

ENGLAND AND WALES / JUDGMENT

Sale R. v

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Neutral Citation Number: [2013] EWCA Crim 1306 IN THE COURT OF APPEAL (CRIMINAL DIVISION) ON APPEAL FROM Woolwich Crown Court HHJ Sullivan T20100393 Case No: 201201876 C1 Royal Courts of Justice Strand, London, WC2A 2LL Date: 25/07/2013 Before: LORD JUSTICE TREACY MR JUSTICE MACDUFF and MR JUSTICE DINGEMANS

- ----- Between : Regina
- and - Peter John Sale
- -----
- ----- Mr J Goose QC (instructed by Registrar of Appeals) for the Appellant
Mr S Farrell QC and Mr J Riley (instructed by Crown Prosecution Service) for the
Respondent Hearing dates: 27th June 2013
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Judgment

Lord Justice Treacy: 1. 2. 3. 4. This appeal is concerned with a confiscation order. There are three main aspects to it. Firstly, questions relating to piercing the corporate veil; secondly, as to the assessment of benefit, and thirdly, whether the confiscation order was disproportionate in the light of the Supreme Court's decision in *R v Waya* [2012] 3 WLR 1188. On the 14th March 2011 in the Crown Court at Woolwich the Appellant pleaded guilty to corruption contrary to Section 1 of the Prevention of Corruption Act 1906 (Count 1), and to fraud by false representation contrary to Sections 1 and 2 of the Fraud Act 2006 (Count 2). On 11th April 2011 he was sentenced to twelve months imprisonment suspended for two years with a requirement of undertaking two hundred hours of unpaid work. That sentence was passed on each count concurrently. Subsequently, confiscation proceedings took place under the Proceeds of Crime Act 2002 ("POCA"). On 28th February 2012 the judge held that the Appellant had benefited in the sum of £1,918,562.44. The Single Judge has granted leave to appeal in this case. Count 1 covered the period between January 2006 and April 2008 during which the Appellant offered and gave gifts to Anthony Burgess, an employee of Network Rail. The purpose of this was to secure commercial favour. Burgess died before the case 5. 6. 7. 8. 9. 10. 11. 12. came to court. He was employed as corporate offices manager, leading a team of twenty, at Network Rail. He was responsible for managing office accommodation. His job involved seeking new accommodation, disposing of unnecessary accommodation and refurbishing accommodation when necessary. His job made him

responsible for organising suppliers and contractors. The Appellant was managing director of Sale Service and Maintenance Limited (“The Company”), which became a supplier used by Network Rail. The company installed and maintained air conditioning units and undertook electrical engineering work. In the course of the corrupt relationship and in return for gifts and hospitality, paid for by the appellant and/or the company, and whose value was a little under £7,000.00, Burgess arranged for the award of a number of high value contracts to the company. Until this point there had been no prior relationship between the company and Network Rail. Purchase orders exceeding £2.4 million were raised in the company’s name. A little over £2 million was invoiced, and around £1.85 million was received. When the Appellant’s home address was searched, investigators found documentation relating to three large contracts recently awarded to the company. The company thereby replaced existing suppliers. The value of those contracts was a little over £1 million. The evidence showed that Burgess had shared tender information with the Appellant. There was evidence that they had split sales invoices so that values remained within Burgess’ delegated authority of £50,000.00 per order. In some cases invoices were raised before the work was done. Count 2 concerned an invoice for around £60,000.00 which had already been submitted by the company to Network Rail and been paid. The invoice was then resubmitted and paid again in August 2007. Email correspondence showed that this was no mistake. In the spring of 2008 Network Rail, having become alert to what was going on, began disciplinary proceedings against Burgess. On the day of the hearing the company issued a credit note relating to the invoice, so that prior to the time of the Appellant’s arrest, the sum obtained on the resubmitted invoice had been repaid. The Appellant submitted a basis of plea which was not challenged. It stated that the period over which gifts were made was one of fifteen months between January 2007 and April 2008. In addition, and significantly for the purposes of this appeal, it stated that the work carried out by the company was done without criticism as to price or quality. The background showed that the company had been started by the Appellant in 2004. He was the sole shareholder, being paid a salary and receiving dividends. By 2006 the company’s turnover was £9.9 million, with profits before tax of £631,000.00. We are told that the accounts for 2009 and 2010 show similar levels of turnover and profits. The company employed a large number of people and traded with a wide range of well known established companies. There is no suggestion that the company was anything other than a legitimate business. It is only in relation to its dealings with Network Rail that illegality is involved. 13. For the purposes of the appeal, the Appellant and Respondent have agreed that: 14. 15. 16. 17. i) ii) £125,000.00 represents the value of the Appellant’s personal benefit, taking into account the apportioned salary and dividends of the Network Rail contracts in relation to the total trading of the company, together with interest; £197,683.12 is the gross value of the profit earned by the company, after deducting the costs of production, but before any taxation, together with interest. The figure in which the confiscation order was made represented the total sum paid to the company by Network Rail (a little over £1.9 million). That sum included an adjustment for interest. The prosecution’s case before the judge was that, although those payments were never made to the Appellant, the court should lift the veil of incorporation and declare the total benefit of the Appellant to be in that sum received by the company. The Crown did not proceed under the criminal lifestyle provisions of POCA. Accordingly, the court’s task was to assess whether the

