



Neutral Citation Number: [2020] EWCA Crim 1055

Case No: 201803556 C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM EXETER CROWN COURT
MR RECORDER MEEKE QC
T20160431

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2020

Before :

LORD JUSTICE DAVIS
MRS JUSTICE ANDREWS DBE

and

HIS HONOUR JUDGE MARKS QC, COMMON SERJEANT OF LONDON

Between :

REGINA
- and -
JON ANDREWES

Respondent

Appellant

Mrs Nadine Radford QC and Mr Richard Reynolds (instructed by Harris Cuffaro & Nichols) for the Appellant
Mr Martin Evans QC and Mr Cameron Brown QC (instructed by the Crown Prosecution Service) for the Respondent

Hearing date: 24th July 2020

Approved Judgment

LORD JUSTICE DAVIS:

Introduction

1. In the aftermath of the decision of the Supreme Court in *Waya* [2012] UKSC 51, [2013] 1AC 1028, s.6 (5) of the Proceeds of Crime Act 2002 (“the 2002 Act) was amended so as to add the words: “Paragraph (b) applies only if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount.” But what does the word “disproportionate” connote in this context? That question, and questions of causation, fall to be answered in this case in circumstances where the appellant obtained remunerative employment and appointments after having made dishonest statements as to his qualifications and experience. This is a case of a kind expressly left open by the Supreme Court in *Waya* for decision in an appeal in which such issues directly arise. Here such issues do directly arise.
2. In confiscation proceedings in the Crown Court, the Recorder on 26 July 2018 assessed benefit in the sum of £643,602.91: representing the amount of pay (net of Income Tax and National Insurance Contributions) received by the appellant in the years of his employment and appointments before his dishonesty was discovered and he was dismissed. The available amount was assessed in the sum of £96,737.24. The recoverable amount was thus assessed in the latter sum: and the Recorder decided that it would not be disproportionate to order the appellant to pay that sum. A term of one year’s imprisonment in default of payment was set.
3. Leave to appeal was granted by the Full Court on a previous occasion. At the appeal hearing before us, the appellant was represented by Mrs Nadine Radford QC and Mr Richard Reynolds. The respondent was represented by Mr Martin Evans QC and Mr Cameron Brown QC. Of counsel, only Mr Brown had appeared in the proceedings below. We are grateful to counsel for their careful and skilfully presented submissions, both written and oral.

Background Facts

4. We will give a relatively short summary of the background facts.
5. In September 2004 the post of Chief Executive Officer at St Margaret’s Hospice, Taunton (a registered charity) was advertised in the national press, following the retirement of the previous Chief Executive Officer. The appellant was one of those who applied for the post. A detailed application pack was provided to him and to other candidates. It was among other things made clear that, in addition to his other duties, the Chief Executive Officer would act as the Responsible Person in accordance with the National Care Standards Act 2001. The tasks and responsibilities attached to the post were fully set out.
6. Of the requirements described as “Essential” in the “Person Specification”, there was included the requirement, as being “necessary for effective performance in the job”, of a first degree. Also described as “Essential” were, among other things: “10 years management experience with 3 years in senior appointment. Wide experience.” Attributes listed as “Desirable” included holding an MBA and 5 years in senior appointment.

7. In his signed application form, dated 3 October 2004, the appellant expressly acknowledged that the appointment, if offered, would be subject to the information given on the form being correct.
8. In that form he claimed, under the heading of University Education, a joint honours degree from Bristol University in Social Policy and Politics (1976-1979) and an MPhil in Poverty and Social Justice from the same university. He claimed to have an MBA from Edinburgh University in Management Science (1982-1984) and to be in the course of studying for a PhD in Ethics and Management at Plymouth University (from 2003). Under the heading of Professional Qualifications he claimed to have an Advanced Diploma in Management Accounting (CIMA).
9. None of this was true.
10. In addition, in giving details of his employment history he variously stated that he had been on secondment at the Home Office between 1979 and 1982; chief executive of the Barrand Partnership between 1985 and 1993; Managing Director of the Sydenham Charitable Trust between 1993 and 1998; Chief Executive of the Groundwork Devon and Cornwall charity between 1998 and 2002 and Chief Executive of Groundwork South West from 2002.
11. The actuality was very different. The appellant had not been seconded to the Home Office. He had worked as a social worker between 1975 and 1984. Between 1990 and 1995 he had been employed by Somerset County Council; and subsequently had been employed by Plymouth Council. Between 1999 and 2000 he had been employed at Plymouth Groundwork Trust for one year, with no record of him being designated Chief Executive. He was then employed between 2003 and 2004 by Groundwork Plymouth, at a salary of £54,631. Although having claimed to be Chief Executive of the Groundwork Charity between 1998 and 2004, he was not registered with the Charity Commissioners until 2004. There was no record of him having worked at the Sydenham Charitable Trust.
12. Overall, therefore, his representations as to the essential requirements of continuous and senior management experience in the charitable sector, as well as to his educational qualifications, were false or dishonestly inflated and were misleading.
13. Unfortunately, these falsehoods were not picked up at the time. The appellant was one of two candidates to be interviewed. He was offered, and accepted, the post of Chief Executive Officer of the St Margaret's Hospice in December 2004, at an initial annual salary of £75,000. He remained in that post until 2015.
14. In 2006, the appellant falsely told staff that he had obtained a PhD from Plymouth University (he had not). He required that he be addressed as Dr Jon Andrewes, a title which in due course appeared in, for example, staff structure diagrams and his email footers.
15. In July 2007 the appellant applied for the role of non-executive director at Torbay NHS Care Trust, a remunerated position. His application form was certified by him to be complete and correct. It contained the like falsehoods as to his academic qualifications. But now he also added a DPhil qualification and styled himself "Dr." His application also contained the like falsehoods as to his employment history. He

was appointed – this being a public appointment – on 19 September 2007 for an initial four year term which thereafter was periodically renewed until termination on 30 September 2015. He was also appointed Chair from February 2012.

