Godley as to the possibility of applying to vacate his plea if it had been entered on a false premise as to the required mens rea for the offence of conspiracy to defraud. They also advised him on the possibility of making an abuse of process application in relation to the alleged agreement as to the future of the Portuguese home. Ultimately, however, they advised that they could not advance the abuse of process argument. They dismissed the possibility of vacating the plea. As a result the second team of counsel dropped out of the picture.

12. Messrs Hodge Jones and Allen then instructed a third team of two counsel. The confiscation proceedings then had to be adjourned, whilst new counsel familiarised themselves with the substantial amount of documentation involved in the case and advised in relation to the abuse of process argument. Messrs Hodge Jones and Allen themselves then withdrew and a new firm of solicitors, Messrs Rahman Ravelli, were instructed in late 2011.
13. Mr Simon Csoka QC and Mr Whitehouse were then instructed on behalf of Mr Godley to advance the abuse of process application in relation to the confiscation proceedings. This led to yet further adjournments of the confiscation proceedings. The abuse application was advanced before me over the course of some three days at the end of January 2012. I heard evidence from the applicant, his wife, his former colleague, his former legal representatives and those members of the prosecution team who were present at the meeting between the SFO and representatives of the defence. The issue before me was whether or not there had been an agreement entered into by the Serious Fraud Office to exclude the Portuguese property as an asset in the confiscation proceedings. If so, I was asked to rule whether the Serious Fraud Office should be prevented from "reneging" on that agreement. 14. However, I ruled that no agreement had been reached, no promise had been given and there had there been no "nod or wink" given as to any "gentleman's agreement that could not be reduced to writing." I held that the most that the prosecution had indicated was that they would approach the question of recoverable assets with an open mind. I further concluded on the evidence that Mr Godley was: "... aware at the time when he pleaded guilty that there would be no certainty as to the stance to be taken in the confiscation proceedings by the SFO. I reject his evidence that he genuinely believed, at the time he pleaded guilty, that he had secured the exclusion of the Portuguese property from these proceedings for the benefit and security of his wife." 15. 16. However, despite that ruling, made in the context of the confiscation proceedings, and the fact that at no time between conviction in 2007 and June 2012 did Mr Godley attempt to vacate his plea, Mr Godley was nonetheless advised to make an application for permission to appeal to the Court of Appeal against conviction and to seek an extension of time within which to do so of nearly 5 years. The confiscation proceedings, which were dependent upon the premise of his conviction, necessarily (as both Mr Godley

and counsel for the prosecution agreed) had to be adjourned pending the determination of that application for permission to appeal. Because of the workload in the Court of Appeal, there was then a considerable delay before the single judge was in a position to consider the application on the papers. The single judge dealt comprehensively with the application and concluded that he should refuse the application. He said: "1. The applicant contends that he pleaded guilty to the charge of conspiracy to defraud on the basis that those previously advising him told him they had been given a firm (oral) assurance that, if he did so, the SFO would not seek a confiscation order in respect of his family home in Portugal.

2. Leading counsel on the applicant's behalf now argues that no such assurance could sensibly have been given, since the law does not invest the prosecution with any discretion in relation to these applications for confiscation: if the statutory presumptions apply, they cannot be disapplied simply because the prosecution does not rely on them. Therefore, he suggests, the guilty plea was entered on the basis of improper -- and erroneous -- advice and the conviction based upon the plea should be quashed.
3. However this precise point was taken before the trial judge, Gloster J, on his behalf in an application to stay the proceedings against him. After a three day hearing at which the applicant, his wife, those who had previously represented him (including Mr Sturman QC, his leading counsel) and representatives of the prosecution -- amongst others -- gave evidence, the judge ruled as a fact that no such assurance had been given. It is true that in an application for a stay the burden of proof rested on the applicant but the judge did not decide the matter on the burden of proof she made clear findings of fact. I cannot see any prospect whatsoever of the CACD deciding that she was wrong.
4. Moreover, privilege having been waived, I find the response of Mr Sturman to be entirely convincing. Following a consultation with the applicant, the pros and cons of pleading guilty were fully set out in the very detailed letter of 12 April 2007, which made abundantly clear that no further assurance could be given in respect of the family home in Portugal than that the SFO would 'keep an open mind' on the subject. In my judgment the applicant pleaded guilty knowing that there was no such assurance as he now alleges.
5. In any event, applicants are required to appeal within the time allowed by the Rules. If the applicant wished to take this point, he could -- and should -- have done so at the time by applying to change his plea; he could easily have done so since he was then represented by a fresh legal team. However, he did not do this. The application now looks very much like an eleventh hour delaying tactic intended to postpone the ongoing confiscation proceedings. In my judgment this application is wholly without merit and I refuse to extend the time for making it." [My emphasis.] 17. There was then a further delay before the full Court of Appeal were able to determine the renewed application for permission to appeal. The renewed application took place at an oral hearing on Wednesday, 27 November 2013. The court dismissed the application. Lady Justice Hallett V-C, giving the judgment of the court, and having quoted the remarks of the single judge, said as follows: "11. With those observations we wholeheartedly agree. In our judgment, Mr Csoka's approach, with respect,

