



Neutral Citation Number: [2024] EWHC 1091 (Admin)

Case No: AC-2023-LON-001078

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2024

Before:

MR JUSTICE FREEDMAN

Between:

PRADIP DAYA (AKA PRADIP CHAVDA)

Applicant

- and -

CROWN PROSECUTION SERVICE

Respondent

Christopher Sykes (instructed by Rosenblatt Law) for the Applicant

Michael Newbold (instructed by Crown Prosecution Service) for the Respondent

Hearing date: 17 April 2024

Judgment sent out in draft: 2 May 2024

Approved Judgment

This judgment was handed down remotely at 2.00pm on 8 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FREEDMAN:

I Introduction

1. This is an application on behalf of the Applicant Pradip Daya for a Certificate of Inadequacy. He claims that his circumstances are such that he no longer has assets with which to pay the balance outstanding in respect of a confiscation order comprising a sum of in excess of £2,000,000 together with interest of a sum in excess of the principal sum.
2. The application is supported by evidence, namely witness statements of the Applicant dated 11 July 2023 and 18 March 2024. It is opposed by the Crown Prosecution Service who rely on a witness statement of Portia Ragnauth dated 16 January 2024.
3. The Applicant was tendered for cross-examination, and he gave evidence. Portia Ragnauth was not tendered for cross-examination, and there was no application for cross-examination. The evidence of Portia Ragnauth is not controversial, but served only to produce documents. Among the documents which have been produced are documents of DC Duckett who has not produced a statement for this application, and so any statements of his are admissible, but hearsay and to be given reduced weight insofar as there may be any issues in respect of them.

II Background

4. The Applicant was convicted following a trial by jury before the Crown Court at Southwark on 29 June 2007 in respect of offences of fraudulent trading, obtaining money transfers by deception, and money laundering. He was sentenced to 3 years 10 months imprisonment. The offences related to fraudulent property investment schemes.
5. Confiscation proceedings followed pursuant to the Criminal Justice Act 1998 (“the CJA”). There was a note of agreement between the parties dated 9 September 2008, and signed by counsel. A benefit figure was agreed of £2,787,525, less realisable assets of a sum of £619,763.85. A large part of the benefit figure comprised the value of the offences on the indictment and cheque and cash transfers and deposits. No admission was made by the Applicant in respect of any other asset.
6. The Crown Court was satisfied that the Applicant had other, unidentified assets valued at £2,109,761.15 enabling him to pay the balance of the order.
7. The Applicant did not give evidence before the Crown Court. The prosecution submitted that there were undisclosed assets based on the business transactions through the course of the trial and the volumes of evidence produced by the prosecution. From the agreed benefit figure the judge deducted living expenses of £58,000 and made a confiscation order in the sum of £2,729,525.
8. HHJ McMullen QC addressed the issue in his judgment as follows:

“In the absence of evidence from the defendant, I start with the approach of Mr Duckett, who invites me on the material which he

has put before me to take the view that there are undisclosed assets. I pay attention to what I have learnt about the business transactions of the defendant through the course of the trial, and through the volumes of evidence which have been produced to me by Mr Duckett. I have no difficulty in making the assumption and making the finding, which I do, from all I know in this case, that the defendant has hidden assets, which together with the known assets make a figure of £2,797,525, but I acknowledge, as Mr Duckett does, that the defendant has had to make use of some of that in respect of his living expenses, for which the figure is roughly £58,000. So, the benefit figure exceeds the realisable assets figure, known and unknown, and the figure for those latter assets is £2,729,525.”

9. Reference to DC Duckett’s approach must have been to that part of his statement dealing with ‘hidden assets’, in which he identified that the Applicant had withdrawn £247,733.10 in cash from identified accounts during the relevant period. Further, that £278,802.32 in investor funds had been transferred to the Applicant’s wife’s account in 2001 – 2002, and that much of that was then transferred to offshore accounts in Switzerland and Guernsey. £491,169.10 had therefore been identified as being transferred out of known accounts and remained unaccounted for. “Numerous others” had invested in the Applicant’s projects and did not recover their investments.
10. When addressing the question of time for payment, HHJ McMullen QC further noted that:

“I have also paid attention to the background to this case, which as I have indicated includes a very substantial overseas activity by the defendant, substantial business contacts, substantial social and family contacts, and all of the circumstances of the case.”
11. On 9 September 2008, the Crown Court at Southwark (HHJ McMullen QC) made a confiscation order against the Applicant in the following terms:
 - (i) his benefit from criminal conduct was found to be £2,787,525;
 - (ii) his realisable amount was found to be £2,729,525;
 - (iii) the order was to be paid within a period of 4 months;
 - (iv) in default, a period of 6 years imprisonment was to be served. The six-year default sentence was activated on 16 February 2009. The applicant was released from his default sentence on 16 December 2011.