Appellant had “benefited from his particular criminal conduct”. See Section 6(4)(c) POCA. The Crown did not seek to argue that any benefit had been obtained in relation to Count 2. The Appellant argued that the court should not lift the corporate veil, emphasising that the company was not a sham, that Network Rail had received full value under the various contracts, and asserting that the Appellant had not hidden behind the company to carry out the crimes. These were offences personal to the Appellant which did not involve using the company as a vehicle for crime. Having heard the competing submissions, the judge in a brief ruling, held that the corporate veil should be lifted. She referred to *Jennings v CPS* [2008] 2 Cr App R 29 and *R v Seager & Blatch* [2010] 1 Cr App R (S) 60. The essence of her ruling was that the Appellant had done acts in the name of the company which constituted two separate criminal offences, to which he had pleaded guilty, so that it was right and just to lift the corporate veil. She distinguished the result from that in *R v Seager & Blatch*, (where the corporate veil was not lifted), on the basis that there the business carried out by the companies was entirely legitimate. In those cases the matters were before the court purely because the Defendants were disqualified from acting as company directors. The present case was different in the light of the business conducted by the company with Network Rail and the plea of guilty to corruption.

18. When the judge made her decision the Supreme Court had not heard the case of *Waya*, so considerations of proportionality were not argued before her. However, Mr Goose QC now relies in part on the result in *Waya*, as will become apparent. 19. Shortly before this appeal was heard, the Supreme Court gave judgment in *Prest v Petrodel Resources Limited & Others* [2013] UKSC 34. That decision has a bearing on this appeal, although its subject matter related to the question of piercing the corporate veil in relation to the provisions of the Matrimonial Causes Act 1973. Detailed consideration was given to the concept and meaning of piercing the corporate veil in terms which are of general application.
20. Whilst strictly speaking the discussion in *Prest* about piercing the corporate veil was obiter to the decision, it is plain that the Supreme Court was addressing the issue across the law generally and intended to do so. None of the cases cited to or considered by their Lordships were criminal confiscation order cases, but the principles enunciated apply across the board. Neither party to this appeal sought to argue that the observations in *Prest* did not apply. Indeed both parties made arguments by reference to *Prest*. 21. Before us, Mr Goose QC, for the Appellant, argued that the judge below was in error in declaring that the Appellant’s benefit from his particular criminal conduct was the same as the turnover of trading between the company and Network Rail. The judge had wrongly lifted the veil of incorporation in assessing the Appellant’s benefit, and should have found that his benefit was represented by a proportion of his salary and benefits from his employment with the company in relation to the company’s trading with Network Rail compared with the total trading of the company during the relevant period.
22. Mr Goose submitted that the court should not lift the veil by considering the company’s position. The payments by Network Rail had only ever been paid to the company and not to the Appellant. The company was a legitimate and profitable business and not a sham or a