16. On 1 July 2015 the appellant was further appointed as Chair of the Royal Cornwall NHS Hospital Trust, a remunerated position. His application for that position had included corresponding (even if not identical) falsehoods as to his academic qualifications and his employment history. Five candidates had been interviewed; he was successful. Requirements of honesty and integrity were explicit requirements for the post. He subsequently resigned when he was challenged about his academic history.
17. In a witness statement dated 24 November 2016 Mr Michael Clark, Chair of the Trustees of St Margaret’s Hospice at the time of the appellant’s appointment, stressed that significant relevant previous experience had been viewed as essential: had candidates not had such experience, the post would have been re-advertised. He confirmed that the appellant would not have been offered the role if it had been known that he was lying about his previous experience and education. The need for integrity and honesty was emphasised. Mr Clark did, however, make clear that, at all events until Mr Clark himself retired in November 2008, the hospice had made significant progress and that he had never entertained any doubts about the appellant’s ability to carry out his role as Chief Executive Officer. It seems, in fact, that the appellant throughout was regularly appraised as either strong or outstanding in annual reviews.
18. His employment, and his two appointments, came to an end in 2015 when the truth started to emerge. In fact, criminal proceedings were then also commenced against the appellant, and others, in respect of the procurement of certain contracts placed by the hospice. In the event, the appellant was acquitted on those matters and, as we see it, they are irrelevant to the present appeal.

The Crown Court Proceedings

19. The present proceedings were instituted in 2016. There were three counts on the indictment which were pursued. Count 1 (which related to the St Margaret’s Hospice job application) was charged as obtaining a pecuniary advantage by deception, contrary to s.16 (1) of the Theft Act 1968: the pecuniary advantage being particularised as the opportunity to earn remuneration or greater remuneration in an office or employment, by deception. Counts 2 and 3 related to the application to the Torbay Care NHS Trust and Royal Cornwall NHS Hospital Trust. Those counts were charged as fraud (by false representation) under the Fraud Act 2006, which statute had in the meantime been introduced.
20. The appellant pleaded guilty to those three counts. (A further count of possessing an article for use in fraud was left to lie on the file.) He was sentenced in the Exeter Crown Court on 6 March 2017 by His Honour Judge Mercer QC. A very detailed (amended) Basis of Plea had been proffered. The prosecution did not necessarily accept all of it; but it was not thought necessary to hold a *Newton* hearing.
21. The appellant was 63 years old at the time and with no previous convictions. The judge remarked that for a period of over 10 years his outwardly prestigious life had

been based on a lie: “more accurately, a series of staggering lies”. The judge said of those lies that by them the appellant had secured responsible positions, in which honesty and integrity were essential qualities: “positions which you, at least probably if not certainly, would not otherwise have obtained”. The judge sentenced on the basis that the appellant had worked hard in all the dishonestly obtained posts and had achieved success.

22. The judge also noted that the appellant had received income over the ten year period in excess of £1 million (“income you should not have received”): but accepted that was not, for the purpose of the sentencing guidelines, loss caused or intended to be caused. He further noted that the dishonesty had denied others the positions which he had obtained: “but, above all, what you did means that you were performing roles which you should not have been performing and, inevitably, that causes real damage to the public’s confidence in the organisations which you deceived.”
23. Giving full credit for the plea, and having regard to other mitigation, the judge imposed a sentence of two years’ imprisonment. He set a timetable for the confiscation proceedings, as requested by the prosecution.
24. In the event, Judge Mercer was not available to undertake the confiscation hearing. The matter was dealt with by Mr Recorder Meeke QC. There was a two-stage hearing in June and July 2018.
25. It should be made clear that, throughout, the proceedings were conducted by reference to the asserted benefit from particular criminal conduct. At no stage had the prosecution sought to rely on the criminal lifestyle provisions of the 2002 Act.
26. At the initial confiscation hearing the appellant’s counsel placed some reliance on the Guidance issued to prosecutors by the Crown Prosecution Service (in 2009) on the discretion to institute confiscation proceedings, and in particular the concluding paragraphs of that Guidance. It was also, among other things, said that the asserted benefit (in the form of remuneration received over the period) was too remote from the conduct. The Recorder rejected that. He found that the dishonest representations were continuing representations; further, “by his pleas to counts 1-3 ... he plainly accepts, in terms, that he had [benefited from his particular conduct].”
27. As to the valuation of the benefit so obtained, the first year’s remunerated employment was left out of account, apparently because for some reason no reliable figures were available. From May 2006 to the termination of his employment, his remuneration (net of tax and National Insurance Contributions) was, ignoring pence, £547,748. For the Torbay NHS Care Trust, the net income over the relevant period was £62,156; for the Royal Cornwall Hospitals NHS Trust it was £33,687. The Recorder valued the benefit as £643,602, before adjustment for inflation.
28. The recoverable amount, together with the issue of proportionality, was determined at a later hearing. In the event, the recoverable amount was agreed as £96,737.24.
29. As to proportionality, the Recorder referred to *Waya* and certain other authorities. The Recorder went on to hold that honesty and integrity had been fundamental to the appellant’s role: “qualities he clearly lacked”. He also went on, at paragraph 48 of his ruling, to state:

“That said, few would regard as proportionate an order, were I in a position to make it, which deprived [the appellant] of the whole of his earnings for 10 years”

In this regard, the Recorder had in fact declined – perhaps strictly incorrectly –to adjust the benefit figure for inflation, on the footing that it would be academic.

30. The Recorder further said that it would be impossible to assess arithmetically the value of the appellant’s work for the hospice and the two Trusts but in any event he was not required to do so. All that he was required to do was to assess whether the recoverable amount was disproportionate. As to that, he said at paragraph 50:

“Given the recoverable amount is £96,737.24 I have determined that it would not be disproportionate to order D to pay a confiscation order in that sum and accordingly I make such an order. It represents less than 15% of the benefit figure as I have found it to be, a benefit figure which does not include D’s first year’s salary from SMH and which has not been adjusted per sec. 80 (2) (a) of the Act.”