ignores a clear ruling of a High Court Judge based upon evidence from not only the applicant but his wife and a number of his legal representatives. The judge ruled the applicant's evidence was unreliable. She rejected what he claimed were his reasons for entering his plea of guilty. It is not open to the applicant or Mr Csoka on his behalf now to proceed upon the basis that those findings have never been made. If Mr Csoka wished to do try to undermine those findings, it was incumbent upon him to put before this court some material which might have justified a re-visiting of them. Absolutely nothing has been put forward other than the applicant's own discredited account and what in our view was the unjustified criticism of the applicant's former advisers.

12. This renewed application has been, we fear, a waste of our time, the time of the Court of Appeal Office Staff and Lawyers and a waste of precious resources generally. For all those reasons, the renewed application must be refused." 18. It was in those circumstances that, after further adjournments pending and following the determination of the application to Court of Appeal, the confiscation proceedings finally came on for hearing before me on 14 and 15 April 2014. Mr Godley was not present at that hearing. It was accepted by Mr Csoka on behalf of Mr Godley that the court had jurisdiction to proceed in the latter's absence and that it had no power to compel his attendance. Pressure of work since that date has unfortunately delayed the production of this judgment. The issues
19. Ms Allison Clare, counsel for the prosecution, submitted that the following issues fell to be determined at the hearing on 14 and 15 April 2014: i) ii) iii) iv) the fact and extent of Mr Godley's "benefit" pursuant to section 71 of the 1988 Act; whether Mr Godley has satisfied the court on the balance of probabilities that "the realisable amount" is less than the value of his benefit; the amount to be recovered pursuant to section 71, 74 and 102 of the 1988 Act; the amount to be paid by way of compensation from any confiscation order pursuant to section 130 of the Powers of Criminal Courts (Sentencing) Acts 2000 and section 72 (7) of the 1988 Act and the persons to whom any such amount should be paid. The principal issues in dispute between the parties Benefit 20. Under section 71(1A) of the 1988 Act the court must first determine whether the defendant has benefited from any relevant criminal conduct, and if so, the value of that benefit. The burden is on the Crown to prove, to the civil standard, the fact and extent of the defendant's benefit: see R v Barwick [2001] 1 Cr App R (S) 129 at [33]. A defendant benefits from an offence in so far as he obtains property as a result of or in connection with its commission, and his benefit is the value of the property obtained: see section 71(4) of the 1988 Act.
21. Whilst, despite the previous concession as to quantum of benefit made in Mr Godley's response dated 25 March 2011 to the prosecution's statement dated 22 November 2010, Mr Csoka did not formally concede that Mr Godley had received any benefit from his criminal conduct, realistically Mr Csoka did not put forward any arguments to support the proposition that Mr Godley had not received any benefit from his crime. Value of benefit 22. The second question which the court has to address is what is the value of the benefit which the defendant has so obtained: see R v May [2008] UK HL 28, [8].

23. Ms Clare submitted that the total benefit received by Mr Godley from the relevant criminal conduct, as set out in the various statements of information produced by the prosecution pursuant to section 73 of the 1988 Act was £1,330,156. That figure was based on the latest addendum to the prosecution's section 73 statement dated 13 March 2014. This figure, when adjusted in accordance with the relevant retail price index (namely the new RPIJ measure of Consumer Price Inflation, which is a Retail Prices Index (RPI) based measure that uses a geometric (Jevons) formula in place of a previous arithmetical formula) produced a total benefit of £1,567,974. The figure of £1,330,156 reflected a concession made in the course of Ms Clare's oral submissions that the prosecution was not going to pursue its claim in respect of two previously claimed items, namely the sum of £212,460 paid by Imperial in respect of UK tax and an amount of £23,447 in respect of HINT credit card expenditure. The total benefit of £1,567,974 was made up as follows: Cash payments from ICS & Imperium Bank relating to the defendant's employment in the Bahamas Cash payments from Central Consolidated Management Ltd relating to the defendant's employment in the Bahamas Cash payments from ICF (UK) and Imperium Bank relating to the defendant's employment in the UK Housing costs in the Bahamas paid by Imperial Total benefit without RPIJ Total benefit including RPIJ addition £749,869 £83,932 £439,688 £56,667 £1,330,156 £1,567,974
24. Ms Clare did not seek to revisit the question of when Mr Godley's criminal conduct began. The prosecution was prepared to accept, following my detailed analysis of the relevant dates as part of the sentencing exercise in August 2010, that, for confiscation purposes, the benefit date range was 1 November 1999 – 30 June 2002.
25. Mr Godley served various written responses to the prosecution's section 73 statements. These were dated variously 25 March 2011, 25 March 2012, 3 May 2012 (which included an expert report and a bundle of documents). The written arguments raised in Mr Godley's written response statements in relation to benefit centred on the quantification of the benefit received by Mr Godley. In those written response statements the contested points which had been raised related to the following: i) 'the benefit date range: Mr Godley proposed a benefit date range of 1 January 2001-27 November 2001, as compared with the prosecution's proposed benefit date range of 1 November 1999-30 June 2002; ii) certain specific items of benefit as follows: a) b) c) the inclusion of certain payments made to Mr Godley during the period April 2001-June 2002; Bahamas' housing costs; indexation calculation. Accordingly the position according to Mr Godley's latest written statements was that the correct quantum of benefit received by Mr Godley was £460,462. Realisable amount
26. Once it is established that a defendant has benefited from his criminal conduct, the court then has to go on to determine the amount which it will require the defendant to pay: see section 71(1B) and (6) of the 1988 Act. I consider in some detail below the relevant definition sections, but for present purposes it is sufficient to refer to: i) section 71(6) (in its relevant formulation) which provides that: "(6) Subject to subsection (1C) above the sum which an order made by a court under this section requires an offender to pay shall be equal to -
- (a) the benefit in respect of which it is made; or