12. The Court made a compensation order requiring payment of £410,035.18, to be paid from monies recovered by way of the confiscation order.
13. The confiscation order related to identified assets in the form of:
 - (i) a property at 1 Ridding Lane, Greenford, valued at £154,700;
 - (ii) a property at 31 – 32 Church Street, Wellingborough, valued at £465,000;
 - (iii) the balance of an Abbey account, £13.85.
14. Following the making of the confiscation order, a third party successfully asserted his ownership of the property at 31 – 32 Church Street. The Court of Appeal allowed an appeal by the Applicant on 15 July 2011 by reference to this information relating to the third party's ownership and reduced the amount to be paid pursuant to the confiscation order to £2,264,525.00. In addition to this, the Applicant sought permission of the Court of Appeal to challenge the unidentified assets finding on the grounds that he did not have proper and competent representation by his solicitors at the original confiscation proceedings. Leave was refused. It therefore follows that the unidentified assets finding has not been challenged on appeal, save for the unsuccessful application for permission to appeal.
15. Of the sum ordered to be paid, the Applicant has now paid £132,596.82. The balance of £2,131,928.18 together with accrued interest remains outstanding. Due to the passage of so many years, the amount of interest exceeds the original balance. Interest has accrued at a rate of 8% per annum and is not compounded. The sum for interest referred to at paragraph 3 of the submissions of the Applicant is a sum of £2,473,210.10. Interest is accruing at £467.63 per day.

III Evidence of the Applicant

16. The Applicant did not give any evidence as to the finding of the unidentified assets and said that he understood that the Crown Court's finding could not be relitigated. He did at one point say that he had conceded the position under duress, but he did not give any evidence as to what the true position was, albeit that he made no admissions. It is accepted on his behalf that he is unable in these proceedings to challenge the finding of the Crown Court and that his only recourse would have been by way of appeal. As indicated, his application for permission to appeal as regards his legal representation was refused. The Applicant gave evidence of his employment history, being employed by Blue Sky between 2013-2016 and receiving a sum of £85 per week for 18 weeks of work. He was then employed between 2016-2019 as a fleet cleaner on refuse trucks, lorries and large vehicles, as a result of which his health suffered. He was paid between about £1,500-1,900 per month.
17. During the pandemic, he became involved with the PPE business and worked as a salesman. He earned some income acting as a purchaser of PPE for others. He received credits, which he said were loans and not windfalls. The Applicant has declared weekly income of £420 in connection with his declarations with the magistrates court arising

out of the unpaid confiscation order. He says that he has no assets. He has been making weekly payments of £50. He has attended at least 45 magistrates court hearings for enforcement.

18. His health has declined. In this regard he has provided evidence about dermatological illness in 2018 to 2019 and in 2022 and 2023; about PTSD and depression in 2021 and 2023; and about asthma and Type 2 diabetes in 2022. Further explanation about his personal circumstances has been provided by his former wife, his younger brother and a Hindu priest. He gave evidence about the breakdown of his marriage and the fact that his children no longer have a relationship with him. He is close to family in Zambia, but he is unable to visit them. In the course of his oral evidence, he gave an emotional account as to how he believed that the legal process and the continuation of the confiscation order over so many years was crushing him.
19. The Applicant has stated that his recollection is limited by the passage of years and the impact of worsening issues on mental health. He indicates that he has been open in relation to his assets and has provided documents to the police. He says that a large percentage of the transactions are loans from friends and family and his repayments. He has provided a bank account reconciliation, providing details over a six-year period between June 2017 and June 2023. He says that he is now *'destitute and reliant on support from family and friends to have even the most basic quality of life. I own no car or home and have a basic lifestyle... I am impecunious'*. He says that the order is hanging over him and has seriously harmed his mental health. He does not have assets or income to pay the sums owing and requests a Certificate of Inadequacy so he can *'regain some normality in my life'*.
20. This judgment shall return later to cross-examination of the Applicant in relation to his assets.

IV The four submissions of the Applicant

21. The Applicant submits the following:
 - (i) He could only begin reducing the amount payable under the order if he was already discharging the current amount of interest accruing of about £150,000 per annum (8% per annum of the principal sum of in excess of £2.1 million). Even if growth from interest could be paused, and even if the applicant had a disposable income of £150,000 per annum, payment of the order would take around 30 years, which is just over £4.6 million divided by £150,000. In 30 years' time he would be 94 years of age.
 - (ii) He concedes that he cannot demonstrate his hidden assets are inadequate to pay the Order. Whatever his reasons for remaining silent at the confiscation stage, he is unable to identify any hidden assets or to identify any value which they may have. It seems to him that he is now trapped by the system because he is unable to say or do anything and faces the prospect of having the order against him forever.

(iii) Notwithstanding that concession, he is unable to pay £150,000 per annum. He has identified his very limited assets and resources. He says that his assets are chaotic, he has identified how he has been in overdraft, and he has no prospect of paying the amounts due to the sums which have grown in amount. He says that even if he had hidden assets, he does not have resources to pay the vast amount of interest that has now accrued.

