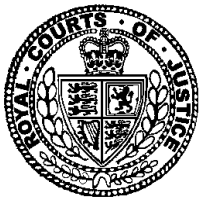

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Case No: 201902069 B4
201902071 B4
201902075 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT NOTTINGHAM
His Honour Judge Sampson
T20167439, T20167433,T20167434

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29th October 2020

Before :

LORD JUSTICE GREEN
MR JUSTICE SPENCER
and
HIS HONOUR JUDGE MENARY QC
(sitting as a Judge of the Court of Appeal (Criminal Division))

- -

Between :

THE QUEEN	**Respondent**
- and –	
JOHN LOWTHER **LUKE LOWTHER** **DAVID LOWTHER**	**Appellants**

- -
- -

Ivan Krolick (instructed by Khan Solicitors**)** for the **Appellants**
Ben Isaacs (instructed by **CPS Appeals and Review Unit**) for the **Respondent**

Hearing date: 6th October 2020

- -

Approved Judgment

Covid-19 protocol: This judgment will be handed down by the Court remotely, by circulation to the parties' representatives by email and, if appropriate, by publishing on www.judiciary.uk and/or release to Bailii. The date and time for hand down will be deemed to be 29th October 2020 at 10.30 am

Mr Justice Spencer:

Introduction and overview

1. These three appellants, who are brothers, appeal by limited leave of the single judge against confiscation orders made against them in the Crown Court at Nottingham following their conviction for serious conspiracy offences involving blackmail, money laundering, intimidation and perverting the course of justice. They also renew their applications for leave to appeal on all the grounds for which the single judge refused leave.

2. The appellants each pleaded guilty on 16th March 2017, the fourth day of the trial. On 7th April 2017 they were sentenced by His Honour Judge Sampson. For John Lowther (now aged 42) and Luke Lowther (now aged 37) the total sentence was 8 years' imprisonment. For David Lowther (now aged 28) the total sentence was 9 years' imprisonment. Each of them was made the subject of a serious crime prevention order under section 19 of the Serious Crime Act 2007 for a period of 5 years. There were other ancillary orders.

3. The confiscation proceedings eventually came on for hearing before Judge Sampson nearly two years later in February 2019. There was a five-day hearing, at the conclusion of which, on 8th February 2019, the judge gave a ruling on the issues of principle which had been raised. Mr Krolick appeared at that hearing on behalf of John and Luke Lowther. David Lowther was represented by other counsel. Mr Isaacs appeared for the Crown. The judge directed that counsel should endeavour to agree the figures for the respective confiscation orders based upon his ruling. That is what happened. There was liaison between the prosecution's financial investigator, Ms Naylor, and the forensic accountant instructed on behalf of the appellants, Mr Davidson.

4. The matter came back before the judge on 29th March 2019. Substantial progress had been made in agreeing the figures, but three outstanding issues were the subject of further argument and ruling. By this stage David Lowther and his lawyers had parted company and he was unrepresented. The judge adjourned his case for two weeks so that he could obtain fresh representation. The ruling the judge gave on 29th March therefore related only to John and Luke Lowther.

5. The matter finally came back before the judge on 10th May 2019. The judge enquired whether the confiscation issues had been resolved in the case of David Lowther and was assured by his new counsel, Mr Harry, that the figures were now agreed in his case as well. The judge went on that day to deal with the applications for serious crime prevention orders but returned briefly to the confiscation orders at the end of that hearing to deal with a discrete matter relating to compensation orders and apportionment, to which we shall have to return at the end of this judgment.

6. On 10th May 2019, at the conclusion of the hearing, the judge made confiscation orders as follows.

7. In the case of John Lowther the benefit figure was £263,719.40. The available amount was found to be **£198,202.41** and a confiscation order was made in that sum.

8. In the case of Luke Lowther the benefit figure was £172,722.50. The available amount was found to be **£170,540.77** and a confiscation order was made in that sum.

9. In the case of David Lowther the benefit figure was £248,869.41. The available amount was found to be **£183,759.06** and a confiscation order was made in that sum.

10. In each case the order was to be paid within 3 months, with appropriate periods of imprisonment in default.

11. On behalf of each of the three appellants Mr Krolick settled grounds of appeal supported, in each case, by a fully reasoned advice on appeal. Mr Isaacs settled a detailed respondent's notice and addendum, addressing each of the grounds.

12. The single judge refused leave on all grounds but one. In respect of that ground there was a concession in the respondent's notice that the judge should have deducted from the value of the various properties still held by the appellants the costs of sale if the properties had to be realised. In the light of that concession the single judge granted limited leave on that ground only. He directed that the parties should agree the financial consequences of the appeal being allowed on this sole ground and directed that an agreed order should be lodged within 21 days. He granted a representation order for counsel, limited to the work in agreeing the order.

13. Pursuant to that direction there were exchanges of emails between the parties. Mr Isaacs, on behalf of the prosecution, prepared a draft agreed order based on the figures for costs of sale provided by the appellants' solicitors. The draft was not agreed by Mr Krolick and his solicitors. At the outset of the hearing of the appeal and the renewed applications on 6th October 2020 we were informed that the figures Mr Isaacs had included in the draft order were now agreed. There remained an issue of principle, however. Mr Isaacs contends that the costs of sale should be deducted only from the figure for the realisable assets of the respective appellants, whereas Mr Krolick contends that the costs of sale should also be deducted from the benefit figure for each appellant as well.