- (b) the amount appearing to the court to be the amount that might be realised at the time the order is made, whichever is the less. ”; and ii) section 74 (3) which defines the "amount that might be realised at the time a confiscation order is made" ("the realisable amount") as: “(a) the total of the values at that time of all the realisable property held by the defendant, less
- (b) where there are obligations having priority at that time, the total amounts payable in pursuance of such obligations, together with the total of the values at that time of all gifts caught by this Part of this Act.” 27. The burden is on a defendant to prove to the civil standard (i.e. on the balance of probabilities) that the realisable amount is less than the amount of the benefit: see *R v Barwick* supra at [34]; *R v Barnham* [2005] EWCA Crim 1049 at [31-34] and [14]. However there is also a responsibility placed upon the court not to make a confiscation order when there is a serious risk of injustice to the defendant: see *R v Barnham* at [32-34].
28. Mr Godley's latest response statement dated May 2012 asserted that he and his wife had joint assets with a value of £420,017.03. However although that defence statement made various assertions as to what Mr Godley "will state", in large part the matters referred to in that statement remained unsupported by evidence. At the hearing in April 2014 Mr Csoka produced a further "defence schedule of current joint assets" which asserted that as at that date Mr and Mrs Godley's joint assets had a value of £339,714.64. That schedule was likewise not supported by a witness statement or statement of truth from Mr Godley, and, as he did not attend the hearing, he did not give evidence to support it. 29. 30. 31. The prosecution's additional section 73 statement served shortly before the hearing in April 2014, as well as addressing the reduction in benefit, also appended a updated valuation of 468 Lakeside Village, Amancil, Portugal, Mr and Mrs Godley's home ("the Portuguese property"). That property now has a reduced valuation of €430,000. Mr Csoka realistically accepted that the Portuguese property and the money standing to the credit of the joint bank accounts were realisable assets although he argues that, because title to the property is vested in a company called Taybar Ltd, there are problems and associated costs with its realisation. The principal dispute in relation to realisable assets centred round the defence submissions in relation to gifts which the prosecution contend were made by Mr Godley and Mrs Godley to their children and by Mr Godley to Mrs Godley. In summary Mr Csoka submitted that the court should exercise its discretion to exclude all the gift amounts and that, although various assets were transferred into Mrs Godley's name, that was for tax reasons and not in order to avoid certain financial consequences connected with this and other proceedings. I deal with the detailed evidence relating to the gifts below. In summary the prosecution contend, in accordance with its revised gift schedules produced for the April 2014 hearing, and without prejudice to its contention that the onus is on the defendant to show that he has realisable assets which are less in amount than the benefits which he received, that: i) ii) iii) gifts totalling £38,489 were made to their son Kevin Godley in the period from 9 November 1999 to 31 January 2005; gifts totalling £20,803.85 were made to their son Chris Godley in the period from 23 October 2001 to 22 November 2007; gifts totalling £73,451.69 were made to their daughter Kim Godley in the period from 16 February 2001 to 21 April 2008; and that iv)