(iv) It is just and proportionate to grant a Certificate of Inadequacy. The Court ought to exercise a discretion to decide that it is not just and proportionate to continue the order. By reference to the argument run by the Applicant in *Glaves* at para. 51, the logic of the case for the Respondent should be tempered by the injustice of the position in the event that there is no Certificate of Inadequacy. It is submitted that it is unrealistic to argue that it remains a necessary means of compelling the Applicant to surrender over £2 million that has somehow stayed hidden for almost 16 years. In contrast, the Order has undeniably become ever more crushing. Even if this submission is wrong, and even if he surrendered the assets, he would be left with some £2.5 million of interest to repay and no means of doing so.

V Relevant law

22. The application is made pursuant to the provisions in Part VI of the Criminal Justice Act 1988 ('CJA'). Although now repealed, transitional provisions preserve the CJA in respect of cases where the underlying offence (or any of the offences) was committed before 24 March 2003 (Proceeds of Crime Act 2002 (Commencement No.5, Transitional Provisions, Savings and Amendment) Order 2003/333, articles 3 and 10).
23. The earliest of the counts in respect of which the Applicant was convicted related to the period between 1 January 2003 and 31 December 2003. That the confiscation order was made under the CJA was confirmed at the confiscation hearing.
24. Section 83 CJA provides (to the extent relevant):

“(1) If, on an application made in respect of a confiscation order—

(a) by the defendant;

...

the High Court is satisfied that the realisable property is inadequate for the payment of any amount remaining to be recovered under the order the court shall issue a certificate to that effect, giving the court's reasons.

(2) ...

(3) Where a certificate has been issued under subsection (1) above, the person who applied for it may apply—

(a) *where the confiscation order was made by the Crown Court, to that court;*

...

for the amount to be recovered under the order to be reduced.

(4) *The Crown Court shall, on an application under subsection (3) above—*

(a) *substitute for the amount to be recovered under the order such lesser amount as the court thinks just in all the circumstances of the case; and*

(b) *substitute for the term of imprisonment or of detention fixed under section 139 of the Powers of Criminal Courts (Sentencing) Act 2000 in respect of the amount to be recovered under the order a shorter term determined in accordance with that section in respect of the lesser amount...*

25. “Realisable property” is defined in section 74 CJA:

“(1) *In this Part of this Act, “realisable property” means, subject to subsection (2) below—*

(a) *any property held by the defendant; and*

(b) *any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Part of this Act.”*

26. Section 83 CJA therefore provides for a two-stage process. This Court must first determine whether an inadequacy exists. If it does, a certificate is issued, and the Crown Court can then determine the extent to which the underlying confiscation order should be varied.

27. The approach to be adopted by this Court on an application for a Certificate of Inadequacy has been considered in a number of authorities. They were reviewed by the Court of Appeal in *Glaves v CPS* [2011] EWCA Civ 69.

28. At paras. 18 – 19, Toulson LJ summarised the approach as follows:

“[18] ... *The general principles were succinctly summarised by Mr David Holgate QC, sitting as a Deputy High Court Judge, in B [2008] EWHC 3217 at para 74:*

(1) *The burden lies on the applicant to prove, on the balance of probabilities, that his realisable property is inadequate for the payment of the confiscation order (see Re O’Donoghue [2004] EWCA Civ 1800, per Laws LJ at para 3).*

- (2) *The reference to realisable property must be to “whatever are his realisable assets as a whole at the time he applies for the Certificate of Inadequacy. If they include assets he did not have when the confiscation order was made, that is by no means a reason for leaving such fresh assets out of consideration” (Ibid and see also Re Phillips [2006] EWHC 623 (Admin)*
- (3) *A s83 application cannot be used to go behind a finding made at the confiscation hearing or embodied in the confiscation order as to the amount of the defendant's realisable assets. Such a finding can only be challenged by way of an appeal against the confiscation order. (See Gokal v Serious Fraud Office [2001] EWCA Civ 368 , per Keene LJ at paras 17 and 24).*
- (4) *It is insufficient for a defendant to say under section 83 “that his assets are inadequate to meet the confiscation order, unless at the same time he condescends to demonstrate what has happened since the making of the order to realisable property found by the judge to have existed when the order was made”. (See Gokal para 24 and Re O'Donoghue at para 3).*
- (5) *The confiscation hearing provided an opportunity for the defendant to show that his realisable property was worth less than the prosecution alleged. It also enabled the defendant to identify any specific assets which he contended should be treated as the only realisable property. The section 83 procedure, however, is intended to be used only where there has been a genuine change in the defendant's financial circumstances. It is a safety net intended to provide for post-confiscation order events. (See McKinsley v Crown Prosecution Service [2006] EWCA Civ 1092 per Scott Baker LJ at paras 9, 21- 24, 31 and 35).*
- (6) *A Section 83 application is not to be used as a “second bite of the cherry”. It is not an opportunity to adduce evidence or to present arguments which could have been put before the Crown Court judge at the confiscation hearing (para 38 of Gokal and paras 23, 24 and 37 of McKinsley).*

[19] It is important to emphasise that this is a helpful summary of general principles developed by the courts in order to fulfil the purpose of the statutory scheme in a way that does justice, but that the underlying objective is critical. It will be necessary to examine more closely the fourth proposition, and the case of O'Donoghue, when looking at the issues in the present case,

bearing in mind that such propositions, however eminent their source, are not to be equated with statutory rules.”