14. Accordingly, we have to deal with two matters. First, we must consider whether any of the renewed grounds are arguable. Second, if we refuse leave on all those grounds, we must deal with the outstanding ground of appeal on which leave has been granted and decide what adjustment should be made to the confiscation orders in the light of the concession that the judge should have deducted the costs of sale in determining the value of the relevant properties. We heard the appeal and the renewed applications on 6th October 2020. We reserved our decision in view of the volume of documentation we needed to review in the light of counsel's submissions, including additional material supplied after the hearing which counsel wished us to consider. There has also been an extensive exchange of further written submissions on one aspect of the case, which is dealt with in the footnote at the end of this judgment.

15. We are grateful to Mr Krolick and to Mr Isaacs for all their submissions, written and oral. In his oral submissions Mr Krolick highlighted the points advanced very fully in his grounds of appeal and written advices, all of which we have considered carefully. We do not propose to rehearse every point and every argument. We shall concentrate on the issues of principle which Mr Krolick has urged upon us.

The renewed applications for leave to appeal

The facts of the offences

16. We deal first with the renewed applications for leave. It is necessary to set the submissions in their factual context. The three appellants were born into the travelling community, although they are not Romanies. The appellants were convicted of a series of offences arising from their operation of a "protection" business, as the prosecution described it. There was targeted and persistent extortion of businesses backed up with threats and, when necessary, the use of violence. The appellants laundered the proceeds of the crimes. None of the appellants had any formal employment or income but each built up a portfolio comprising several plots of land and a number of properties.

17. Four sets of complainants and businesses provided evidence against the appellants and their associates. Two are particularly relevant to the confiscation proceedings.

18. Count 1 charged all three defendants with conspiracy to blackmail Steven and Paul Horobin, directors of a haulage and concrete mixing business operating across Derbyshire. The appellants repeatedly targeted the Horobins and made numerous demands for money, accompanied by acts of intimidation, threats of violence and damage to property. As a result, the Horobins acceded to the blackmail demands and paid a total of £29,500 to the appellants in instalments. John and David Lowther were paid £29,000. Luke Lowther was paid £500.

19. Count 2 charged Luke and David Lowther with conspiracy to blackmail Garry Longdon, a skip driver with a company called Heanor Mini Skips, obtaining £1,500 by menaces. Following the theft of one of his lorries Mr Longdon was directed to the appellants who said they could assist him for a fee. His lorry was subsequently returned but he was accused of denigrating the appellants. As a result he was assaulted and further cash was demanded from him by Luke Lowther. When the matter was reported to the police there was further intimidation by David Lowther and the co-accused, Ryan Colson, which led to Mr Longdon attempting to retract his statement. That gave rise to a charge of perverting the course of justice.

20. It was discovered that the appellants had been laundering the proceeds of their criminal activities through the co-accused Colson's company. The police investigation had uncovered numerous financial transactions between the parties and from the evidence of the recorded calls from prison it emerged that John Lowther and his sister Caroline McDonagh had discussed how they would obtain the £70,000 that the appellants had invested in Colson's company. That gave rise to count 21 which charged John and David Lowther and Colson (and others) with a money laundering conspiracy to arrange the removal collection and transfer of cash to and from Colson. In the event the prosecution contended that the benefit obtained by the appellants John and David Lowther from the conspiracy in count 21 was limited to £30,000. By the time of the confiscation hearing the co-accused Colson had already satisfied a confiscation order for £30,000 in respect of count 21. Consequently, and to avoid double recovery, this sum of £30,000 was not included in the benefit figure for John Lowther or for David Lowther.

The confiscation proceedings

21. The confiscation proceedings were very protracted. There were delays on the part of the appellants in filing their evidence and supporting documentation. We have been provided with the section 16 prosecutor's statements of information in relation to John and Luke Lowther and various other documents including John Lowther's witness statements. It is plain, however, that the judge had a great deal more documentation than we have. Mr Krolick told us that for the hearing in the Crown Court there was a separate bundle of documents for each appellant running to 400 pages or so. Following the hearing, by agreement between counsel, we were supplied with a copy of the report of the forensic accountant, Mr Davidson, dated 31st January 2019, in relation to the confiscation application against John Lowther, as an example of the material the judge had before him. This was only one of several reports Mr Davidson prepared in respect of each appellant.

22. At the confiscation hearing before Judge Sampson there was a measure of agreement as to the relevant benefit figures. The extent of benefit from "particular criminal conduct" was comparatively modest. It related to count 1 (£29,500, alleged by the prosecution against each appellant) and count 2 (£1,500, alleged against Luke Lowther and David Lowther), In addition, however, it was common ground that this was a "criminal lifestyle" case. The principal issue for the court, therefore, was to decide whether each appellant had benefited from his "general criminal conduct". This involved examination of the statutory "assumptions" in section 10 of the Proceeds of Crime Act 2002 (POCA). The prosecution's position was that all four assumptions applied.

23. The issue was whether the appellants could discharge the burden of proof which rested upon them (to the civil standard) to displace the statutory assumptions. They each gave evidence. We were told that each was in the witness box for the best part of a day, mainly under very thorough cross-examination by Mr Isaacs. They each said that their land, properties and other assets, as well as all credits to their bank accounts, were derived from legitimate income such as general building work, labouring, trading in vehicles and/or horses, and occasional loans from business associates. This evidence was roundly challenged by the prosecution. The appellants called no witnesses of fact to support their evidence but relied on the reports from the forensic accountant, Mr Davidson, who was also called to give evidence. In particular, the appellants did not call the accountant, Mr Akhtar, who had belatedly prepared accounts for them and submitted tax returns shortly before the hearing.

24. In support of their case the appellants asserted that in a separate investigation into their financial affairs which began in 2013 the National Crime Agency (NCA) accepted that the appellants had earned a legitimate income from genuine trading. That was not in fact the position. The prosecution called a senior officer of the NCA, Mr Bonnen, whose evidence the judge accepted. The judge rejected any suggestion by the appellants that the NCA had in any way accepted the truth of the explanations given to the NCA as to their income and their financial affairs generally. The NCA investigation was interrupted by the criminal proceedings and was never completed. The appellants did, however, each pay a lump sum to the NCA on account of tax liability. John Lowther paid £20,000. Luke

Lowther paid £10,000. David Lowther paid £10,000 as part of £10,596 paid to the NCA and HMRC combined.