gifts totalling £1,691,179 were made by Mr Godley to Mrs Godley, principally via a company called Tundra Capital Management Ltd ("TCM"). Discussion and determination Benefit - appropriate date range 32. 33. I accept Ms Clare's submission that the appropriate date range for the consideration of Mr Godley's receipt of benefit is the period from 1 November 1999 – 30 June 2002. This is a matter which I carefully considered in the context of sentencing Mr Godley in August 2010. I did so on the basis of extensive submissions from Mr Doyle QC and on the basis of evidence which I had heard. In that context it was material for me to address not only Mr Godley's role in the affairs of Imperial but also the earliest date from which I could safely conclude that he had been involved in criminal conduct. The relevant passage appears at pages 17F – 30F of the transcript dated 5 August 2010. Apart from the fact that Mr Godley had previously accepted in his response document dated 25 March 2011 the date range proposed by the prosecution, there was nothing in any of Mr Godley's defence statements (and in particular in his defence statement dated 4 May 2012), or the accompanying materials, which evidentially supported a start date of 1 January 2001 or an end date as early as 27 November 2001. Mr Godley remained as a director of Caribbean companies known as the IC placement companies throughout late 2001 and well into 2002 at a time when the underlying businesses were clearly insolvent and yet, nonetheless, large investments continued to be solicited which were received into the IC placement companies. In the circumstances I see no reason whatsoever to revisit, or go behind, the evidential analysis which I conducted at the sentencing hearing in relation to the date range. Quantum of benefit 34. 35. As I have already stated, the prosecution's case was that, based on the latest addendum to the prosecution's section 73 statements, the total benefit received by Mr Godley from the relevant criminal conduct during the period from 1 November 1999 – 30 June 2002, was £1,330,156, and, when adjusted in accordance with the new RPIJ measure of Consumer Price Inflation produced a total benefit of £1,567,974. Those figures were supported by a various evidential materials in addition to the section 73 statements, including a comprehensive financial analysis report from Ms Naomi Thomas, the prosecution's forensic accountant who gave evidence before me in both trials. The final figure included concessions made by the prosecution in relation to objections taken by Mr Godley in relation to, amongst other things, a UK tax payment of £212,460 paid by Imperial on his behalf and the inclusion of Hint credit card expenditure.; Mr Csoka did not seek to cross examine Ms Thomas or to challenge her evidence in any way. Nor, as I have already said, did Mr Godley support his objections to the quantum of benefit by means of witness statements or any oral evidence. Moreover in his oral submissions Mr Csoka did not seek to support the remaining objections in relation to benefit which had been originally put forward in written response statements served on behalf of Mr Godley. He accepted that, whilst he could not concede the question of quantum, he could not realistically challenge the figures. 36. I find as a fact that the objections raised in Mr Godley's earlier written responses to the prosecution section 73 statements in relation to benefit are not made out. i) ii) iii) First, I see no reason not to include in the benefit figure certain payments made to Mr Godley during the period April 2001-June 2002. The fact that such payments were not listed within the ICF salary records is irrelevant; Ms Thomas' evidence clearly demonstrates that

the disputed payments were paid during the period to Mr Godley from Imperial companies such as ICF or Imperium Bank. They were clearly related to Mr Godley involvement as a director of Imperial companies and as such are properly included as part of any benefit figure related to his criminal conduct. Likewise, I am satisfied that the prosecution has proved that Mr Godley received a benefit of £56,667 in respect of his housing costs in the Bahamas which were paid for by Imperial. This figure reflects the sum of US \$5000 paid per month by Imperial in respect of his housing allowance in respect of the relevant period from 1 November 1999 – 30 June 2002. The fact that, as Mr Godley's forensic accountant, Mr Philip de Nahlik asserts, Mr Godley had to maintain a house in the UK for his family and that "the house in the Bahamas was wholly exclusively necessarily incurred so that he could carry out contractual obligations", even if that be the case is irrelevant. Mr Godley was in the Bahamas for the sole purpose of perpetrating the fraud on investors and monies were paid to him from ICG, the corporate vehicle for the fraud, during the currency of, and in connection with, the commission of the offence. Accordingly, such monies are properly included as a benefit from criminal conduct I should mention that Mr Godley did not produce any evidence to support his assertion that US \$3000 as opposed to \$5000 was being paid per month. Although Mr Csoka questioned whether there should be any indexation calculation at all in relation to the amount of the benefit, it is clear that section 74(5) expressly enables any increase in the value of money to be taken into account in the determination of the quantum of the benefit received. In the light of the prosecution's latest adjustment to the indexation calculation, using the new RPIJ measure of Consumer Price Inflation, there is nothing in the other points taken by Mr Godley's forensic accountant in relation to the issue of indexation. 37. Accordingly I conclude that the prosecution has proved that Mr Godley received a total benefit of £1,567,974 (taking into account inflation) from his relevant criminal conduct. Realisable amount Relevant definitions 38. I have already referred to 71(6) (in its relevant formulation) which provides that the sum which an offender is required to pay: "shall be equal to -

- (a) the benefit in respect of which it is made; or
- (b) the amount appearing to the court to be the amount that might be realised at the time the order is made, whichever is the less. ". Likewise I have already referred to section 74(3) which defines the "amount that might be realised at the time a confiscation order is made" ("the realisable amount") as: "(a) the total of the values at that time of all the realisable property held by the defendant, less
- (b) where there are obligations having priority at that time, the total amounts payable in pursuance of such obligations, together with the total of the values at that time of all gifts caught by this Part of this Act." 39. Section 74 (1) defines "realisable property" (subject to what is an irrelevant subsection for present purposes) as: "(a) any property held by the defendant; and