front. The Appellant's unlawful activities did not involve hiding behind the company to carry out the offences. He was acting in his own behalf and not using the company as a vehicle for crime. The judge had fallen into error by applying the second of three tests identified in *R v Seager & Blatch* [2010] 1 Cr App R (S) 60 at paragraph 76. The judge had wrongly applied the second test too precipitately. 23. The relevant part of paragraph 76 of *Seager & Blatch* provides: "It is 'hornbook' law that a duly formed and registered company is a separate legal entity from those who are its shareholders and it has rights and liabilities that are separate from its shareholders...a court can 'pierce' the carapace of the corporate entity and look at what lies behind it only in certain circumstances. It cannot do so simply because it considers it might be just to do so. Each of these circumstances involves impropriety and dishonesty. The court will then be entitled to look for the legal substance, not just the form. In the context of criminal cases the courts have identified at least three situations when the corporate veil can be pierced. First, if an offender attempts to shelter behind a corporate façade, or veil to hide his crime and his benefits from it...secondly, where an offender does acts in the name of a company which (with the necessary mens rea) constitute a criminal offence which leads to the offender's conviction, then 'the veil of incorporation is not so much pierced as rudely torn away': per Lord Bingham in *Jennings v CPS*, paragraph 16. Thirdly, where the transaction or business structures constitute a 'device', 'cloak' or 'sham', i.e. an attempt to disguise the true nature of the transaction or structure so as to deceive third parties or the courts..."

24. Mr Goose submitted that the judge had wrongly applied the second situation identified in *Seager & Blatch* because this was a legitimate trading company and it had not been used as a vehicle for crime. In truth, the criminal activity was that of the Appellant in his own capacity. The company had merely lawfully provided work and materials in fulfilment of the contracts which the Appellant had obtained for the company.
25. Mr Goose conceded that the question was one of fact and degree and must necessarily involve an analysis of the extent to which the company had been used to carry out the crime. He argued that in the circumstances of this case, in contrast to others where the whole business was a vehicle for fraud or criminal conduct, matters had not gone far enough so as to enable the court to look beyond the Appellant's position and to that of the company, particularly where it was accepted that the company had given full value for the work which it had carried out. 26. In *Prest* Lord Sumption said at paragraph 27: "27. In my view, the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrong doing is well established in the authorities..." "28. The difficulty is to identify what is relevant wrong doing. References to a 'façade' or 'sham' beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the

identify of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the “façade”, but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company’s involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical...” “35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose of depriving the company or its controller of the advantage that they would otherwise have obtained by the company’s separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil...” 27. Lord Neuberger, at paragraph 81, expressly accepted the formulation at paragraph 35. Lady Hale, with whom Lord Wilson agreed, at paragraph 92 said: “What the cases do have in common is that the separate legal personality is being disregarded in order to obtain a remedy against someone other than the company in respect of a liability which would otherwise be that of the company alone...” 28. 29. 30. 31. Lords Mance and Clarke were concerned about being too prescriptive in analysis, but accepted the general principle put forward by Lord Sumption. However, they thought there might be rare cases when the principle might extend beyond the narrow circumstances of evasion. Lord Walker was reluctant to add to the discussion, but considered that many of the cases of piercing the corporate veil were properly understood as applications of other legal principles. In the light of that clarification as to the limited category of cases in which piercing of the corporate veil, properly understood, takes place, Mr Goose submitted that the situation in this case was probably not correctly identified as one involving piercing the corporate veil. The second situation identified in Seager & Blatch could, in an appropriate case, be based on the law of agency, so that where a company is used as a vehicle for crime, it acts as the agent of the principle. However, Mr Goose submitted that on the facts of this case, the company was not so used in a way which would create principal/agent’s liability. This was not a case where Lord Sumption’s “evasion principle” could apply since the Appellant had not interposed the company so as to frustrate or evade the enforcement of an existing legal obligation. He submitted that the “concealment principle” did not apply either, arguing that the Appellant’s position, and that of the company, was always open and public. In the circumstances the court should concentrate on the Appellant’s personal benefit without reference to the company’s financial position. In the event that those submissions were not accepted, Mr Goose sought to rely on Waya. He contended that if the court looked at the company’s position in assessing benefit, the order made by the judge for approximately £1.9 million