25. With that brief summary we turn to the renewed grounds of appeal arising from the judge's findings on the issues of principle in his ruling given on 8th February 2019. The ruling came at the end of the five-day hearing. The judge had the benefit of detailed closing written submissions dated 7th February from Mr Krolick (at that stage representing only John and Luke Lowther) and from Mr Isaacs on behalf of the prosecution.

Count 1, £29,500, Luke Lowther (Ground 1)

26. The first issue identified by the judge related to count 1 and the benefit (in the case of each defendant) arising from the particular criminal conduct resulting in the payment of £29,500 by the Horobins. In evidence John and David Lowther each accepted receiving half of £29,000. Luke admitted receiving only £500. The judge was satisfied that all three appellants were jointly and severally liable for the full sum of £29,500. Luke Lowther seeks to challenge that finding in his first ground of appeal.

27. In short Mr Krolick's submission is that although the judge was entitled to find that each was jointly involved in the offending, it did not necessarily follow that each had acquired the benefit jointly. Mr Krolick relies on the observations of the Supreme Court to that effect in *R v Ahmad and Fields* [2014] UKSC 36; [2015] AC 299, at [50] - [51]. However, to put this in context it should be noted that at [46]-[47] it was said in *Ahmad*, after reviewing the authorities:

> "46. Accordingly, where criminal property is obtained as a result of a joint criminal enterprise, it will often be appropriate for a court to hold that each of the conspirators thus "obtained" the whole of that property….However, that will by no means be the correct conclusion in every such case.
> 47. ….. [W]hen a defendant has been convicted of an offence which involved several conspirators, and resulted in the obtaining of property, the court has to decide on the basis of evidence, often relying on common sense inferences, whether the defendant in question obtained the property in the sense of assuming the rights of an owner over it, either because he received it or because he was to have some sort of share in it or in its proceeds….
> 51. ….Where the evidence supported a finding that the asset acquired from a crime was obtained effectively on a several basis, the judge should make it, but there are cases in which a finding of joint obtaining is the proper, indeed the only available finding…"

28. It is clear from the judge's ruling overall that he disbelieved the evidence of the appellants on this as on every disputed issue of fact. The obtaining of the whole of the £29,500 by blackmail was a joint offence. It mattered not who had personally taken delivery of the cash on each occasion that monies were paid over by the Horobins. They were, in effect, a firm or a partnership or, as the judge put it, "a team". We note from the prosecution's opening note (at paragraphs 9-12) that the initial £20,000 was paid over to

the appellants in three or four instalments, John and David coming to collect the money. There was a further occasion on which Steven Horobin was instructed to meet Luke Lowther to collect a further £500. Later again, in response to further blackmail demands, the final £9,000 was physically handed over to John and David Lowther.

29. The judge was, therefore, fully entitled to conclude on the evidence that the appellants were at all times "… a team, who by agreement extorted money out of the Horobins through one indivisible course of conduct over a period of time." Luke had been sentenced on the basis that he played an equal role; his contribution was to provide the "muscle", as needed. The judge may not have spelt out in so many words that he was finding as a fact that the three appellants all received the whole of the monies jointly, but that was plainly his conclusion. We agree with Mr Isaacs that a finding of joint obtaining and joint benefit was therefore the proper and indeed the only available finding. We refuse leave on this ground of appeal.

Provenance of cash deposits, Ground 1 (John and David), Ground 2 (Luke)

30. Applying the statutory assumptions in section 10 of the Act, the judge was satisfied, as a starting point, that the benefit resulting from the appellants' general criminal conduct included: first, cash deposits into their banks accounts; second, the proceeds of sale of various properties sold after the relevant day (6 years before charge): third, the value of various properties in which they continued to hold an interest, whether alone or with others.

31. In relation to cash deposits the appellants relied on their own evidence. The judge set out his findings in relation to their evidence and their lack of credibility. They relied on the tax returns belatedly submitted by their accountant, Mr Akhtar. The judge concluded that he was not prepared to accept the appellants' tax returns as evidence of legitimate earnings without satisfying himself that the evidence on which the tax returns purported to be based was reliable. Mr Davidson, the forensic accountant, had not examined the documentation on which the returns were said to be based. Throughout his report on John Lowther, in reviewing various property transactions and the provenance of the monies which funded them, Mr Davidson noted that the prosecution did not accept that the transactions came from "legitimate earned income", which was "ultimately a matter for the court to decide". That is precisely what the judge did. He said it was astonishing that Mr Akhtar had not been called; that gave rise inevitably to the suspicion and the conclusion, on the balance of probabilities, that information given to Mr Akhtar by the defendants would not stand up to scrutiny.

32. More generally, in relation to the provenance of the appellants' income the judge said, at page 8C:

> "The burden is on the defendants to show, in effect, on the balance of probabilities, that their income or any part of it, was not the result of assumed general criminal conduct. Having heard each defendant, I reject the evidence of each as incredible. In respect of income the assumptions remain intact."

33. That fundamental and critical finding of fact is the subject of a common ground of appeal for all three appellants. Mr Krolick contends that the judge erred in failing to consider all the evidence relating to the provenance of the cash deposits paid into the appellants'

bank accounts, in particular their lifestyle as members of the travelling community and their inability to read or write. This he submits went a long way to explain why there was little documentary evidence to support their case. They had been brought up to deal only in cash and from a young age had been encouraged to put their cash savings into bank accounts which they later invested in properties. Mr Krolick developed this ground in his oral submissions. He says the judge should have stood back and considered whether there was a risk of injustice having regard to the appellants' background and lack of education.