- (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Part of this Act.” 40. Sections 74(7) and 74(8) define the value of a gift at the time that a confiscation order is made as follows: “(7) Subject to subsection (12) below, references in this Part of this Act to the value at any time (referred to in subsection (8) below as “the material time”) of a gift caught by this part of the Act are references to -
- (a) the value of the gift to the recipient when he received it adjusted to take account of subsequent changes in value of money; or
- (b) where subsection (8) below applies, the value there mentioned; whichever is greater.
- (8) Subject to subsection (12) below, if at the material time he holds -
- (a) the property which he received (not being cash); or
- (b) property which, in whole or in part, directly or indirectly represents in his hands the property which he received; The value referred to in subsection (7) above is the value to him at the material time of the property mentioned in paragraph (a) above or, as the case may be, of the property mentioned in paragraph (b) above so far as it so represents the property which he received, but disregarding any charging order.” 41. In other words the total of the values "at that time of all gifts caught by the Act" is not limited by reference to the value of property currently held by the recipient of the gift at the date the confiscation order is made. If its value at the time the gift was made is greater, then that value can be taken into account, subject to section 74(10). The fact that a gift may be difficult or impossible for a defendant to recover is not a basis upon which it could be said to fall outside the definition of realisable property. Under the Act, by definition, a gift includes property not in the power or control of the defendant: see *R v Liverpool Magistrates Court ex parte Ansen* [1998] 1 All ER 692; *Re L* [2010] EWHC 1531 at [17] - [30]. 42. Section 74 (10) provides as follows: “(10) A gift (including a gift made before the commencement of this Part of this Act) is caught by this Part of this Act if -
- (a) it was made by the defendant at any time after the commission of the offence or, if more than one, the earliest of the offences to which the proceedings for the time being relate: and
- (b) the court considers it appropriate in all the circumstances to take gift into account.” The realisable amount 43. Based on the recent "defence schedule of current joint assets" produced on 13 April 2014, which asserted that as at that date Mr and Mrs Godley's joint assets had a value of £339,714.64, Mr Csoka submitted that any confiscation order should not exceed that sum. He further argued that, in the exercise of the court's discretion pursuant to section 74(10) of the Act, the court should exclude, as amounts to be taken into account in calculating the realisable amount, gifts which the prosecution claimed had been made to Mrs Godley and to his and Mrs Godley's children. He also argued that the prosecution's evidence did not support gifts of such amount having been made by Mr Godley to Mrs Godley and that, in any event, give the value of their joint current assets as disclosed in the schedule dated 13 April 2014, any confiscation order should not exceed that sum. 44. The

critical issues in the case in relation to "realisable amount" were therefore: i) whether or not the court was entitled on the evidence before it to include in the calculation of the realisable amounts: a) b) gifts totalling £1,691,179 made by Mr Godley to Mrs Godley; and gifts totalling £132,744.54 made by Mr Godley to his children; and ii) whether the court the court considered it appropriate in all the circumstances to take the various gifts into account. 45. In relation to the last question of appropriateness, it is also clear from the decision of the Court of Appeal in *R v Benjafield* [2000] EWCA Crim 86, as approved on appeal by the House of Lords (see [2002] UKHL 2), that a judge, in conducting the second stage of confiscation proceedings (viz. ascertaining the realisable amount), must be astute to avoid any risk of serious injustice to a defendant. Thus Lord Woolf CJ, giving the judgment of the court, stated at [87]: "87. The onus which is placed upon the defendant is not an evidential one but a persuasive one, so that the defendant will be required to discharge the burden of proof. (See Lord Hope's third category of provisions in *Kebilene* (at p.992)). This is therefore a situation where it is necessary to carefully consider whether the public interest in being able to confiscate the ill- gotten gains of criminals justifies the interference with the normal presumption of innocence. While the extent of the interference is substantial, Parliament has clearly made efforts to balance the interest of the defendant against that of the public in the following respects:

- a) It is only after the necessary convictions that any question of confiscation arises. This is of significance, because the trial which results in the conviction or convictions will be one where the usual burden and standard of proof rests upon the prosecution. In addition, a defendant who is convicted of the necessary offence or offences can be taken to be aware that if he committed the offences of which he has been convicted, he would not only be liable to imprisonment or another sentence, but he would also be liable to confiscation proceedings. "
- b) The prosecution has the responsibility for initiating the confiscation proceedings unless the court regards them as inappropriate. In both cases there is a discretion to be exercised and the manner in which the discretion is exercised is capable of being reviewed by this court.
- c) There is also the responsibility placed upon the court not to make a confiscation order when there is a serious risk of injustice. As already indicated, this will involve the court, before it makes a confiscation order standing back and deciding whether there is a risk of injustice. If the court decides there is, then the confiscation order will not be made.
- d) There is the role of this court on appeal to ensure there is no unfairness." [My emphasis.] Gifts made by Mr Godley to his children 46. At the hearing, by which time the prosecution had served a revised schedule of the gifts to the children, there was no realistic challenge to the amount of such gifts. Mr Csoka's submission was that in the exercise of my discretion I should exclude the gifts made by Mr Godley to his children pursuant to section 74 (10)(b). The argument put forward in Mr Godley's defence statement was that " in the main the payments were made innocently and purely to pay for them to attend university and support them with associated living expenses the innocuous and regular nature of the payments