was disproportionate in that it took the benefit figure as being the company's turnover resulting from the corruptly obtained contracts. He submitted that where full value had been given in work and materials by the company in performing those contracts with Network Rail, it was disproportionate and unjust to look at the headline turnover figure. The costs of production, in wages, equipment and materials supplied were all incurred in an entirely lawful way, albeit in performance of what was an illegally obtained contract. Those costs should properly be brought into account, and the proportionate method of doing that would be to look at the company's gross profit generated from the illegally obtained contracts. For the purposes of this appeal that had been agreed at £197,683.12 – see paragraph 13 above.

32. Mr Farrell QC, for the Respondent, began by pointing out that the Appellant was the sole shareholder in the company, and that the company itself could have been charged alongside him. The decision had been taken not to do that to avoid over-complication. In *R v H & Others* [1996] 2 All E. R 391 Rose LJ had approved such a course.
33. Mr Farrell submitted that the case was covered by the principles enunciated in *Prest*. The court should treat a company's assets as belonging to the controller of the company when the company has been used for the purposes of crime. The decision in *R v Grainger* [2008] EWCA Crim 2506 could be distinguished on the basis that the Appellant in that case did not have control of the company. In *Seager & Blatch* where the Appellants did have control of the company, the corporate veil was not pierced because the business of the companies was lawful and they had not been used for criminal purposes. There the Appellants' criminality had been to act in breach of a director's disqualification order. This case was, however, different because this Appellant controlled the company and used it actively for the purposes of his corrupt offending.
34. Mr Farrell then discussed the concealment and evasion principles referred to in *Prest*. He invited us to consider that the evasion principle applied, but said that in any event the concealment principle did. In relation to that, he said that the Appellant, as the controller of the company, was a joint actor with it in the relevant events. Contracts which the Appellant had secured for the company had been put in place between the company and Network Rail. The company had then managed those contracts throughout by invoicing and collecting payment, and by providing labour and materials in satisfaction of the contracts. The Appellant and the company had been involved in the provision of gifts and other benefits to Mr Burgess. Their actions were inextricably linked. Accordingly, the second situation identified in paragraph 76 of *Seager & Blatch* was satisfied since the Appellant had done acts in the name of the company constituting a criminal offence. In those circumstances there was no difficulty in bringing his conduct within Lord Sumption's concealment principle, enabling the court to look at the real situation in a proper application of the criminal law, without needing to pierce the corporate veil. It mattered not that the company had originally been incorporated without any criminal intent, what was relevant was its use for criminal purposes at the time of the relevant transactions. Accordingly, it was justifiable in

this case to look at how the company had benefited. 35. Section 76 of the Proceeds of Crime Act provides: “(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.” 36. In the context of benefit, Mr Farrell argued that there could be no argument about the necessary causal connection. What had been obtained as a result of the corrupt conduct was the contracts. The value of the work was reflected in the approximately £1.9 million invoice total. The true question therefore was whether an order in that sum was disproportionate. At paragraph 21 of *Waya* it had been submitted that it would be very unusual for orders under the statute to be held to be disproportionate. If, as the Appellant argued, it was only appropriate to attack the profit resulting from a corruption offence, that would be offensive. Network Rail was not the only victim, the market itself had been corrupted and distorted, and other identifiable companies affected by the tainted tendering process. Accordingly, the figure of approximately £1.9 million should not be viewed as disproportionate in the context of corruption: it would be wrong just to look at the profit engendered. 37. It would not be disproportionate for the costs of performing the contract to be left out of account in a case such as this. If that did not occur, offenders would only lose their profit, and that would not be proportionate.