31. In the result, therefore, the confiscation order was in the sum of £96,737.24. The Recorder had also been asked to make a compensation order in favour of the hospice and the two Trusts out of that sum (see s.13 (6) of the 2002 Act), pro-rated to the amounts of remuneration each had paid out. He acceded to that request. On this court’s query as to how the asserted losses had been calculated, we were told, rather vaguely, that, at least as far as the hospice was concerned, donations had fallen markedly when the allegations first surfaced – although whether this was because of the allegations about his qualifications or because of the other criminal proceedings about the procuring, with others, of contracts for services is wholly unclear.

The Legislative Scheme

32. The structure of the 2002 Act, for the purposes of calculating the recoverable amount, is all too familiar.
33. Where the prosecutor has asked the court to proceed under s.6, the court must decide whether or not the defendant has a criminal lifestyle. If the defendant does not, then the court must decide, on the balance of probabilities, if the defendant has benefited from particular criminal conduct. Section 6 (5) of the 2002 Act, as amended, provides as follows:

“(5) If the court decides under subsection (4)(b) or (c) that the defendant has benefited from the conduct referred to it must—

(a) decide the recoverable amount, and

(b) make an order (a confiscation order) requiring him to pay that amount.

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

34. Section 7 then relates to the recoverable amount: which, put shortly, is the lower of the benefit or the available amount. Section 8 relates to benefit and s.9 to available amount. Section 10 then turns to the criminal lifestyle provisions: those provisions are not in point in the present case.
35. The overall approach for these purposes is, as is well known, succinctly summarised in *May* [2008] UKHL, 28, [2008] 1AC 1028: (1) Has the defendant benefited from relevant criminal conduct? (2) If so, what is the value of the benefit so obtained? (3) What sum is recoverable from the defendant? It can be noted that the third question remains apt to cover the assessment of disproportionality introduced by the subsequent amendment to s.6.
36. Given the nature of some of the arguments in this case, s.76 of the 2002 Act is of importance. In the relevant respects, that section provides as follows:

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

(5) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.

(6) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and some other.

(7) If a person benefits from conduct his benefit is the value of the property obtained.”

Submissions

37. We will briefly outline the parties’ respective stances at this stage, because they set the scene for the review of the legal authorities which we are required to undertake.
38. For the appellant, Mrs Radford QC emphasised that the appellant had provided full value for the remuneration which he had received. Until the truth emerged, he had performed his roles competently and satisfactorily: and there was no evidence, for example, to rebut what Mr Clark had said in his witness statement.
39. She very fairly – and in our view correctly – accepted that, in the present circumstances, the false representations were to be regarded as ongoing throughout the periods of employment or appointment, as the case may be: she did not seek to limit the false representations to the date on which the dishonest job applications were submitted. She also accepted the gravity of the appellant’s conduct, the ongoing breach of trust involved and the effect on public confidence. But she emphasised that those factors should be reflected in the sentence (here, two years’ imprisonment) imposed by way of punishment: and it would be wholly wrong, she said, to reintroduce those factors in support of the assessment of benefit and of recoverable amount.

40. Moving on from that, she submitted that, whilst the appellant had made false representations in his applications, the actual work which he then did (competently, as it is to be taken) was lawful and of full value to his employers and appointers. It was, she said, too far removed from his actual criminal offending to constitute benefit from particular criminal conduct.
41. Her alternative and perhaps principal argument, albeit to an extent linked to her first argument, was to the effect that, at all events, the confiscation order was disproportionate. It was disproportionate because it in substance required the appellant to make payment back of his remuneration in circumstances where he had already given full value for his employment and appointments, even if he had obtained the employment and appointments dishonestly. Thus the appellant had in effect made restoration; and it was contrary to the scheme of the 2002 Act that he should have to make restoration again. That would in effect be double punishment. In the present case, she concluded, there was no benefit from the particular conduct and at all events no confiscation order should have been made.
42. For the respondent, Mr Evans QC submitted that the arguments based on remoteness were misplaced. Here, applying (as one should) a conventional “but for” approach, there was no doubt but that the employment and the appointments, and remuneration therefrom, were obtained by reason of the false representations. That is what both Judge Mercer QC and the Recorder had found on the evidence and that was plainly justifiable on the evidence. It was true that the appellant had then continued in post for several years. But, as conceded on behalf of the appellant, the false representations were to be taken as continuing throughout; and there was no question of any waiver, as the hospice and Trusts were unaware of the dishonesty and, indeed, the employment and appointments were terminated once the truth emerged. Unquestionably, therefore, the appellant had benefited from conduct, having obtained the remuneration “as a result of or in connection with” the conduct.
43. As to disproportionality, Mr Evans emphasised that the purpose of the 2002 Act is to deprive criminals of the proceeds of their criminality. Here, the remuneration represented the proceeds of the appellant’s dishonest representations; and there was, he said, nothing disproportionate in requiring him to disgorge that benefit, even if he had worked during those years. Mr Evans accepted, indeed averred, that, on his argument, had the appellant had available assets worth in excess of £1 million then a confiscation order in the full amount of the remuneration (net of tax) over the ten year period, and inflation adjusted, should have been made.
44. Thus the two arguments could hardly be more diametrically opposed. Mrs Radford was arguing, in principle, for no order. Mr Evans was arguing, in principle, for an order in the full amount (subject to the limit of available assets) of the remuneration received. Neither party, it may be added, showed much, if any, enthusiasm for the approach taken by the Recorder: which in effect was to uphold a confiscation order in the amount of the available assets as that represented only some 15% of the benefit figure.