... is consistent with them being for university and living expenses and not as a means of dishonest disposal/concealment but more importantly due to the fact that they clearly cannot be recovered. " 47. I reject that submission. First of all I am satisfied that gifts in the amounts as specified in the latest prosecution gift schedule were indeed made to Mr and Mrs Godley's children in the total sum of approximately £132,744.54 and that there is no double counting. The fact that the gifts were made to assist the children with their normal living expenses and not "as a means of dishonest disposal/concealment" is irrelevant. The fact of the matter is that, from the substantial benefits which he indubitably received from Imperial, as a result of his criminal conduct, Mr Godley was in a position to make extremely generous gifts to his children. Second, the fact (if it be the case) that, as is asserted in various defence schedules, certain gifts were allegedly funded from TCM after Mr Godley had left Imperial and therefore said not to be derived from "a tainted source", is likewise irrelevant. No authority or statutory provision was cited by Mr Csoka in support of such proposition and it is contrary to the clear terms of the Act which provides that a gift is *prima facie* caught by the Act simply "if it was made by the defendant at any time after the commission of the offence": see section 74 (10). Moreover it is clear from the relevant authorities that assets which make up the realisable property do not need to be the fruits (directly or indirectly) of criminal conduct. Even if the proceeds of criminal conduct have been spent, a confiscation order can be made on the strength of legitimately acquired assets: see *R v May* [2008] UKHL 28 at [9]; and *R Waya* [2012] UKSC 51 at [27]. Third, neither Mr Godley nor his children have produced any evidence to suggest that the children are not in a financial position to repay the gifts; indeed such evidence as the prosecution has produced suggests that in relation two of their children there is substantial equity in properties which are owned by them in England. In any event, whilst the inability of a defendant's children to repay gifts might in certain circumstances be a relevant factor affecting the court's discretion, in all the circumstances of the present case, including the absence of any evidence from Mr Godley or any of the children themselves, I consider it is indeed appropriate to take into account the present-day value of such gifts. I do not consider that there is any injustice either to Mr Godley or to his children in so doing. No evidence has been produced to this court to suggest that that Mr Godley would not be able to recover the sum of £132,744.54 from his children in respect of the gifts which he made to them. Alleged gifts made by Mr Godley to Mrs Godley 48. 49. 50. 51. 52. As I have already said, the prosecution has identified monies which it contends were transferred to Mrs Godley directly or indirectly by Mr Godley by way of gift in the period 10 April 2003 to 31 May 2006 in an amount of £1,691,179 (including the purchase price of the Portugal property). The prosecution contends that the evidence shows that these amounts include gifts made directly from accounts held by the defendant and also directly or indirectly by the defendant from Alpha Toronto No. 2, TCM and Atlantic Management Holdings Ltd ("Atlantic"). There is no dispute that the transfers of the monies, which are alleged by the prosecution to be gifts, actually took place and were effected after the commission of the offence. It is clear on the evidence before me, that the transfers identified in the revised prosecution schedule, appearing at divider 4 of the bundle produced for the hearing on 14 and 15 April 2014, were

indeed made to Mrs Godley from the accounts identified in that schedule and indeed there was no argument by Mr Godley to the contrary. In his defence response statement dated 4 May 2012 Mr Godley raised various arguments in opposition to the prosecution's case that the transfers were gifts which were caught by the Act. In summary these were: i) ii) iii) iv) that the only reason for any assets being held in, or transferred into, Mrs Godley's name was for tax purposes; Mr and Mrs Godley acted on the basis of professional tax advice; that Mr Godley had not taken any steps to transfer his assets into the name of his wife in an attempt to put them beyond the reach of any interested parties; that the liquidators of Imperial were unable to establish any traceable or proprietary links between the funds which Mr Godley had received from Imperial and those which were paid by TCM; and that the monies paid to Mrs Godley by TCM and Atlantic were not gifts made to her directly or indirectly by Mr Godley, but rather were the proceeds of dividend payments received by her in her own right as a shareholder in TCM and Atlantic. In addition, Mr Csoka submitted that, notwithstanding that the onus of proof was on a defendant to establish that the amount appearing to the court to be the amount that might be realised at the time the order is made, was less than the amount of the benefit, nonetheless the onus of proof was on the prosecution to establish that a defendant had, directly or indirectly, made a gift to a particular person. As to the arguments summarised at paragraphs 50(i) to (iii) above, it is in my judgment wholly irrelevant that, in making the gifts, Mr and Mrs Godley acted on the basis of professional tax advice; that Mr Godley had not taken any steps to transfer his assets into the name of his wife in an attempt to put them beyond the reach of any interested parties; or that the liquidators of Imperial were unable to establish any traceable or proprietary links between the funds which Mr Godley had received from Imperial and those which were paid by TCM. None of those considerations - in particular those as to the intention of Mr Godley as donor - are relevant factors which 53. 54. TCM 55. the court is obliged, or entitled, to take into account in deciding whether the relevant transfers are gifts for the purposes of confiscation proceedings. In most cases it would be impossible for the prosecution, without an extensive evidential enquiry, to challenge the assertion of a defendant's subjective intention. There is nothing in the statutory language of the 1988 Act that excuses gifts, which are made, or not made, for particular purposes, from the ambit of the statute I also assume, in Mr Godley's favour, but without deciding, that, in the present case, the onus of proof is on the prosecution to establish, on the balance of probabilities, that the relevant transfers or other payments to Mrs Godley were gifts. I do not decide the issue as a matter of law, because it seems to me that where they onus of proof lies in any particular case may be critically fact dependent. A straight transfer from a husband defendant to wife of monies may shift the evidential burden to a defendant to establish that the transfer did not represent a gift. On the other hand, payments from a company, as here, may require the prosecution to establish that such a transfer was indeed a gift. I am satisfied on the balance of probabilities that all the transfers to Mrs Godley from TCM, Alpha Toronto No 2 and Atlantic Management Holdings as set out in the evidence before me should, as a matter of law, be regarded as gifts directly or indirectly made by Mr Godley to Mrs Godley. The facts may be briefly summarised as follows. TCM was incorporated in the Bahamas on