34. The difficulty with this submission is that the judge heard all the evidence. The appellants each gave evidence at considerable length. The judge disbelieved the appellants. He was quite entitled to reach the conclusion he did. In his ruling on 8th February the judge gave examples of the lack of credibility of their evidence. One will suffice for present purposes. David Lowther was asked in cross-examination if he could give even one single example of a piece of legitimate work. He was unable to do so convincingly. The appellants failed to produce any corroborative evidence of their involvement in any sort of lawful trade.

35. Mr Krolick criticises the judge's approach as altogether too broad brush. He submits that the judge failed to review the evidence in any detail in his ruling; he should have set out his findings on the individual transactions; the appellants were entitled to know why the judge found against them.

36. We reject that criticism. It ignores the reality of the case and the starkness of the central issue of the appellants' credibility. It fails to acknowledge that the starting point of the judge's assessment was the statutory assumptions, and that the burden of proof was on the appellants to demonstrate, by evidence, that the assumptions could be displaced. Mr Krolick addressed us, by way of example, on the evidence relating to John's alleged legitimate purchase and sale of a large number of horses. In fact the judge dealt with that comprehensively in his ruling, at page 5 B-E.

37. There is a further crucial point in relation to the cash deposits which only became clear during the course of counsel's submissions. It overlaps with the next grounds we shall consider, but it needs to be emphasised in its own right straightaway. Although the judge concluded that the cash deposits were the product of general criminal conduct, it is important to emphasise that the cash deposits were <u>not</u> included as part of the benefit figure for any of the appellants. This was to avoid double counting, because the prosecution relied on those cash deposits as illustrative of the source of the funds used to purchase the succession of properties which featured in the confiscation and which formed part of the benefit obtained as a result of the appellant's general criminal conduct. That was made clear in Mr Isaacs' closing written submissions. In the course of his oral submissions before us Mr Krolick very properly abandoned his "aggregation" argument before us once the position had been clarified. He could no longer assert that the prosecution were seeking to "have the penny and the sweet" (as Toulson LJ put it in *R v Pattison*, cited later in this judgment).

38. We are satisfied that this ground of appeal, in the case of each appellant, is unarguable and leave is refused.

<u>Real property, Grounds 2-4 (John and David), Ground 3 (Luke)</u>

39. In his ruling of 8th February the judge then turned to the real property. He accepted the prosecution's submission that if the court was of the view that the appellants had not established that they earned any legitimate income, the benefit obtained from their general criminal conduct was the value of the following:

> a) any properties [i.e. the sale proceeds of any properties] which were bought after the relevant day and in respect of which the purchase was not funded by the sale of any other property, and the sale of which did not fund any other property (only Portland Road, Selston and part of the proceeds of Toad Hole Close fall into this latter category); plus
> b) all properties held; plus
> c) vehicles; plus
> d) expenditure incurred.

The judge then dealt with specific properties and parcels of land. Mr Krolick submits that the judge erred in principle in his approach, and illustrated that submission by reference to purchases and sales of properties by John Lowther, although the points apply equally to the other two appellants.

40. The judge's findings here give rise to two common grounds of appeal. In relation to John and David Lowther, Mr Krolick argues in ground 2 that when considering the effect of section 10(2) of the Act in relation to the properties sold after the relevant day, the judge erred in law in holding that the provenance of the funds used in the acquisition of those properties was a material factor and failed to consider the more restrictive provisions of section 10(2). Developing this ground a little further, Mr Krolick's argument is that the relevant assumption in section 10 (2) applies only if the property transferred to a defendant was obtained "as a result of his general criminal conduct", whereas section 76(4) of the Act provides that a person benefits from conduct "if he obtains property as a result of *or in connection with the conduct*". Mr Krolick submits that in section 10(2) the omission of the underlined words found in section 76(4) must be deliberate, and that consequently the test of causation in s.10(2) must be stricter than under s.76(4).Thus the provenance of the underlying property which was sold is not relevant. Quoting from Mr Krolick's written submissions: "If the question asked is: 'as a result of what were the various purchase monies transferred?', the answer must be: 'the sale of the property in which the defendant held an interest and which he was authorised to sell.'" Mr Krolick complains that in his ruling the judge did not address this issue of law which, he submits, raises a point not hitherto the subject of judicial authority, so far as he is aware.

41. The single judge observed in refusing leave on this ground, that the point of law raised in ground 2 is unarguable. The single judge said:

> "…It has never previously been decided because nobody has ever thought it worth raising. Section 10(2) POCA 2002 does not require the court to focus only on the final transaction of a money laundering exercise and ignore the fact that the original assets were obtained by criminality and then converted into a property which was lawfully owned. The words in the section are obviously broader than that. The phrase "as a result of

> general criminal conduct" requires a causal connection between the general criminal conduct and the transfer of property: the one must be "the result" of the other. It does not require that the transfer must itself be part of the general criminal conduct by itself being a crime. Even if it did, on the findings of the judge, the transfer would be a result of a series of transactions which together would amount to an offence under section 327 POCA 2002."

42. We respectfully agree with that analysis. As Mr Isaacs pointed out in his written submissions, if Mr Krolick's argument and interpretation were correct it would mean that any conversion of criminally obtained property would frustrate the confiscation regime. For example, he says, a defendant may use the proceeds of a fraud to buy a Lamborghini. If he then sells the Lamborghini in an arm's-length transaction, the proceeds of sale are plainly not to be excluded from the benefit figure merely because they were transferred to the defendant as a result of a legitimate sale, rather than the original fraud. We agree with Mr Issacs' analysis that this ground of appeal would undermine the whole principle and process of tracing, which is a crucial element of the confiscation regime and enshrined in section 80(3) of the Act. We refuse leave on this ground.