The Legal Authorities

45. Against that context, we turn to a selection of the legal authorities.

46. In *Carter and others* [2006] EWCA Crim 416, one of the defendants had obtained a pecuniary advantage by deception, in the form of wages received by him when he was living unlawfully in the United Kingdom and when he had no legal right to work at all. The court approached the case on the basis of asking whether the deception was an operative cause of obtaining the property in question (that is, the wages received). The court held that it was, noting also that the deception continued throughout the employment. An argument on proportionality based on Article 1 Protocol 1 of the Convention was also raised. But it was rejected: although it is right to say that that was before the much more extensive and authoritative consideration in *Waya* itself.
47. In *Nelson, Pathak and Paulet* [2009] EWCA Crim 1573, [2010] QB 678, in one of the cases, *Paulet*, the defendant had obtained remunerated employment by falsely representing that he was lawfully entitled to work in the United Kingdom. The court took the same approach as in *Carter*: an argument that the wages were to be taken as paid in return for the efficient performance by the defendant of his duties was rejected. After referring to *Carter*, the court said:

“49. It seems to us to be obvious that where you obtain an opportunity to work from an offer of employment being made to you, and the offer has been induced by a false representation that you are entitled to work, then the false representation continues thereafter for the benefit of the offender who, permitting the representation to continue, is able to obtain employment. Once made, it continues to have effect throughout the employment which has been taken up. At any stage, had the representation been corrected, it is plain that the employment would have ceased.

...

50. Paulet's case cannot be distinguished. The reality is that throughout the period of his employment he was relying on a continuing dishonest representation to three different employers. He deceived them into thinking that he was entitled to obtain employment with them. That was a crucial element of his criminality.”

The court in that case did acknowledge that in some cases the passage of time might cause the deception to cease to have any meaningful effect on the decision to continue the employment. But self-evidently, we note, that is not the present case. It is clear in this case that the employment and appointments would have been terminated had the truth emerged sooner.

48. *Paulet* did in fact eventually end up in the European Court of Human Rights (and after the decision in *Waya*): (2015) 61 EHRR 39. The court there held, by a majority, that the approach of the Court of Appeal had been too narrow: and that the requirements of Article 1 Protocol 1 had not been taken sufficiently into account. It was held for this purpose that there had to be a reasonable relationship of proportionality between the means employed and the aim to be realised. Accordingly, the matter was remitted so as to enable the proportionality exercise to be undertaken. Mrs Radford did particularly refer to the minority opinion of two judges of the court

who would, as a matter of substance and not simply as a matter of procedure, have found in favour of the defendant. However, given that that was a minority opinion, and given too that it was seemingly strongly marked by an in rem approach to the proceeds of criminality (whereas the English confiscation system is geared to an in personam approach), we do not think that over-much weight should, for present purposes, be accorded to that minority opinion.

49. We consider that in so far as the domestic cases touch upon proportionality they are all, in so far as they pre-date *Waya*, to be treated with a degree of circumspection. Correspondingly, in *Shabir* [2008] EWCA Crim 1809, [2009] 1 Cr. App. R (S) 84 an outrageously unjust result was averted by resort to principles of oppression and abuse of process. It is doubtful whether resort to such principles would be necessary nowadays, if ever such facts were to recur.
50. That, then, leads to *Waya* itself.
51. *Waya*, which was *not* a criminal lifestyle case itself, was quite complicated on its facts. But, shortly put, the key point was that although the defendant had made a dishonest misrepresentation to the lending institution, thereby inducing it to make the loan, that deception caused no loss to the lender: it was fully secured and was in due course repaid, by remortgage honestly obtained. The Supreme Court, having regard to the provisions of Article 1 Protocol 1 and to considerations of proportionality, held that an order made in the amount of the loan obtained would be disproportionate. Nevertheless, a confiscation order corresponding in effect to the prorated increase in the value of the property attributable to the loan was, in the opinion of the majority, justified and proportionate. All nine members of the court, it should be emphasised, were agreed as to the general statements set out in paragraphs 1-34 of the joint judgment of Lord Walker and Lord Justice Hughes: all of which paragraphs are in point for present purposes. As to the actual outcome, the minority (Lord Phillips and Lord Reed) considered that there was no “real” benefit to the defendant and that it was disproportionate to base the confiscation order on the increase in the value of the flat: and would have made no order at all.
52. At paragraph 12 of the judgment, the court accepted, by reference to Article 1 Protocol 1, that there was imported a requirement that there must be a reasonable relationship of proportionality between the means employed by the State in the deprivation of property and the legitimate aim which was sought to be realised by the deprivation. The court went on to say that the essence, or “grain”, of the 2002 Act was not deterrence (although that may be a concomitant). Rather, its essence and purpose was to remove from criminals the proceeds of their crimes: paragraph 21. Further, the power of the court to refuse to make a confiscation order on grounds of disproportionality was not to be equated with a general residual discretion: paragraph 24. The court went on to note, with examples, at paragraph 26, that a confiscation order may properly and proportionately remove from a defendant a sum larger in fact than his net proceeds of crime. The focus is on what is obtained: not on what is retained.
53. In the course of the judgment of Lord Walker and Lord Justice Hughes, this was then said at paragraphs 27-29:

“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.

28. The case of a defendant such as was considered in R v Morgan [2008] 4 All ER 890 is, however, a different one. To make a confiscation order in his case, when he has restored to the loser any proceeds of crime which he had ever had, is disproportionate. It would not achieve the statutory objective of removing his proceeds of crime but would simply be an additional financial penalty...

29. The principle considered above ought to apply equally to other cases where the benefit obtained by the defendant has been wholly restored to the loser. In such a case a confiscation order which requires him to pay the same sum again does not achieve the object of the legislation of removing from the defendant his proceeds of crime, but amounts simply to a further pecuniary penalty - in any ordinary language a fine. It is for that reason disproportionate. If he obtained other benefit, then an order confiscating that is a different matter.”

54. After going on to deal with various authorities, the court further went on to say this at paragraph 34:

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

(It is understood that the last reference was to the case of *Paulet*.) As we have already indicated, the present case is precisely one of those cases of employment obtained by deception to which the Supreme Court was there alluding.