23 July 2002. Its office holders were Mr Godley who was a director and company secretary; Mr. Gary Lyons who was a director; and Mr. John Hall who was also a director. A document purporting to be a "share register" identified the shareholding in TCM issued on 10 November 2002 as follows: i) ii) iii) iv) Mr Godley as holding 12,750 shares or 25.5%; a Mr Donato Carucci as holding 12,750 shares or 25.5%; Mr Gary Lyons as holding 12,250 or 24.5%; and Mr John Hall as holding 12,250 or 24.5%.

56. Mr Godley did not adduce in evidence his share certificates or explain the provenance of the "share register" document. Mrs Godley confirmed in evidence at the hearing on 30 January 2012 that she did not subscribe any money for the shares purportedly held by her. 57. By letter dated 9 January 2003, TCM (by its director, Mr Gary Lyons) provided information to the Allied Irish Bank to establish banking facilities for the company and its directors in their personal capacity. The following passages of the letter are relevant for present purposes: "Please accept this letter as confirmation that the directors as listed, are the beneficial shareholders of Tundra Capital Management Ltd.".... "As a result of legal advice obtained from Charles Russell solicitors the group will be divesting itself of all management and control in the UK as part of restricting the group. This naturally has personal tax ramifications for the directors/beneficial owners and as a result they seek the opening of personal accounts with your branch." 58. 59. 60. In his evidence given to this court on 30 January 2012, in the context of the abuse application, Mr Gary Lyons confirmed that this was an accurate statement of the beneficial shareholding at the time. The attachments to the 9 January 2003 letter listed the only directors of TCM as Mr Godley, Mr Gary Lyons and Mr John Hall. Mrs Godley confirmed in evidence on the 30 January 2012 that she had never been a director of TCM. In his police interviews in November 2005, Mr Gary Lyons stated that Mr Godley, Mr Hall and himself had set up Alpha Toronto and Anglo Canadian and were all equal shareholders in the former. The 9 January 2003 letter also stated that Alpha Toronto and Anglo Canadian were "wholly owned subsidiaries" of TCM. 61. In his section 73 defence statement dated 3 May 2012 at paragraphs 66 Mr Godley stated: "The Defendant was a Director of Tundra along with Donato Carruci, Gary Lyons and John Hall. Due to tax advice received it was agreed that the shares would be held by Anne Godley due to the fact she was non-UK domiciled and therefore it would be more tax efficient." 62. 63. Transfers from TCM, purporting to be dividend payments, were subsequently made to Mrs Godley. I am satisfied on the evidence before me that any shares which Mrs Godley held in TCM, alternatively any dividend payments which she received, were as a result of gifts made to her by Mr Godley. Either Mr Godley beneficially held the 24.5% shareholding in TCM and subsequently gifted it to her; or, alternatively, he gifted her the relevant dividend payments. In the absence of any evidence from Mr or Mrs Godley as to the actual position, I am entitled to conclude that all payments made to her from TCM directly or indirectly represent gifts by Mr Godley caught by the 1988 Act. Atlantic Management Holdings 64. Atlantic Management Holdings was incorporated in January 2004 in the Bahamas. It appears from the prosecution's, and Mr Godley's evidence, that it was set up by the founders of TCM as a replacement holding company which could be used instead of TCM. In his section 73 response Mr Godley stated