43. The second common ground of appeal in relation to the judge's findings on the properties is that the judge erred in failing to give any adequate consideration to the evidence concerning the provenance of the funds used in the acquisition of the properties, and erred in failing to find that the appellants had shown that such properties had not been obtained as a result of any criminal conduct. The grounds of appeal identify different properties for each appellant in this regard, but the point of principle is the same. For example, Mr Krolick took us through the history of the purchase and sale of the plot of land at Toad Hole Close, on which three houses were built, one for each of the appellants. In his report, the forensic accountant Mr Davidson traced the history of these and all the other properties. Mr Isaacs does not take issue with the factual history of the conveyancing transactions. The prosecution's submission, accepted by the judge, was that the provenance of the monies which funded the purchase of the properties was the result of the appellants' general criminal conduct.

44. Thus, again, the difficulty Mr Krolick faces with this submission is the judge's very clear and crucial finding that he rejected the evidence of the appellants as incredible. In his ruling of 8th February, at page 8H-9A, the judge took as an example supposed loans made to the appellants by a man called Brett Smith. He said that he was not satisfied that the appellants had discharged the burden of proof so as to demonstrate that the monies coming from Brett Smith did not represent the result of general criminal conduct, and that this observation "would need to be applied to any relevant property."

45. The judge was entitled to conclude that the appellants had failed to discharge the burden of proof upon them to show that the properties had not been acquired with monies acquired from their general criminal conduct. He was not obliged to set out the history of the property transactions in minute detail and make finings at every juncture. Again we are satisfied that this ground is not arguable in the case of any of the three appellants.

Sums paid to the NCA, Ground 5 (John and David), Ground 4 (Luke)

46. The final common ground of appeal relates to the treatment by the judge of the sums paid by the appellants to the NCA: £20,000 for John Lowther, £10,000 each for Luke Lowther and David Lowther. In his ruling of 8th February the judge acknowledged that each of them must be "given credit" for this payment in calculating the benefit figure. This gave rise to some ambiguity which was resolved at the next hearing on 29th March 2019. The judge made it clear he was satisfied that the money used to pay the NCA came from the proceeds of crime. It was clear, however, that the money had already been paid to the State. It obviously should not be paid twice (i.e. paid again as part of the "recoverable amount" in the final analysis) but equally obviously the appellants should not have the benefit of its being deducted twice. The judge pointed out, as is the fact, that in her s.16 statement the financial investigator did not include these sums in her computation of benefit. As the judge put it, to deduct the sums again would be to "…cheat the public of those proceeds of crime." It was certainly not his intention, he said, that the appellant should have the benefit of that money being deducted twice.

47. The judge was unarguably correct in his approach. As Mr Isaacs put it in the respondent's notice, the suggestion that there should be a further deduction to reflect the payments to the NCA has no logical foundation. We agree with the single judge that this ground of appeal is based upon a misunderstanding or misinterpretation of the judge's ruling and the eventual order. The order which was eventually made was correct, even if the phrasing of the original ruling might have been a little ambiguous. We refuse leave on this ground.

48. It follows that we refuse leave on all the grounds which Mr Krolick renews. That leaves the ground of appeal on which the single judge granted leave and is not contested.

The appeal

Costs of sale, Ground 5 (John), Ground 4 (Luke and David)

49. In his ruling on 8th February the judge said there was an issue as to whether the costs of sale should be deducted "at this stage". His view was there should be no deduction because it was possible there might be no sale. We note that in the prosecution's closing written submissions, Mr Issacs had suggested, at paragraph 54, that the cost of realising the sale of the properties was "speculative" and that the normal practice is that the costs of sale are administratively deducted from the available amount by varying the confiscation order after the properties are sold.

50. It is now common ground that the judge was inadvertently led into error. His attention was not drawn to the decision of this court in *R v Cramer (*1992) 13 Cr App R (S) 390. There it was held as a matter of principle that the costs of sale should be taken into account in determining the market value of a property. We observe that in that case the property had in fact been sold so there was no element of speculation as to what the costs might be.

51. Mr Isaacs now very properly concedes that the costs of sale should be deducted from the market value of each of the relevant properties in calculating the "available amount" and thus the "recoverable amount" for the purposes of the confiscation order.

52. Mr Krolick argues that the costs of sale should also be deducted from the value of the properties in calculating the *benefit figure*. In fact it makes no practical difference anyway. They will only be required to pay the "realisable amount". So provided the costs of sale are deducted from the realisable amount for each of them, no equivalent reduction in the benefit figure would affect the amount they are actually required to pay. In the cases of John and David Lowther the realisable amount is very significantly less than their benefit figure, by some £69,000. In the case of Luke Lowther the realisable amount (after deducting the costs of sale) is still more than £2,000 less than his benefit figure. The only situation in which it could make any difference is if an appellant were to come into new wealth in the future, enabling the Crown Court to review his "available amount" and increase the confiscation order up to the amount of his benefit figure.

53. Mr Krolick submits that s.79 POCA (Value: the basic rule) and s. 80 POCA (Value of property obtained by conduct) both state in terms that the value of property at any relevant time is the "market value" of the property. He submits that *Cramer* is of general application, and that whenever "market value" has to be assessed, the actual or prospective costs of sale must be deducted, as much in calculating "benefit" as in calculating "available amount."

54. As a general proposition we cannot accept Mr Krolick's argument, and the more so as applied to the present case. In *Cramer* there was no need to consider whether the costs of sale fell to be deducted from the benefit figure. The property had already been sold. The only issue was whether, in fixing the amount of the confiscation order, it was only the net proceeds of sale (rather than the gross figure) that should be included in the defendant's realisable assets.