29. The Court of Appeal in *Glaves* concluded that a finding of ‘hidden assets’ (itself a non-statutory term, see paras.12 - 14 of the judgment) did not operate as an absolute bar to the granting of a Certificate of Inadequacy. At paras. 52 and 54-56 (emphasis added), the Court held:

“52. The starting point for considering any application for a Certificate of Inadequacy is the confiscation order itself. Since the burden of proof at the time of the making of a confiscation order is on the defendant to show that his available assets are less than the benefit figure, it follows that there may be cases in which a confiscation order is properly made in a larger sum than the defendant is in truth able to pay, and this may result in him having to serve a period of imprisonment in default for failing to pay what he cannot pay. It may be that the defendant has been dishonest or cavalier in his evidence or it may be that, although truthful, he has not been able to produce evidence sufficient to discharge the burden of proof which rests on him. In the case of money which has gone through a bank account in modest amounts over the course of time, and for which he is not kept detailed records, he may be unable to give more than a generalised explanation.

...

54. At the stage of an application for a Certificate of Inadequacy, the burden of proof is again on the defendant. He is unlikely to succeed unless the court is satisfied that he is being candid, and an application for a Certificate of Inadequacy is not intended to be a means of the defendant having a second bite at the same cherry. Those principles are clearly established. However, a rule of law which said that the court could not be persuaded that the defendant was unable to pay the outstanding amount by reason of a worsening of his financial circumstances unless he gave full disclosure of what had happened in the meantime to all his assets, including previously unidentified assets, would trammel the width of s83 by imposing a restriction which is not in the statute. It would also be capable of causing not merely hardship but hardship amounting to injustice.

55. In the case of previously unidentified assets, it is possible that a defendant may genuinely have no idea or only a dim recollection what had originally happened to them. He should be allowed to try to persuade the court, if this be the case, that his identified assets have shrunk in value and that as a result he is not able to pay the amount outstanding. What the court makes of that evidence will be a matter for its judgment. Much

will no doubt depend on the nature of the case. Cases involving unidentified assets can vary greatly. The case of an international drug dealer with evidence of a lavish lifestyle, ready access to large sums of cash and connections with a web of offshore companies and bank accounts, may merit different treatment from the case of a defendant whose apparent circumstances and amount of unaccounted for assets are much more modest. It is for the court to consider the totality of the evidence before concluding whether it accepts that the defendant has suffered a change of fortune such that he is probably not able to pay the balance of the outstanding money. If the defendant is not permitted the opportunity of trying to establish this, there is a real risk that even though he can demonstrate a change in his circumstances, possibly very great, he may serve an additional period of imprisonment through failure to do that which is impossible by reason of his change of circumstances.

56. ...[T]he statutory scheme for confiscating the proceeds of crime is intended to be draconian. So it is, but in administering the scheme it is right that the courts should keep a sense of justice and proportion, bearing in mind the essential purpose of the scheme, which is not to punish a defendant a second time for conduct for which he will have been sentenced but to deprive him of the benefit of his criminal conduct.” (Emphasis added)

30. The issue on the facts of *Glaves* bears examination because it is very different from the facts of the instant case. In *Glaves* the confiscation order was a sum of about £140,000. It returned to the court when there was a shortfall of about £58,000 of which a sum of about £22,000 comprised unidentified assets. The court was not entitled to go behind the finding of unidentified assets. Nonetheless, the court considered what level of evidence was required for a Certificate of Inadequacy in respect of these remaining sums and bearing in mind that Mr Glaves could not account for unidentified assets which comprised just over a third of the remaining shortfall.
31. The first proposition quoted by Mr Holgate QC and referred to by Toulson LJ in *Glaves* cited the case of *Re O’Donoghue*. Before this court, counsel has identified what they regarded as a difference of emphasis between the judgments of Laws LJ and Pill LJ in *Re O’Donoghue*. It is worth citing the relevant paragraphs. In the judgment of Laws LJ in paragraph [3], he said the following:

“Where a defendant has been in possession of an asset, such as the £35,500.00 here, the question obviously arises what he has done with it and whether, as might in the ordinary way be the case, interest or “other fruits” as the judge put it, have been obtained in respect of it. In that case, if the defendant is simply silent as to what has happened to the asset, the court on a section 83 application is liable to find that he has not satisfied the section’s requirements and accordingly is not entitled to a

Certificate of Inadequacy. Whether that conclusion is arrived at or not will obviously depend on the court's appreciation of all the evidence.”

32. In the Judgment of Pill LJ at [18], he said the following:

“The judge has a fact-finding exercise to conduct under section 83(1) of the Criminal Justice Act 1988. He has to assess the current value of realisable assets as a whole. All I would add, whilst expressing full agreement with what My Lord has said, is that the judge needs to keep a sense of proportion in conducting that exercise, however dishonest or uncooperative a defendant may have been with respect to what has been found to be one or more of his realisable assets. There could be cases where, on an overall view, it would be open to the judge to hold that the value was on balance of probability inadequate within the meaning of the section, even if the defendant has declined to condescend to give an explanation with respect to every single asset.”