that he was one of the directors of Atlantic Management Holdings and described it as a "cash management vehicle". Mrs Godley received the sum of £ 200,000 on 26 May 2004 from this company. Other than an assertion by Mr Godley that Mrs Godley was a 25.5% shareholder in this company, there is absolutely no evidence to support Mr Godley's assertion that this payment reflected monies invested by Mrs Godley. On the contrary the evidence all strongly suggested that this was yet another means of channelling funds, ultimately beneficially owned by Mr Godley, through TCM to Mrs Godley. In the absence of any evidence from Mr Godley or Mrs Godley, I have no hesitation in concluding that the sum of £200,000 paid to Mrs Godley on 26 May 2004 should be characterised as a gift to Mrs Godley. Alpha Toronto No 2 65. This company paid Mrs Godley the relatively modest sum of £5,100. It was a subsidiary of TCM. In the light of my previous findings it follows that the sum shall be regarded as a direct or indirect gift from Mr Godley. Conclusion on the gifts to Mrs Godley and to Mr and Mrs Godley's children 66. 67. I am satisfied on the evidence before me that gifts made to Mrs Godley by Mr Godley in a sum of £1,691,179 are available to be taken into account and that is appropriate to do so. The principal asset, namely the Portuguese property, was purchased directly from the dividend payments received. The sum of £1,691,179 represents the value to Mrs Godley as at the date when she received such gifts. I see no reason in the exercise of my discretion not to take into account the value of such gifts when made, or, in the interests of justice, to regard their current value as reduced to the quantum of the assets as purportedly set out in the defence schedule of current joint assets dated 13 April 2014, namely the sum of £339,714.64. Neither Mr Godley or Mrs Godley provided evidence in the form of statements on oath, or were prepared to attend court to be cross-examined, as to the quantum of their assets. There has been no adequate disclosure by them of their assets in such a way as to enable the prosecution realistically to test their assertion that their current assets are worth substantially less than the benefit which I have held that Mr Godley received from his criminal conduct. I am also satisfied that gifts made to their children in the sum of £132,744.54 are available to be taken into account. I see no reason in the exercise of my discretion or in the interests of justice not to take into account the value of such gifts when made. No evidence has been produced by Mr Godley or his children to support the proposition that the children cannot repay the value of the gifts from their current assets. On the contrary, the evidence from the prosecution suggests that, at least in relation to the English assets, there is sufficient equity in the real estate owned by the children to repay the amount of the gifts. 68. In all the circumstances I consider it appropriate to take the gifts made by Mr Godley to Mrs Godley and their children into account. Conclusion in relation to the realisable amount 69. In my judgment Mr Godley has not satisfied the court on the balance of probabilities that the "amount that might be realised at the time a confiscation order is made" as defined in section 71 of the 1988 Act is less than the benefit of £1,567,974 which I have held that he received. The amount to be paid 70. 71. 72. In accordance with section 71(6) of the 1988 Act I conclude that a confiscation order should be made against Mr Godley in the sum of £1,567,974, being the value of the benefit which he received, less the sum of £93,025, which he paid the liquidators of Imperial by way of settlement in the summer of 2008, such sum to be grossed up to its present-day value in

accordance with RPIJ. I consider that it is appropriate to deduct that payment, either under section 71(C) of the 1988 Act, or alternatively, pursuant to my obligation not to make a confiscation order that could give rise to a serious risk of injustice. It seems to me that, in circumstances where Mr Godley has paid the liquidators a substantial sum by way of compensation, it would indeed be unjust to make him pay that sum again by means of a confiscation order. I order that Mr Godley should pay the amount determined in accordance with paragraph 70 above by way of a confiscation order. In the event that such sum is not paid within six months of the date of the order made pursuant to this judgment, I sentence Mr Godley to a further term of imprisonment of 3 years in default of payment. The reasons for my decision that this is the appropriate default term and for declining to deduct from the confiscation order Mr Godley's legal costs of defending the civil proceedings brought against him will be set out in my supplemental judgment. The amount to be paid by way of compensation from any confiscation order and the persons to whom any such amount should be paid 73. 74. 75. Pursuant to section 72(7) of the 1988 Act the court may in certain circumstances direct that any compensation order made under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 be paid out of sums recovered by way of confiscation. The relevant circumstances here would be that it appeared to the court that Mr Godley would not have sufficient means to satisfy both a confiscation order and a compensation order. I am satisfied that in the present case it would be appropriate to make a compensation order against Mr Godley but that it is highly unlikely that he would have sufficient means to satisfy both a confiscation order and a compensation order. In the circumstances I order that there be a compensation order in the sum ordered by way of confiscation and that any such compensation order be paid out of the confiscation sum. On the material before me it appears that it would be appropriate that any compensation realised from the confiscation order made against Mr Godley should be paid pro rata for the benefit of the investors in the ICG Placement Funds, who apparently have received nothing to date. However counsel for the prosecution should confirm with the liquidators that the liquidators do not wish to put before the court any arguments to the contrary as to who the beneficiaries of any compensation order should be. 76. I will hear argument from counsel as to the appropriate terms of the order giving effect to this judgment.

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