55. It is plain that the subsequent amendment to s.6 (5) of the 2002 Act is directly founded on the decision in *Waya* and on the words suggested in the judgment in that case (in paragraph 16). The amended statute does not of itself proffer any definition of “disproportionate” or any criteria for the assessment. It is thus to be assumed that it is to be interpreted in the light of the decision in *Waya* itself.
56. The relatively rigorous approach to disproportionality laid down in *Waya*, and as reflected in the actual decision of the majority, also finds its reflection in subsequent decisions.
57. Thus the decision of the Supreme Court in *Ahmad and Fields* [2014] UKSC 36, [2015] AC 299 is essentially founded on the same proposition that a defendant in confiscation proceedings is not to be made the subject of a confiscation order to the extent that restoration has already been made. Likewise, in *Harvey* [2015] UKSC 73, [2017] AC 105, the majority in the Supreme Court held that VAT which had actually been paid should not be included in a confiscation order against a defendant convicted of handling stolen goods: to do so would otherwise constitute disproportionate double recovery by the Executive.
58. Nevertheless, the courts have generally been strict in requiring restoration to be in full before a confiscation order may be mitigated on grounds of disproportionality. Thus if a stolen car is restored in a damaged state the value of it in such damaged state will not be taken into account. Likewise, the making of a compensation order will not of itself render a confiscation order in the entire amount disproportionate unless the rendering of compensation is certain; although if it is certain, or has already been made, then it *would* be disproportionate double counting also to make a confiscation order in the full amount: see *Jawad* [2013] EWCA Crim 644, [2013] 1 WLR 3861. (That is not to say that in some cases partial restoration may not suffice. For example, if a burglar steals six valuable items of jewellery and restores three of them when apprehended, a confiscation order in the amount of all six items is not, post-*Waya*, to be anticipated. Likewise, if a thief steals £10,000 and restores £5,000 a confiscation order in the sum of £10,000 is not to be anticipated.)
59. We were also referred to a number of cases where it was held that, in certain circumstances, the courts are not required to make a confiscation order in the amount of the gross turnover (as opposed to net profits). Mrs Radford relied on these as showing the courts distinguishing between cases where goods or services were provided by way of lawful undertaking but where there was associated illegality, on the one hand, and cases where the entire undertaking was unlawful, on the other hand: see, for example, *King (Scott)* [2014] EWCA Crim 621, [2014] 2 Cr. App. R (S) 54; *Reynolds* [2017] EWCA Crim 1455, in particular at paragraph 58 of the judgment. Thus in *King (Scott)*, where the disproportionality of a confiscation order was under consideration, the court, after a review of the authorities, said this at paragraph 32:
- “The authorities reveal there is a clear distinction to be drawn between cases in which the goods or services are provided by way of a lawful contract (or when payment is properly paid for legitimate services) but the transaction is tainted by associated illegality (e.g. the overcharging in *Shabir* or the bribery in *Sale*), and cases in which the entire undertaking is unlawful (e.g. a business which is conducted illegally, as in *Beazley*).

When making a confiscation order, the court will need to consider, amongst other things, the difference between these two types of cases.”

Mrs Radford’s submission was that that approach applied by analogy here: the appellant’s employment and appointments at the hospice and at the Trusts was lawful in itself; the sole taint was the dishonest method by which he had obtained and then retained such employment and appointments.

60. In this regard, the high water-mark of Mrs Radford’s argument, in terms of legal authority, perhaps was the case of *Sale* [2013] EWCA Crim 1306, [2014] 1 WLR 124.
61. In *Sale*, the defendant was the sole shareholder and director of a company bearing his name. It carried on the entirely legitimate business of installing air-conditioning units and undertaking electrical engineering works and had done so for a number of years. Latterly, the company secured some valuable contracts, albeit at a proper price, from Network Rail by reason of financial inducements made to a manager at Network Rail. The company then fulfilled those contracts efficiently and for the proper price, receiving in total some £1.9 million of which £200,000 would represent net profit. For reasons which are not readily apparent, it was held that the corporate veil should be lifted and that Mr Sale should in effect be equated with the company.
62. The Court of Appeal concluded that it was disproportionate to make a confiscation order in the gross amount of £1.9 million. The court carefully considered *Waya*. The court accepted that Network Rail had received full value for money, money which it would have had to pay some other contractor to perform had it not engaged this company. The court went on to hold that the case was not entirely analogous to one where goods or money had been entirely restored to the loser; nor, given the advantage obtained by obtaining a market position and other advantages at the expense of legitimate competitors, had there been full recompense or divesting of the benefit of the crime. Referring to the case of *Jawad* and to paragraph 34 of *Waya*, the court said this at paragraph 56 of its judgment:

“...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 moneys 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.”
63. In the result, the court held it disproportionate to make a confiscation order in the amount of £1.9 million. It held that the appropriate order would have been for the net profits on the Network Rail contracts but which should have been further increased to reflect the pecuniary advantage gained by obtaining market share and so on (on which, however, the court had no evidence).
64. For completeness, we would also refer to two other cases, amongst the plethora of authorities in this field.

65. The first is the case of *Box* [2018] EWCA Crim 542, which concerned the tainted gift provisions of the 2002 Act. At paragraph 20 of the judgment of the court this was said:

“...the word ‘disproportionate’ used by Parliament in the amendment to s.6 (5) of the 2002 Act has in UK domestic law a particular meaning. In this context it means that the order must be proportionate to the achievement of the statutory aim [recovery of the amount the defendant has obtained from crime]. In almost all cases an order made in accordance with the provisions of the Act will satisfy that test. In some entirely different situations ... that may produce disproportionality ...”