33. There is no contradiction between the two. Pill LJ expressed full agreement with Laws LJ. Laws LJ was referring to a case where a defendant was silent as to what had happened to the asset such that the court was not able to be satisfied that the section’s requirements had been fulfilled. Pill LJ referred to a sense of proportion for a defendant who did not give an explanation with regard to ‘every single asset’ of ‘his realisable assets’. In other words, it might be that there is sufficient evidence where some evidence is given, and the Court takes an overall view that on the balance of probability the value was inadequate, even if the defendant has not given evidence about every single asset. This is to be contrasted to a person who has given no evidence about the unidentified assets or what has happened to any of them subsequent to the confiscation order such as to give rise to the alleged inadequacy.

34. Reference was made to *Price v CPS* [2016] EWHC 455 (Admin) (Mr Justice Garnham). That case involved the drug trafficking of a vast amount of cocaine and a sentence reduced on appeal of 25 years. The benefit derived from drug trafficking was in excess of £2.3 million and there was a default sentence of 10 years. Garnham J drew four conclusions from the analysis of previous decisions at paragraph [34]:

“34. I draw the following four conclusions from the analysis of the Court of Appeal in these two cases [O’Donoghue and Glaves]:

(i) The principles enumerated by Mr Holgate in B provide a convenient starting point for the Court's consideration of a s17 application; those principles are not, however, to be construed as if they were statutory rules;

(ii) The statute contemplates that there will be cases when it will be possible for an applicant to establish that a confiscation order was properly made against him in a larger sum than in truth he is able to pay;

(iii) The burden of proof will be on him, but an applicant is entitled to try to persuade the court that his identified assets have diminished in value and that as a result he is not able to pay the amount outstanding; he is entitled to attempt that task even in circumstances where he cannot provide full disclosure of what had happened to all his assets, including previously unidentified assets; and

(v) It is a matter for the judgment of the court, on the facts of an individual case, whether the applicant has made out such a case; in reaching that judgment the court must maintain a sense of proportion, however dishonest a defendant may have been about his assets.

35. At paragraph 41 Garnham J said that no appeal to a sense of justice or proportion can entitle the Applicant to challenge the Judge's findings at a confiscation hearing where those findings have been upheld at the Court of Appeal. In that case the court was not persuaded by submissions to the effect that the Applicant had every incentive to pay the outstanding sum if he were able and that the court could conclude that he was not able to do so. The problem was that the Applicant had failed completely to explain how his circumstances had changed since the finding of unidentified assets in the past. At para. 54 Garnham J said the following:

“54. In order to satisfy me, on the facts of this particular case, that the realisable property is inadequate to meet the confiscation order, the Applicant would have needed to provide an honest account of what profit he had made from his past criminal activities in the drug trade, precisely what he had done to earn those sums, where he had hidden those profits, what had become of all the monies he had acquired, and where the monies remaining are now kept. He has attempted to do none of those things. Instead, he has blandly ignored all the evidence that he had made substantial sums from the illegal trade in drugs in the past and has resorted to mere assertion that he is not in a position to meet the confiscation sum. That is plainly inadequate to discharge the burden on him.”

36. The Court was also referred to the case of *O'Connor v CPS* [2021] EWHC 2900 (Admin) (Lang J). In that case there was a principal sum of over £4 million and interest in addition to that of a sum of over £4.6 million. There was no attempt to explain what had happened to the hidden assets, nor where the benefit which the applicant derived from the fraud had gone. Lang J held at paras. 65 - 66 that:

“65. *The Applicant has not attempted to explain what has happened to the hidden assets, nor where the £4 million benefit which he derived from his fraud has gone. In truth, by submitting that there are no hidden assets (see paragraphs 68 and 70 of his statement), he is asking me to set aside the Crown Court's finding that he had hidden assets, and that his realisable property was equal to the benefit figure. However, I cannot go behind the terms of the confiscation order, and there is no new evidence before me to demonstrate that the hidden assets have depreciated in value or are no longer available to him.*

66. *Therefore, I conclude that the Applicant has failed to prove, on the balance of probabilities, that his realisable property is inadequate for the payment of the confiscation order, and so his application is dismissed.”*

37. This approach has not been modified by the decision of the Supreme Court in *Regina v Waya* [2013] 1 AC 294. The Supreme Court acknowledged in that case (at para. 24) that considerations of proportionality did not grant a general discretion to the Court which had been removed by statute. Nothing in *Waya* requires this Court to adopt a different approach to that set out in section 83 CJA when considering whether a Certificate of Inadequacy should be granted.
38. Reference was also made to an excerpt from the Law Commission Report No. 410 entitled “Confiscation of the proceeds of crime after conviction”. There were some areas identified about the existing law which were unsatisfactory and interesting proposals were made for a change in the law. However, it did not add to the statement of the law over and above that which is set out in the cases cited above.
39. It is not necessary in this judgment to restate the law as set out and quoted extensively above from the appellate cases of *O’Donoghue* and *Glaves*. I have also quoted from the first instance cases of *Price* and *O’Connor* because they apply and provide summaries of relevant parts of the decisions in the appellate cases.