55. Interestingly and in passing, we note from Mr Davidson's report that the deduction of costs of sale is suggested only in respect of the "realisable amount". It is also relevant to contrast the position in relation to properties such as Toad Hole Close, which had long since been sold and thus did not feature as part of the "available assets" still there to be sold if necessary in order to meet the confiscation order. In calculating the "benefit" resulting from the sale of such properties, for example 3 Toad Hole Close, the prosecution's s.16 statement quite properly identified only the "amount received" by John Lowther (£87,020). We note from Mr Davidson's report dated 31st January 2019, para 5.40, that the costs of sale had been deduced in arriving at the figure of £87,020.Thus the costs of sale were properly taken into account in respect of those properties in calculating the contribution they made to the benefit figure.

56. We are satisfied that the position is different in relation to properties still held, which will form part of the available assets. Mr Isaacs argued that there is clear authority to support the proposition that it is only against the realisable assets that there should be a deduction for the costs of sale. In *R v Pattison* [2007] EWCA Crim 1536; [2008] 1 Cr App R (S) 51 this Court was concerned with the valuation of a freehold property as part of the benefit obtained as a result of the defendant's criminal conduct. It was contended that in assessing the value of the property there should be deducted (inter alia) "…the legal and other expenses associated with its acquisition and its intended sale". The Court upheld on appeal the judge's conclusion that those expenses should not be deducted. Counsel for the defendant had referred the Court to various cases where the costs of realising a sale

of the property had been taken into account. At [16] Toulson LJ, giving the judgment of the Court, said:

> "Those are cases where the Court has been looking at the question of what are a defendant's realisable assets, rather than the question of what benefit he received. In considering what are a defendant's realisable assets, it may be relevant to take into account the costs inherently involved in the realisation of those assets, but the cost involved in their potential realisation has no relevance to the assessment of the original benefit received."

57. In addition to this clear authority on the point, we note the observations of the Supreme court in *R v Ahmad and Fields* (supra), at [61], in addressing the question of the value of the benefit received by a defendant who steals property:

> "…the court takes the market value of the property because that is the value of what the thief has misappropriated, viz <u>what it would cost anyone to acquire it on the open market…</u>" [emphasis added]

In other words, at the benefit stage the market value of the property is what someone would be prepared to pay for it, not the net proceeds of sale which the defendant would obtain from its sale.

58. To similar effect, in *R v Islam* [2009] UKHL 30; [2010] 1 Cr App R (S) 42, in a confiscation case where the Supreme Court was considering the valuation of vast quantities of imported heroin, the distinction was recognised between the value of the consignment of heroin at the time the defendant received it (which was the black market value of the drugs at that time) and the value of the same drugs when it came to assessing his realisable assets (at which stage it could not be said that the drugs had in any legitimate market value). Speaking of the former, it was said by Lord Mance SCJ at [35]:

> "The assessment under s.80(2) (a) of the benefit consisting of the market value of property obtained looks simply at the objective value of the property if put up for sale on the market. Here that means (under s.80(2)(a)) at the time when the defendant obtained it, i.e. at the moment of importation…".

59. Accordingly, we are satisfied that in the present case the costs of sale of the properties included in the benefit figure fall to be deducted <u>only</u> against the appellants' realisable assets in calculating the available amount (and thus the recoverable amount for the purpose of fixing the amount of the confiscation order). The potential costs of sale of those properties are not to be included in the benefit figure. This is consistent with the objective of the Act, which is to ensure that the sum required to be paid in satisfaction of a confiscation order is no more than the amount of the defendant's realisable assets. If a property has to be sold, then it is only the net proceeds of sale which are available to meet the confiscation order. That was essentially all that was decided in *Cramer* (supra).

<u>Disposal</u>

60. On the basis of the agreed figures provided by the Appellants' solicitors, the total costs of sale of the properties forming part of their respective realisable assets are as follows: for John Lowther, **£3,759.12**; for Luke Lowther, **5,573.04**; for David Lowther, **£4,795.47**.

61. The consequence is that the confiscation orders fall to be reduced by those amounts. The order against John Lowther is reduced to **£194,443.29**. The order against Luke Lowther is reduced to **£164,967.73.** The order against David Lowther is reduced to **£178,963.59.**

62. We therefore allow the appeals of each appellant to that limited extent. We quash the confiscation orders made by the Crown Court on 10th May 2019 and we substitute confiscation orders in the sums just mentioned.

Footnote

Counts 1 and 2, credit for compensation orders paid and joint benefit

63. There is one final matter. It relates pricipally to count 1, where the judge found that each of the three appellants had obtained the sum of £29,500 from the Horobins jointly, and that their respective benefit figures must therefore each include that full amount of £29,500. The same was true of the sum of £1,500, as between Luke Lowther and David Lowther, which they obtained jointly from Garry Longdon in respect of count 2. It was conceded that this full amount of £1,500 must be included in the benefit figure for each of those two appellants.

64. It was common ground that out of the funds recovered by the confiscation orders there should be compensation paid to the Horobins in the sum of £29,500 and to Garry Longdon in the sum of £1,500. At the conclusion of the final hearing of the confiscation proceedings on 10th May 2019, at page 9G-16B, the judge was addressed by all counsel in relation to the practicalities of achieving this, including apportionment. There was an extended discussion at the end of which agreement seemed to have been reached. All that was left was for the Crown Court to draw up the orders, with the assistance of drafts provided by Mr Isaacs, and for the judge to approve the orders.

65. In the event, compensation was apportioned between the appellants as follows in the orders approved by the judge:

John Lowther: £14,500, presumably representing one-half of the £29,000 physically received by himself and David Lowther jointly from the Horobins (count 1).