66. The second is the decision in *Morrison* [2019] EWCA Crim 351, [2019] 2 Cr. App. R (S) 25. The court there engaged in a wide-ranging review of many of the authorities on the concept of disproportionality in the context of confiscation proceedings including, but not limited to, the context of tainted gifts (with which much of that case was concerned). It helpfully summarised some of the relevant principles at paragraphs 62 to 68 of the judgment. In particular, for present purposes, it said this at paragraph 67:

“67. Fifthly, the exception concerning proportionality in s.6(5)(b) is not to be equated with a general discretion in the court; nor even with a provision requiring or permitting the court to avoid the risk of serious injustice. It does not call for nor does it permit a general balancing exercise, in which various interests are weighed on each side of a balance, including the potential hardship or injustice which may be caused to third parties by the making of an order which includes a tainted gift. The proportionality exception in s.6(5)(b), although important, has a more limited scope.”

The court went on to stress that all cases were fact specific.

Disposal

67. Against that citation of authority, we turn to our disposal of this appeal.

(1) Causation

68. The arguments of the appellant on this aspect of the appeal are to be rejected. They fail at every level.
69. First, the appellant had actually pleaded guilty to obtaining a pecuniary advantage (in the form of an opportunity to earn remuneration) by deception and to fraud. As the Recorder crisply put, by his pleas to the three counts the appellant accepted in terms that he had benefited.
70. Second, the actuality, as found by the Recorder on abundant evidence, was that the dishonest representations made by the appellant in his applications were causative of his obtaining the posts in question. But for those dishonest statements he would have

been turned down for the posts and so would have gained no remuneration from them. Those findings amply confirm that the particular pecuniary advantage and benefit obtained was “as a result of or in connection with” the alleged conduct.

71. Third, the words used in s.76 (4) and (5) are framed in broad terms: see, for example, *Morgan* [2013] EWCA Crim 1307, [2014] 1 WLR 3450 at paragraph 55 of the judgment.
72. Fourth, and yet further, the attempt to say that the appellant’s benefit (in the form of his remuneration from such posts) was too remote from the dishonest conduct and was, instead, to be taken as derived from his performance of the roles for which he had been employed or to which he had been appointed, is also inconsistent with authority. Thus the same argument had been run in *Carter* (cited above) but rejected: as it likewise had been in *Paulet*, at paragraphs 49 to 50 of the judgment (cited above). The court in each case further had pointed out that the false representations were continuing representations: as conceded to be so in the present case.
73. Generally speaking, the courts in confiscation proceedings have been disinclined to pursue a technical or artificial approach to causation or unduly to restrict the width of the words “as a result of or in connection with”.
74. Thus in the admittedly very different context of confiscation proceedings where there has been a breach of an Enforcement Notice under s.179 of the Town and County Planning Act 1990, attempts have been made by defendants, in seeking to resist an assessment of benefit by reference to, for example, rents received, to argue that the rents accrued from a lawful activity (viz. renting out property): and so were too remote to constitute benefit. That is an argument broadly corresponding in nature to the present argument. But the courts in such cases have consistently rejected that, holding that the courts should adopt the “familiar and straightforward test where issues of causation are in play”. On that approach, it is appropriately to be held in such a case that but for the criminal conduct in ignoring the Enforcement Notice the rents in the relevant period would not have accrued to the defendant at all: see *Hussain* [2014] EWCA Crim 2344, at paragraph 21 of the judgment; *del Basso* [2010] EWCA Crim 1119, [2011] 1 Cr. App. R (S) 41; *Boruch Roth* [2020] EWCA Crim 967. Although the statutory and regulatory context in those cases is of course different from the present kind of case, it can be seen that the approach there adopted is consistent with the approach taken in cases such as *Carter* and *Paulet*.
75. It may of course be that in some employment cases, depending on the facts, the false representations, depending on their nature, can be adjudged never to have had or to have ceased to have had operative effect, or to have been implicitly waived. But even if that can be so, this most certainly is not such a case.
76. We do not propose to say more on this aspect of the appeal. The remuneration derived from the employment and appointments was correctly adjudged by the Recorder in his first ruling to be benefit obtained as a result of or in connection with the conduct.

(2) Proportionality

77. We turn, then, to the issue at the heart of this appeal: the issue of disproportionality by reference to s.6 (5) of the 2002 Act. It is clear, we add, from the wording of that sub-

section that disproportionality is to be assessed by reference to the making of a confiscation order: it is not to be assessed by reference to the amount of benefit as such.

78. As we have said, the 2002 Act proffers no criteria by reference to which an assessment of disproportionality, for the purposes of making a confiscation order, is to be made. So what does the word “disproportionate” connote in this context?
79. The authorities summarised above at all events make clear what the word “disproportionate” does *not* connote.
 - (1) First, it does not reintroduce by the back door the notion of a residual judicial discretion. The wording of s.6 (5) is plainly founded on the lead judgment in *Waya* and that judgment is specific on the point: see paragraph 24. Moreover, it is striking that in s.10 (the criminal lifestyle provisions) limitations on the making of the assumptions are permitted where there would be a “serious risk of injustice” if the assumptions in question were made. But “serious risk of injustice” is not the language of s.6 (5).
 - (2) Second, and reflecting that, an assessment of disproportionality is not to be made by a balancing of factors and competing interests in the way that may be appropriate in some public law or procedural law or family law contexts: see, for instance, *Morrison* at paragraph 67.
 - (3) Third, disproportionality cannot for these purposes properly be assessed by reference to the proportion which the available amount bears to the benefit. Although that approach was the one adopted by the Recorder in the present case, that, with respect, cannot be right (and indeed counsel before us did not seek to support it). It cannot be right just because such an approach both would be arbitrary and would be contrary to the scheme and purpose of the 2002 Act.
80. Turning from the negatives, one then has to ask what the word “disproportionate” *does* connote.
81. The answer to this is central. And the answer, in our opinion, is given by posing the notional question “disproportionate to what?”. For the authorities, and in particular *Waya* itself, make it quite clear that that assessment of disproportionality is made by reference to the aim of the 2002 Act: which is to deprive criminals of the proceeds of their criminality. Consequently, Crown Court judges in assessing disproportionality always should, in considering whether or the extent to which a confiscation order should be made, ask themselves if such an order is disproportionate to the achievement of the statutory objective of depriving criminals of the proceeds of their criminality. So to approach matters would then avoid wrong notions of some kind of a residual discretion or a perceived need for either a draconian outcome or a “just” outcome, as the case may be, and the like.
82. It also, we might add, is precisely for that reason that where the criminal lifestyle provisions or the tainted gift provisions have been correctly applied, the outcome will only exceptionally be capable of being adjudged disproportionate. It will be

exceptional just because the statutory provisions on criminal lifestyle (which also include an entitlement to disapply the assumptions) and on tainted gifts are themselves geared to the objective of depriving criminals of the proceeds of their crimes: as the observations in *Box* illustrate.