VI Applying the law to the facts

(a) Failure to discharge the burden under section 83

40. The starting point for this Court must therefore be the findings of the Crown Court in 2008. The Crown Court here made a finding of fact that the Applicant held £2,109,761.15 in assets which it was unable to identify. The Applicant did not make out a positive case then. The decision of the Court as to unidentified assets stands. The Applicant has subsequently sought to appeal the decision and has been successful only in part by a reduction of the quantum of the identified assets. Save for that, it has not been set aside on appeal. As the Applicant and his Counsel accept, this Court cannot go behind it.

41. The question then is whether the Applicant has discharged the burden of showing on the balance of probabilities that there has been a change in circumstances such that he is no longer able to pay the confiscation order. I shall first of all consider the principal sum, and then consider the effect of interest having accumulated.
42. The Applicant has failed to give evidence of what has become of the unidentified assets. He has given evidence of his impecuniosity and of the work which he has done in recent times for low pay. The problem is that although the Applicant accepts that he is not able to go behind the original order, for so long as he does not identify what has become of the unidentified assets, he is unable to discharge the burden. There is no evidence of assets having been lost or having depreciated or otherwise been reduced in value. The Court is left with the assets never having been identified by him either at the time of the confiscation or in this application for a Certificate of Inadequacy.
43. It may be that he is asking the Court to infer that the assets must have been lost or depreciated to nothing by his subsequent conduct. It was submitted on behalf of the Applicant that if there were unidentified assets available, he would have surrendered them by now. This is based on the premise that he would not have taken the work which he did of cleaning refuse vehicles and lorries for modest sums if he had other money. He would have repaid the confiscation order. This does not assist him because if he gives no evidence at all of the unidentified assets, then he fails to demonstrate what has happened since the making of the confiscation order to realisable property found by the judge to have existed when the order was made: see the fourth point in *Re B* quoted by Toulson LJ in *Glaves* at para. 18(4).
44. It follows that the Applicant has failed to show that there has been a genuine change in his financial circumstances since the time of the confiscation order. He has therefore failed to satisfy the onus on him. This is not because of a shortcoming of the evidence in respect of certain assets whether due to the passage of time or his becoming more vulnerable, has interfered with the details of his recollection. The Court makes allowance for the passage of time, especially where he has become more vulnerable, or the fact that he might not have records for a part of the assets. The Court maintains a sense of proportion however dishonest a defendant may have been about his assets.
45. This is not a case referred to in para. 54 of *Glaves* of a person who has fallen short of giving full disclosure of what happened to all of his assets, where that sense of proportion or the allowances which the Court makes may lead to a result in favour of an applicant. Far from that, this is a case of a total failure on the part of the Applicant to provide evidence of the unidentified assets at all times, which is at the time of the original order in 2008, at all times since then and at the time of the instant application.
46. If there was a more sympathetic approach in the judgment of Pill LJ at [18] in *O'Donoghue*, it is not applicable in a case like this one. It is applicable to a case where there have been shortcomings in the evidence, perhaps because there was no evidence in respect of certain of the assets. That approach does not have application in the instant case where there has been a total failure to deal with the identification of the hidden assets and what became of them. If that is because the Applicant does not accept that there ever were any unidentified assets, he cannot have a second bite of the cherry in the words of Pill LJ at para. 19. He cannot then prove a change in fortune such that he is not able to pay the balance of the outstanding money, using the language in *Glaves* at para. 55.

47. The case law above cited distinguishes not only between those who say nothing and those who at least say something in respect of hidden assets. The Court makes realistic adjustments about how much a person can be expected to recall or about how many documents a person may be expected to have in respect of all of the details of a case from long ago. This is the explanation why in *Glaves*, a case involving £22,000 unaccounted for out of a confiscation order of £140,000, the Court has shown itself to be more sympathetic than in cases involving very large sums of unidentified assets, none of which has been addressed properly or at all.
48. Whilst this is not a case of international drug dealing like *Price*, it has a similarity in the very large amount of the unidentified assets and in an applicant who has attempted to do nothing to show what has become of the money. There is also a similarity with *O'Connor* (where the sums were even larger, twice as much) of the Applicant failing to explain what had happened to the unidentified assets or how they had depreciated or were not available to him. Mr O'Connor was seeking to say that there were no hidden assets, which was not permitted. The allowances in cases like *O'Donoghue* and *Glaves* have no direct application to a case like the instant case of a total failure to engage in proving what has become of unidentified assets of more than £2 million.
49. It follows that in the instant case, the Applicant has failed to discharge the burden of showing on the balance of probabilities that there has been a change in circumstances such that he is no longer able to pay the confiscation order. This is not a case where after making allowances for the passages of time and the difficulties of the Applicant, as well as exercising a sense of proportion, the Court can find that the Applicant has done enough to discharge the burden. This is a case where the Applicant has failed to provide any evidence as to what has become of the unidentified assets. There is no new evidence to demonstrate that the unidentified assets have depreciated in value or that they are no longer available to the Applicant. He has therefore failed to prove, on the balance of probabilities, that his realisable property is inadequate for the payment of the confiscation order.