Discussion and Conclusions

38. When the judge identified the benefit as approximately £1.9 million, she also held that the amount available to satisfy the order exceeded the benefit figure so that the recoverable amount was equal to the benefit figure. There is no appeal against the findings relating to available and recoverable amounts. The appeal has concentrated on the benefit figure and its proportionality. 39. The first question for us is the correct approach to the finding of a benefit figure. Should it be assessed by reference to the Appellant’s personal position or by reference to the activities of the company? It is clear to us from Lord Sumption’s analysis of the concept of piercing the corporate veil in *Prest*, that there has in the past been some confusion of nomenclature in this respect. We are not persuaded that this is a case coming within the evasion principle referred to at paragraph 28 of *Prest*. This is because in this case there was no legal obligation or liability which was evaded or frustrated by the interposition of the company in this case whereby the interposition of the company would mean that the separate legal personality of the company would defeat the right or frustrate its enforcement. This was a company which existed long before this corrupt conduct, and which existed for bona fide trading purposes: there was no interposition of the sort described.
40. We do, however, consider that in the circumstances of this case, the effect of POCA is that this matter falls within the concealment principle. Thus, we accept the Crown’s argument, rather than that put forward by Mr Goose, who himself accepted that the matter was one of fact and degree. In the circumstances of this case, where the Appellant was the sole

controller of the company, and where there was a very close inter-relationship between the corrupt actions of the Appellant and steps taken by the company in advancing those corrupt acts and intentions, the reality is that the activities of both the Appellant and the company are so interlinked as to be indivisible. Both entities are acting together in the corruption. 41. 42. Accordingly, insofar as the company was involved, what it did served to hide what the Appellant was doing. Although the Supreme Court did not consider Seager & Blatch, there is in our judgment, nothing inconsistent in the approach taken at paragraph 76 of that case with Prest. It may be that the three situations identified by the court in Seager & Blatch might be prefaced as if the preceding sentence read as follows: “In the context of criminal cases the courts have identified at least three situations when a benefit obtained by a company is also treated in law by POCA as a benefit obtained by the individual criminal.” The italicised phrase replaces the words “the corporate veil can be pierced”. It seems to us that the three situations identified in Seager & Blatch do not necessarily involve a piercing of the corporate veil in the more limited sense of the evasion principle. They appear to be consistent with the operation of the concealment principle. We see no reason why the analysis relevant to criminal confiscation proceedings made at paragraph 76 of Seager & Blatch should not continue to apply in criminal confiscation proceedings, subject to an understanding of Prest.

43. What is clear to us in this case is that the court is entitled to look to see what were the realities of this Appellant’s criminal conduct. We are satisfied that such an exercise, consistent with the objectives of POCA, is to seek to discover the facts which the existence of the corporate structure would otherwise conceal so as properly to identify the Appellant’s true benefit. 44. In this respect it is to the provisions of POCA that we must look. First of all, this was not a criminal lifestyle case, so by reason of Section 6(4)(c) the court must decide whether the Appellant benefited from his particular criminal conduct. By Sections 76(3)(a) and (b) the relevant conduct is that covered by Counts 1 and 2, albeit that it is conceded that no benefit resulted from Count 2. Then, the provisions at Sections 76(4) and (5) set out above come into play. We are not concerned with the provisions of Sections 79 and 80 relating to valuation as there is no controversy about those matters. 45. 46. 47. 48. Applying the provisions of Sections 76(4) and (5), it seems to us that Section 76(4) is apt to capture the whole of the invoices paid (about £1.9 million) as benefit obtained as a result of or in connection with the admitted criminal conduct. In addition, it would seem that pecuniary advantage has also been derived in that the corrupt conduct will have improperly enhanced the company’s place in the market. Such an approach is consistent with that taken by Lord Justice Thomas in *R v Innospec Limited* [a judgment at Southwark Crown Court] [2010] EW Misc 7 (EWCC). At paragraph 34 he said: “However in the present case as the benefits were not merely profits derived from the contracts obtained by corruption, but the very contracts themselves, the financial benefit to Innospec Limited may have been as high as \$160 million.” Accordingly, prior to the decision in *Waya*, we would not have found fault with the judge’s conclusion either as to permissibility of examining the company’s finances, or as to the benefit figure of about £1.9 million. The decision in *Waya* requires any confiscation