83. But how then, in a case which is not a criminal lifestyle case but a case of benefit from particular conduct, does the Crown Court go about the assessment of whether the making an order in the postulated recoverable amount is disproportionate to the achievement of the statutory objective?
84. It is noticeable, in our view, that the Supreme Court in the cases of both *Waya* and *Harvey* have eschewed approaching the issue of proportionality in confiscation proceedings under the 2002 Act in the way taken in the civil courts. Indeed, familiar cases such as *de Freitas v Permanent Secretary of Ministry for Agriculture, Fisheries, etc.* [1999] 1 AC 69 and (post-*Waya*) *Bank Mellat v HM Treasury* [2013] UKSC 38, [2014] AC 700 are neither cited nor discussed in those cases. Rather, the underpinning, even if not an absolute principle as such, for the assessment of disproportionality in this particular context (that is, whether the making of the confiscation order in the recoverable amount is disproportionate to the achievement of the statutory aim of depriving criminals of the proceeds of crime) is indicated to be by reference to whether such an order will constitute a double recovery from, or double penalty on, the defendant and will not achieve expropriation of the proceeds of his crime.
85. For this purpose, it is essential to bear in mind the fundamental point that a confiscation order is not designed to be a punishment (although no doubt some defendants may choose not to see it that way). As Mrs Radford rightly emphasised, the punishment is to be contained in the sentence of imprisonment or fine or other penalty imposed by the judge. The confiscation order itself, on the other hand, and consistently with the statutory aim, is restorative, in the sense of requiring the defendant to disgorge, to the extent that he is able, the product of his criminality. Thus it was that Lord Walker and Lord Justice Hughes in *Waya* emphasised that a confiscation order which requires a defendant who has made full restoration of the benefit to pay the same sum again does not achieve the object of the legislation of removing from the defendant the proceeds of crime but amounts simply to a further pecuniary penalty.
86. The proposition that, in cases of benefit from particular conduct, the notion of double recovery or double penalty is a mark of disproportionality is, we think, borne out in cases subsequent to *Waya*, such as *Ahmad and Fields* and *Jawad and Harvey*. On one view, it is quite a restricted approach – but, as against that, it is conceptually clear and accords with the identified statutory objective. Indeed, as cases such as *Jawad* or *Harvey* in the Court of Appeal [2013] EWCA Crim 1104, [2014] 1 WLR 124 indicate, a strict notion of restoration is liable to be adopted: thus, as we have indicated, promises of restoration (as opposed to actual restoration) ordinarily will not suffice, any more than will, say, restoration of stolen goods in a damaged or depreciated state.
87. Against those considerations we turn to the outcome for the present case.

88. Mr Evans submitted that the entirety of the remuneration over the 10 year period (albeit he conceded that it should be net of all tax) represented the proceeds of the criminality and, consistently with the statutory aim of the 2002 Act, should be confiscated. But that submission in effect makes the determination on the issue of causation of itself determinative of the issue of disproportionality: and that cannot of itself be right.
89. Nor does it follow that the only way in which restoration can be made for this purpose is by the appellant restoring the same sum of money as he had received in net remuneration over the ten-year period. If that very restrictive approach were the required approach, the court in *Waya* surely would not have left open for further decision in later cases the examples given in paragraph 34 of the judgment. It is plain that the Supreme Court contemplated the possibility of cases of disproportion “analogous” to those of the goods or money entirely restored to the victim.
90. *Sale*, we consider, is an important and illuminating example of that. The defendant was not required to restore, by confiscation, the gross value of the contracts dishonestly obtained. Rather, he was only required to restore his net profits on those contracts (with a further sum, had it been capable of assessment, for any additional pecuniary advantage obtained). The rationale for that is clear: Network Rail was regarded as recompensed by its receiving full value for its monetary outlay (see paragraph 56 of the judgment). Providing full value, by performing lawfully the services under the contracts, thus was taken, to that extent, as analogous to restoration; and thus in turn required limitation of the confiscation order accordingly, on grounds of disproportionality. A corresponding approach underpins cases where it is adjudged disproportionate to make a confiscation order in the amount of gross proceeds or turnover and appropriate to restrict such an order to net proceeds where the overall business has been operated legitimately: as cases such as *King (Scott)* and *Reynolds* illustrate.
91. It can surely appeal to no sense of the merits in the present case if the appellant, had he had sufficient realisable assets, had been made subject to a confiscation order in the full amount of the benefit, representing all his earnings obtained over the ten year period, and inflation adjusted. As the Recorder himself said, “few would regard as proportionate” such an order. Of course, merits, as such, is not the test. But the reason why such an order would be disproportionate is, we think, precisely because the appellant is to be taken as having over the years given full value, in terms of the services he provided, to the hospice and Trusts in return for the remuneration which he obtained (remuneration which they would have had to pay to others if they had not employed or appointed him). Issues of quantum merit have no part to play in this case: as the Recorder rightly held.
92. The example was raised in argument by reference to a person applying for a post as a surgeon at a particular hospital. Suppose (no doubt implausibly) that an applicant has no surgical qualifications at all but nevertheless, by a false application, dupes a hospital into appointing him to a surgical post. Now suppose that the applicant does have the requisite surgical qualifications and experience, but nevertheless dishonestly embroiders his application form and thereby is the successful candidate: thereafter performing competently and diligently his surgical duties until he is dismissed when the truth emerges. On Mr Evans’ argument, as he conceded, in both cases the whole amount of the remuneration (albeit net of tax) is to be confiscated without

differentiation. It is to be confiscated without differentiation because in each case, on his argument, both have obtained the employment and thereby the remuneration by reason of their fraudulent misrepresentations. That lack of differentiation in outcome is unappealing. Similarly, for example, we suggest, there can be a real distinction between a person applying for appointment as a company director who falsely exaggerates his credentials and a person applying for such an appointment who, in addition, suppresses the fact that he is the subject of a current Director's Disqualification order.