Luke Lowther: £1,250, presumably representing the £500 he physically received himself from the Horobins, (count 1) plus £750 representing one-half of the £1,500 obtained by himself and David Lowther jointly from Garry Longdon (count 2).

David Lowther: £15,250, presumably representing one-half of the £29,000 physically received by himself and John Lowther jointly from the Horobins (count 1), plus one-half of the £1,500 obtained by himself and Luke Lowther jointly from Garry Longdon.

66. We should make it clear that Mr Isaacs does not accept that this apportionment was necessarily appropriate, but it has not been challenged by the prosecution on appeal. He

would have argued, no doubt, that the £29,500 compensation in favour of the Horobins should have been apportioned equally between the three appellants. It was, however, a matter for the judge's general discretion to decide on the appropriate apportionment of the compensation.

67. The confiscation order for each appellant dealt in the same way with the payment of compensation out of funds recovered by the confiscation order. Taking the order for John Lowther as an example, the confiscation order stated (at the foot of the first page):

> "The defendant is ordered to pay £198,202.41 of which part, namely £14,500 is to be paid as compensation according to the compensation order that is sent to the Regional Confiscation Unit with this order."

68. Mr Krolick has invited us to direct, in effect by way of appeal against the judge's confiscation orders, that there should also be a provision in each confiscation order to ensure that the sum of £29,500 (arising from count 1) forming part of the benefit figure for each appellant should not be paid more than once. The same would presumably apply to the sum of £1,500 as between Luke Lowther and David Lowther (arising from count 2).

69. In support of this proposition, Mr Krolick relies upon the following passage in the judgment of the Supreme Court in *R v Ahmad and Fields*, at [74] – [75]:

> "74. Accordingly, where a finding of joint obtaining is made, whether against a single descendant or more than one, the confiscation order should be made for the whole value of the benefit obtained, but should provide that it is not to be enforced to the extent that a sum has been recovered by way of satisfaction of another confiscation order made in relation to the same joint benefit. A subsequent confiscation order made against a later-tried defendant in relation to the same benefit may well be such an order. In theory a court might therefore need to consider whether to stay the enforcement of a confiscation order made against one or more defendants to await the outcome of a later criminal trial against other defendants in respect of the same criminal conspiracy. However, except perhaps when a second trial is imminent this would not normally be appropriate bearing in mind the purpose of the 2002 Act and the statutory stipulation for a speedy hearing… Orders made on the basis of lifestyle assumptions will require special consideration on their facts [emphasis added]
>
> 75. This conclusion is in line with the outcome in the case of *R v Gangar* [2012 [EWCA] Crim 1378; [2013] 1 WLR 147, although it is based on slightly different reasoning. In that case the Court of Appeal held that, when assessing the "available amount" the court must recognise that the same asset cannot be sold and converted to cash twice. Once the solution now propounded is adopted, the confiscation order will be for the full

> amount obtained by the conspirators against each defendant, but its enforcement more than once will be prevented."

70. We agree that, as a matter of principle, it is quite correct that in the present case there must not be enforcement more than once of that part of the confiscation order against any of the appellants which unequivocally represents all or part of the confiscation order which is referable to the joint benefit found by the judge, and which has already been paid by another appellant.

71. However, the situation is complicated in the present case by the fact that for each appellant this was a "criminal lifestyle" case, in which the benefit figure comprised not only the benefit from their "particular criminal conduct" arising from specific counts on the indictment (i.e. £29,500 in count 1, £1,500 in count 2) but also significant additional benefit from their "general criminal conduct" arising from the assumptions in section 10 of the 2002 Act which they had failed to displace. We have no doubt that this situation is a good example of the reason for the qualification in the final sentence of paragraph 74 in *R v Ahmad and Fields*, highlighted above.

72. To illustrate the point, take John Lowther's case. After deducting from his realisable assets the costs of sale of properties still held by him at the date of the hearing (in accordance with this judgment) the figure for his realisable assets is now £194,443.29. That is the revised amount of his confiscation order. However, his benefit figure is still £263,719. 40 The difference is some £69,000. If he pays the whole of the confiscation order, the amount of the unrecovered benefit from his general criminal conduct, some £69,000, is way in excess of the £29,500 forming part of his benefit figure. Thus it is unnecessary for there to be any restriction on the enforcement of his confiscation order up to the full figure of £194,443.29. That sum does not touch upon the £29,500 contained in his full benefit figure which he does not have the realisable assets to pay. There can be no presumption in logic or in law that the sum of £29,500, represented by the joint benefit, is deemed to be the figure paid first in the confiscation order where the realisable assets fall short of the full benefit figure.

73. Similarly, in the case of David Lowther the figure for his realisable assets is now £178,963.59 (after deducting costs of sale in accordance with this judgment). That is the amount of his confiscation order. However, his benefit figure is still £248,869.41. The difference again is some £69,000. If he pays the whole of the confiscation order up to the full figure of £178,963.59, the amount of the unrecovered benefit from his general criminal conduct, some £69,000, is way in excess of the £29,500 (count 1) and £1,500 (count 2) forming part of his benefit figure. Thus again it is unnecessary for there to be any restriction on the enforcement of his confiscation order up to the full figure of £178,963.59. That sum does not touch upon the £31,000 contained in his full benefit figure which he does not have the realisable assets to pay.

74. The only situation in which it might become necessary to examine the position further and give credit to one of these two brothers for the payment by the other of the amount of their joint benefit, would be if one or other of them came into unexpected wealth in the future (such as a win on the National Lottery all the Football Pools) such that his confiscation order could be increased in line with his then greater available assets. In that

event the matter would have to come back to the Crown Court, pursuant to section 22 of the 2002 Act. That would be the appropriate stage at which to re-examine, if necessary, the extent to which the ensuing increase in the confiscation order (up to the full amount of his benefit figure) might have to be adjusted in accordance with the principle in *R v Ahmad and Fields* in order to prevent double recovery.