order to bear a proportionate relationship to the purpose of the Proceeds of Crime Act, which is to recover the financial benefit which an offender has obtained from his criminal conduct. The confiscation provisions are not intended to work as an additional form of fine or other punitive sanction. In seeking to persuade us that the figure of £1.9 million would be disproportionate, great emphasis was laid upon the fact that, apart from the corruption underlying the offence, the contracts had been properly carried out and given full value to Network Rail. The expenses incurred in carrying out those contracts by the company, some ninety percent of the total invoice price, were expenses which would have been incurred in the performance of any legitimately obtained contract. Those expenses represented management, administration, labour, materials, and other ordinary business overheads. Such payments were to be distinguished from the expenses of criminal activity itself, such as the cost of the bribes or favours for which no credit was claimed.

49. We have considered paragraph 26 of *Way* where Lord Walker and Sir Anthony Hughes stated: "It is apparent from the decision in *R v May* that a legitimate, and proportionate, confiscation order may have one or more of three effects...
- (c) It may require a defendant to pay the whole of a sum which he has obtained by crime without enabling him to set off expenses of the crime. These propositions are not difficult to understand. To embark upon an accounting exercise in which the defendant is entitled to set off the cost of committing his crime would be to treat his criminal enterprise as if it were a legitimate business and confiscation a form of business taxation. To treat (for example) a bribe paid to an official to look the other way, whether at home or abroad, as reducing the proceeds of crime would be offensive, as well as frequently impossible of accurate determination. To attempt to enquire into the financial dealings of criminals as between themselves would usually be equally impracticable and would lay the process of confiscation wide open to simple avoidance. Although these propositions involve the possibility of removing from the defendant by way of confiscation order a sum larger than may in fact represent his net proceeds of crime, they are consistent with the statute's objective and represent proportionate means of achieving it." 50. Their Lordships continued at paragraph 27: "Similarly, it can be accepted that the scheme of the Act, and of previous confiscation legislation, is to focus on the value of the defendant's obtained proceeds of crime whether retained or not. It is an important part of the scheme that even if the proceeds have been spent, a confiscation order up to the value of the proceeds will follow against legitimately acquired assets to the extent that they are available for realisation." 51. In paragraphs 28 and 29, however, they held that it would be disproportionate to make a confiscation order where the criminal has wholly restored to the loser any benefit he had obtained from his crimes. At paragraph 34 their Lordships stated: "There maybe 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, may be severely, but

whether a confiscation order is proportionate for any sum beyond profit may need careful consideration.” 52. 53. 54. It seems to us that there are certain important features of this case which require close consideration. Firstly, this is not, in our judgment, a case analogous to one where goods or money have been entirely restored to the loser. True it is that Network Rail received value for money, but Mr Sale had obtained contracts for his company by corrupt means on a continuing basis so that every contract obtained was tainted by it. Moreover, in a case of this nature it is wholly unrealistic to regard Network Rail as the only victim of the crime. Corruption of this nature clearly impacts on others. The company obtained contracts with a client with whom it had had no previous business relationship. Existing contractors with Network Rail were cheated out of the tendering process. The substantial market in Network Rail contracts of this type was distorted, with the company gaining a market share to the detriment of others. Tendering costs were avoided. The turnover figure of £1.9 million does not reflect the pecuniary advantage obtained by obtaining a market position and similar advantages at the expense of legitimate competitors. This case therefore, unlike *Waya*, is not one where the Appellant can claim to have put matters right by fully recompensing the victim and divesting himself of the benefit of his crimes. Post *Waya* decisions of this court in *R v Axworthy* [2012] EWCA Crim 2889, *R v Hursthouse* [2013] EWCA Crim 517, and *R v Jawad* [2013] EWCA Crim 644 all demonstrate that in cases of total restoration, the property originally obtained should not be treated as benefit, as to do so would be disproportionate. However, it is implicit from *Jawad*, paragraph 27, that in the event of only partial restoration, the whole order for confiscation should stand. The recent decision of this court in *R v Harvey*