(b) The evidence of the Applicant

50. In these circumstances, it is not necessary to form a view of the evidence because the case fails for the above reasons. However, since the Applicant gave evidence, and since I have considered it, I shall set out my findings in respect of the evidence. The Applicant at all stages repeatedly claimed an absence of recall in respect of his assets. The first aspect of the cross-examination was in respect of transfers in 2001-2002 including:
 - (i) Unexplained cash withdrawals of £247,733.10 from various accounts (save for £58,000 in respect of living expenses);
 - (ii) In a four-month period between December 2001 and April 2002, there was transferred from investors a sum of £278,802.32 to his then wife's Abbey account;
 - (iii) A transfer of £60,000 of that money to an account held at AIG Private Bank in Zurich and a transfer of £40,000 of that money to an account at Chandler &

Backer in Guernsey. In all, there were sums of £90,000 transferred to AIG and £45,000 to Chandler & Backer;

(iv) All withdrawals in cash and transfers out of the country unaccounted for of a sum of £491,169.10.

51. The Applicant has failed to provide any sensible answer to any of these matters. He said that it was a long time ago. He made some criticism of DC Duckett who had compiled the evidence, but there was no particularity in his criticism. Of course, the Court makes allowances for the fact that it was all a long time ago. It makes allowances for the health difficulties of the Applicant. However, there was a total and abject failure at all times on the part of the Applicant to provide an answer to the hundreds of thousands of pounds being drawn in cash and to large specific sums being transferred to accounts in Zurich and Guernsey. The Applicant's failure to provide any information about these matters in his preparation for this application and in his cross-examination cannot be put down to the vicissitudes of his life. In part, it is because he knows something, perhaps a lot, but he is not prepared to say anything.
52. Likewise, he was asked about the circumstances in which he transferred his half interest in the matrimonial home to his wife. He said that it was necessary to do so because of the situation with the Bank and the fact that he had creditors. It was not clear precisely what he meant, but it was obvious that there was an intention that his creditors would suffer. In the end, the transaction appears to have been set aside for the benefit of his creditors. All of this leads to a picture not only of a person who was dishonest on a large scale as the jury found in 2007 at the trial and as the Court found in 2008 when it made the confiscation order, but also who is still not being frank with the Court in connection with this application, and who must have some knowledge of what he was doing and what happened to the money. I accept that he did not remember much of the details, but I do not accept the total failure of recollection. I have also made allowance for the poor state of his health. Nevertheless, I am satisfied that the Applicant has withheld such recollection as he must have of the fact that he was able to control very large sums of money and his involvement in offshore bank accounts.
53. If it had been the case that he was able to go behind a finding of unidentified assets, which he is not able to do, the Applicant deliberately has not attempted to explain what has happened to the unidentified assets. He has not been honest in his contention that he is unable to answer the questions in cross-examination at least as regards the big picture points of receipt of large sums and transfers of large sums.
54. The Applicant was also cross-examined about the assets which he had coming in and going out in the period between August 2017 and August 2023. The Respondent invited the Court to find that there was dishonesty in his evidence, particularly in referring to as loans moneys which may have been earned by him. It was difficult to correlate the narrative in a bank account reconciliation at pages 265-266 with his evidence. It is not necessary to make findings about this.

(c) Is there an inadequacy because of the interest due?

55. It remains to consider the issue of interest. The case of the Applicant is that even if he had received the unidentified assets, he does not have the resources to pay the interest. He points to the large amount of interest, which is the result of 8% per annum accumulating, albeit at simple interest, over a period of almost 16 years. It is greater than the outstanding confiscation order. If it is shown that on the balance of probabilities his assets are not sufficient to pay the interest, then it is said that the matter ought to go to the Crown Court to consider the extent of the inadequacy.
56. In my judgment, this is not an answer. The Applicant has failed to prove a case that there has been a change of circumstances in respect of the unidentified assets for all the reasons set out above. It is not simply a burden of proof point because he has failed to engage at all in respect of the unidentified assets including as regards large moneys under his control and his transfers to offshore accounts. The absence of identification of the assets has as its effect that the Court does not know whether the assets have gone up in value or have been converted into profit earning opportunities.
57. In any event, since the onus is on an applicant, this Applicant has singularly failed to discharge it. There is no commercial logic that the assets would remain static in value over a period of 16 years and more. In respect of assets measured in hundreds of thousands of pounds or millions of pounds, the capacity over a period of 16 years for growth equivalent to 8% per annum is not out of the ordinary. It is therefore incumbent on the Applicant to adduce some evidence of what had become of the unidentified assets in order to make good the submission of inadequacy as regards the interest.
58. This is consistent with the authorities. In the case of *O'Connor*, Lang J in the passage quoted at paras. 65-66 did not distinguish between the principal sum and interest in refusing the application for a Certificate of Inadequacy. The absence of evidence and engagement in what happened to the hidden assets prevented him from being able to prove inadequacy of his assets both as regards the £4 million principal sum and the sum of over £4 million of interest.
59. Likewise, in *O'Donoghue*, Lightman J at first instance had referred to the need to show what had become of the hidden assets including *"the possible or probable interest or other fruits of this sum."* Laws LJ on appeal at para. 3 said in this regard:

"Where a defendant has been in possession of an asset, such as the £35,500 here, the question obviously arises what he has done with it and whether, as might in the ordinary way well be the case, interest or "other fruits", as the judge put it, have been obtained in respect of it. In that case, if the defendant is simply silent as to what has happened to the asset, the court on a section 83 application is liable to find that he has not satisfied the section's requirements and accordingly is not entitled to a Certificate of Inadequacy. Whether that conclusion is arrived at or not will obviously depend on the court's appreciation of all the evidence."

60. In *Glaves*, at first instance, Collins J at para. 140 said that whilst an applicant cannot go behind the finding of the Crown Court against him on the existence of hidden assets, he can establish that he has made nothing out of those hidden assets. This is even if the assertion is that they never actually existed, provided that he produces sufficient evidence before the court, and the court is satisfied that he has been honest in showing that he did not actually make anything out of those presumed hidden assets. This was quoted by the appellate court without disapproval, albeit that the findings of the Court were on the basis of the broader reasoning quoted above.
61. In my judgment, on the facts of this case and with an appreciation of all the evidence, the Applicant has failed to satisfy the section's requirements by a total lack of engagement in what had happened to the unidentified assets or to the interest or fruits of it. Absent evidence about the realisable assets at the time of the confiscation order and of what has become of them or of what has become of the assets on the presumption that they were hidden assets, the Applicant has failed to provide any evidence to prove that he did not make anything out of the assets or that they did not rise in value to a commensurate sum to pay the interest due. Just as the Applicant must fail as regards the principal, so too in respect of the interest. Using other words of Laws LJ at para. 4 "*the simple fact is that the [Applicant] has not proved his case under section 83(1)*".

(d) Can the Applicant invoke a sense of justice and proportionality?

62. There is no residuary category to the effect that an applicant can place himself at the mercy of the Court and say that after 16 years, "I have suffered enough" or claim that the punishment has become disproportionate or say, as has often been said, that the regime is disproportionate. There is no such category by itself.
63. As the court in *Price v Crown Prosecution Service* [2016] EWHC 455 (Admin) held at [41]:
- "41. In my judgment, the fact that he did have hidden assets in 2007, at the time of the confiscation proceedings, is not a matter the Applicant can be heard to dispute. No appeal to "a sense of justice or proportion" can entitle the applicant to challenge Judge Zeidman's findings, particularly when those findings were so comprehensively upheld by the Court of Appeal. It follows that it cannot properly be said that the Applicant is "unable" to give any further account of what has happened to those assets; the only proper conclusion, consistent with those findings, is that he chooses not to do so."*
64. The onus is on the Applicant to prove a change in circumstances by reference to what has happened to his assets which makes him unable to pay the confiscation order including interest. In all the circumstances set out above, the Applicant has failed

singularly to prove this. A resort to a sense of justice or proportion by itself will not suffice.

65. Returning to the four submissions of the Applicant, the following conclusions can be stated on each of them:

- (i) The long time required to pay off the moneys is a consequence of the finding of unidentified assets and not having used the assets to pay off the confiscation order. It is also a result of the statutory regime. It does not give rise to an answer to the application.
- (ii) The reference to being trapped by the system might be a reflection of the fact that the regime has often been described as draconian. However, no amount of advocacy intended to evoke the sympathy of the Court can get over the failure of the Applicant at all stages to engage in what were and what became of the unidentified assets. In these circumstances, the Applicant has failed to discharge the evidential burden on him.
- (iii) The submission regarding interest is answered above. Just as the Applicant has failed to engage in the unidentified assets and to prove what became of them, so he has not engaged with the fruits of the assets and has not provided any evidence to the effect that there were no fruits of the same.
- (iv) There is no separate ground of it being unjust and disproportionate to continue to enforce the confiscation order. The call to justice and proportionality can combine with some evidence of a change of what became of the unidentified assets such as to make him unable to pay all of it back or to pay any interest. That call may be heard where an applicant has made some disclosure of the unidentified assets, albeit that it is not full disclosure. It may be relevant to how much can be realistically expected years after the events in question. However, the statutory regime does not allow a party who does not engage in section 83 requirements to throw himself at the mercy of the Court. In such a case, he has nothing to say because, despite his proclaimed intention not to question the findings of unidentified assets, his case does no more than to assert that which he cannot, namely that there were no unidentified assets.

66. It follows that the application is dismissed.