75. We do not consider it appropriate to attempt to address, by some provision in the confiscation orders, this somewhat remote possibility. Such a provision might well serve only to confuse for the time being. The position of John Lowther and David Lowther in relation to compensation is already adequately covered by the Crown Court orders as drawn and approved by the judge. The provision in those orders which we have quoted at [67] above deals only with the disposition of the monies realised under the confiscation order; it does not affect the liability to pay the amount of the confiscation order in full.

76. The position of Luke Lowther is, superficially at least, somewhat different. The figure for his realisable assets is now £164,967.73 (after deducting costs of sale in accordance with this judgment). That is the amount of his confiscation order. However, his benefit figure is still £172,722.50. That is a difference of only some £6,000. If he pays the whole of the confiscation order up to the full figure of £164,967.73, the amount of unrecovered benefit from his general criminal conduct, some £6,000, is less than the £31,000 (£29,500 plus £1,500) forming part of his benefit figure. It follows that if it could be demonstrated that some or all of that £31,000 had already been paid by John Lowther and/or David Lowther as part of the payment of their confiscation order, it would be wrong to enforce the confiscation order against Luke Lowther to that extent, in order to avoid the double recovery precluded by *R v Ahmad and Fields*.

77. However, that entitlement to credit for payment by John Lowther and/or David Lowther would only arise if it could be demonstrated that they had in fact paid the relevant part of the benefit figure comprising joint benefit. In other words, for the reasons we have already explained in their cases, Luke Lowther would only be at risk of overpayment through double recovery of the kind envisaged in *R v Ahmad and Fields* if there had been a substantial increase in the realisable assets of John Lowther and/or David Lowther, resulting in an increase in their confiscation order(s), pursuant to section 22 of the 2002 Act, and if in consequence they had paid all or part of the £31,000 forming part of the benefit they obtained jointly with Luke Lowther.

78. Again, we do not consider it appropriate to attempt to address this even more convoluted hypothetical situation by some form of words in Luke Lowther's confiscation order, which might well serve only to confuse for the time being. It will be sufficiently clear from the terms of this judgment that care will have to be taken by the prosecution, and by the Regional Confiscation Unit, to ensure that in his case too any risk of prohibited double recovery is avoided.

79. We are also satisfied that the orders, as drawn, deal perfectly adequately with the interrelation between compensation and confiscation and need no alteration, save for the reduction in the amount of the confiscation order in each case for the deduction of costs of sale from the available assets, in accordance with this judgment.

80. We have had to deal with these issue at length in this footnote because the parties were unable to agree the appropriate course to be taken to observe the principle in *R v Ahmad and Fields*, mindful of the last sentence of paragraph 74 in the judgment of the Supreme Court in that case. We should record that we heard no full argument on these matters at the hearing of the appeal.

81. In his original grounds of appeal for each appellant, dated 30th May 2019, Mr Krolick had included an addendum querying whether the final form of the Crown Court's confiscation orders (which he had not then seen) met with the requirements in *R v Ahmad and Fields*; if they did not, and if any application under the slip rule had been unsuccessful, Mr Krolick said in the addendum that "… it will be necessary to add the omission as an additional ground of appeal." No such additional ground was ever formulated or pursued.

82. When Mr Krolick finally saw the confiscation orders issued by the Crown Court, he said in a letter to the Registrar dated 20 March 2020 (dealing principally with how the single judge's direction to the parties to agree a draft order should be pursued), that he now assumed that any application under the slip rule (which he described as "rectification") had been refused, although he would need more information from his instructing solicitors. This letter concluded by saying that, if the prosecution agreed, he would want this Court to direct rectification, "… otherwise I will be driven to ask for permission to appeal on this additional ground." Again, no such additional ground was formulated in writing or the subject of an application to amend the grounds out of time after the decision of the single judge.

83. It was only on 5th October, the day before the hearing of the appeal, when the Court requested from both parties an explanation of the latest position on agreeing the order for deducting costs of sale (as directed by the single judge), that Mr Krolick raised again the point mentioned in his proposed additional ground, saying that this was one of three issues relating to the draft order which the Court would be asked to consider. No ground of appeal was formulated in writing, as would be required, despite the passage of over 16 months since the proposed additional ground was first trailed. This is far from satisfactory.

84. The point was the subject of further written submissions, following the circulation of the Court's draft judgment. We then gave directions in the hope that agreement could be reached between the parties on an appropriate form of wording for inclusion in the confiscation orders (should it be necessary). The parties were again unable to reach agreement. We have therefore had to deal with the matter at considerable length in this postscript.

85. For the avoidance of doubt, we do not consider that the point was ever properly raised as a ground of appeal in accordance with the Criminal Procedure Rules and the judgment of this Court in *R v James* [2018] EWCA Crim 285; [2018] 1 Cr. App. R. 33. If it was, we in any event refuse the necessary extension of time and refuse leave.

Directions

86. It will be necessary for the Crown Court to amend the figures in the confiscation orders for each of the three appellants to reduce the sums ordered to the figures set out at [61] above as the agreed sums for costs of sale in accordance with our judgment. This will also necessitate appropriate amendments to the figures for the value of the properties in question in the schedule of assets comprising the "available amount" attached to each confiscation order. We ask that Mr Isaacs, and his solicitors, liaise with the Crown Court in order to make the necessary amendments and revisions so that fresh confiscation orders can be issued reflecting the agreed adjustments as set out in this judgment and in the order on appeal which will be issued by this Court.