[2013] EWCA Crim 1104 affirmed this approach, having considered the approval of the decision in *R v Morgan & Bygrave* [2009] 1 Cr App R (S) 60 in *Waya*. 55. However, this present case might be better analysed by reference to paragraph 21 of *Jawad*, where Hughes LJ said: “*Waya* requires the court to consider whether a POCA confiscation order is disproportionate. We are satisfied that it generally will be disproportionate if it will require the defendant to pay for a second time money which he has fully restored to the loser. If there is no additional benefit beyond that sum, any POCA confiscation order is likely to be disproportionate. If there is additional benefit, an order which double counts the sum which has been repaid is likely, to that extent, to be disproportionate, and an order for the lesser sum which excludes the double counting ought generally to be the right order.” 56. 57. 58. 59. Applying those observations to this case and having regard to *Waya*, and in particular paragraph 34, had this been an offence whose only criminal effect was upon Network Rail which had been provided with value for money achieved by the performance of a contract which required the company to expend monies in the ordinary course of business, it would have seemed to us proportionate to limit the confiscation order to the profit made, and to treat the full value given under the contract as analogous to full restoration to the loser. However, we have already alluded to the pecuniary advantage gained by obtaining market share, excluding competitors, and saving on the costs of preparing proper tenders. A proportionate confiscation order would need to

reflect those additional pecuniary advantages and, it seems to us, that an order for profit gained under these contracts, together with the value of pecuniary advantage obtained, would represent a proportionate order which would avoid double counting. There is no difficulty in attributing these items to the Appellant as proportionately representing his benefit since he was the sole shareholder in the company. Unfortunately, in this case, we do not have the materials to make a confiscation order in substitution for that made below on this basis. There has been no analysis done in relation to pecuniary advantage. The matter was put before this court on the basis of three sets of figures; the turnover figure (£1.9 million); the company profits (£197,000.00), and the Appellant's personal benefit (£125,000.00). The question of pecuniary advantage and the provisions of Section 76(5) do not appear to have been raised in the court below, nor was reference made to them in argument before us. This court is limited to a review of the decision of the Crown Court unless it considers that in the circumstances of an individual appeal, it would be in the interests of justice to hold a rehearing – see Criminal Procedure Rules 2012 Rule 73.7.(2). In the circumstances we do not consider that the interests of justice require a rehearing. Accordingly, we must deal with the matter on the materials available.

60. We have concluded that a confiscation order in the sum stipulated by the judge (around £1.9 million) is disproportionate for the reasons given. However, the agreed figure of £197,683.12 would, in truth, represent a generous order as far as this Appellant is concerned since it fails to take account of the pecuniary advantage we have identified. However, since there is no material before us to put a value upon the pecuniary advantage obtained, we cannot properly add to that sum. In cases of this nature in the future, it is to be hoped that prosecutors will be alert to this aspect of the case, so that the real benefit or pecuniary advantage derived by the wrongdoer can be identified. In the circumstances we quash the amount of the confiscation order made below, and in its place substitute the figure of £197,683.12. 61. There is a consequence of the reduction in the sum ordered. We must reduce the term of imprisonment in default of payment. In place of the term ordered below, we impose a term of thirty three months imprisonment. 62. To that extent indicated, the appeal is allowed.

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