93. A further example was put to Mr Evans by the Common Serjeant in argument. Suppose that a company employs a shelf-stacker on express terms that he has no prior criminal convictions but which he dishonestly fails to disclose. He thereafter works diligently and well until the truth emerges and he is dismissed. Again, on Mr Evans' argument, the individual would potentially be liable to a confiscation order in the full amount of his remuneration. That too is unappealing. At one stage, Mr Evans suggested that such a scenario is distinguishable from the present as no breach of fiduciary duty would be involved. But that distinction is of no validity for these confiscation purposes – rather, such a factor is to be marked in the punishment appropriately to be imposed: precisely Mrs Radford's point.
94. It might be objected that if that were so then how could the outcomes in domestic cases such as *Carter* and *Paulet* have been as they were? One answer is that *Carter* and *Paulet* were in fact decided long before *Waya*. But, quite apart from that, there is also this point of distinction. In *Paulet*, for example, the jobs undertaken were certainly of a kind which in themselves were lawful: in recruitment, in a cash-and-carry operation, as a forklift driver. But the point remained that, because of his unlawful immigration status, he could not lawfully work in the United Kingdom *at all*. The position is analogous to the rent receipt cases where there is a breach of an Enforcement Notice under the Town and Country Planning Act 1990. Renting out property is, in itself, lawful: but in such a scenario the rents derive from the occupation of property which the defendant has no lawful right to rent out or permit to be occupied at all. It can thus be seen that such cases correspond to the approach acknowledged in cases such as *King (Scott)* and *Reynolds*. This also explains how the approach, in terms of confiscation, could legitimately differ in terms of the two examples of the surgeon application given above. In the first scenario, the applicant has no qualifications and no lawful right to work, and cannot lawfully give value, as a surgeon at all. In the second scenario, on the other hand, the applicant does.
95. The conclusion thus has to be that where disproportionality is being assessed by reference to arguments raised as to restoration (in whole or in part) the court ordinarily will need to be satisfied that the postulated restoration has been lawful. We say "ordinarily", however, just because it would be wholly wrong to rule out potential exceptions. This may particularly be so in, albeit not limited to, the sensitive area of employment where the individual has no lawful right to work at all because of his immigration status (as the outcome of *Paulet* in the European Court of Human Rights indicates): the more so where, perhaps, the employer may have been entirely indifferent as to the employee's status. At all events, these sorts of considerations, in our opinion, should properly be left to determination on the particular facts of the particular case, and on a case by case basis.

96. Mr Evans objected that such an approach could lead to uncertainty and give rise to the difficulties and potential fine distinctions exemplified in the outcome of cases such as *McDowell and Singh* [2015] EWCA Crim 173, [2015] 2 Cr. App. R (S) 14. We are not moved by that. All such cases have to be decided in the particular statutory or regulatory context in which they arise and by reference to the particular facts of the case. That (possibly) some individual cases may be difficult to decide in terms of the assessment of disproportionality is not a reason for, in effect, disabling the court from even making the attempt.
97. We would, in fact, at this stage wish to emphasise a point made in *Waya* at paragraph 19. This is that the prosecuting authorities have no obligation to institute confiscation proceedings: they have a discretion (having regard also to the relevant Crown Prosecution Service Guidance). In the employment context in particular, in cases of what is known as CV fraud, prosecuting authorities may need to reflect long and hard before deciding on confiscation proceedings. In saying that, we express no criticism of the prosecution in this case. The decision may well have been influenced by the other criminal proceedings that were started and in any event the prosecution here actually succeeded before the Recorder. But in other such cases very careful consideration should be called for, before confiscation proceedings are requested and pursued.
98. Turning to the facts of the present case, the proper outcome is, in our view, clear enough. The appellant made dishonest representations causative of his obtaining remunerative employment and appointments. He thereby benefited as a result of or in connection with his particular conduct. But throughout, as is to be taken, he properly performed his duties. Further, whilst he had obtained the positions dishonestly, they were positions which he was otherwise lawfully entitled to hold. There was, for example, no legal bar on his being employed or appointed as he was, and indeed no legal bar in principle on the hospice and Trusts waiving their requirements as to what they considered to be essential or desirable attributes. In all the circumstances, he is, in our judgment, to be taken as having given full value for his remuneration. He thereby is to be taken to have made full restoration. A confiscation order would accordingly be disproportionate to the aim of the 2002 Act: it would involve a double penalty.
99. There was some brief discussion before us as to whether at least the appellant should be required to be subject to a confiscation order reflecting a sum equivalent to the difference between his prior earnings and the increased earnings he received at the hospice. But such an approach does not fit with the approach we have outlined above and indeed, as Mr Evans fairly accepted, could be said to be arbitrary in its outcome. (Why, for example, should the outcome on benefit be different simply because he may have been unemployed before he gained the post?)

Conclusion

100. In the present case, the Recorder's assessment of the benefit and of the available amount was justified. However, given the particular facts of the present case and on a proper application of s.6 (5) of the 2002 Act, it was disproportionate to make a confiscation order in the recoverable amount. Accordingly, we allow the appeal and quash the Confiscation Order dated 26 July 2018.

