APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 49
HCA/2018/559/XC

Lord Justice Clerk
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

Appeal against Sentence

by

JOANNE MOONEY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: J Scott QC, Sol Adv; Brown, Sol Adv; Faculty Services Limited for Bridge Litigants, Glasgow
Respondent: J Farquharson, QC AD; Crown Agent

18 July 2019

[1] The appellant pled guilty to a charge of formulating a fraudulent scheme whereby HMRC were induced to pay to claimants the sum of £50,981 not due to them; and whereby an attempt was made to induce payment of a further sum, of £35,968. Of the sum of £50,981 referred to above, the appellant, who was claiming to provide a legitimate service of completing tax returns, received £15,294.

[2] The sheriff imposed a sentence which included a compensation order to HMRC in the sum of £15,000. In terms of the Proceeds of Crime Act 2002, a confiscation order was made in which the accused's benefit from the criminal conduct was identified as £50,981 with a recoverable amount of £1 and an order for payment of that nominal sum.

Legislation

[3] The Proceeds of Crime Act 2002 provides:

> **143 Conduct and benefit**
>
> "(1) Criminal conduct is conduct which—
> (a) constitutes an offence in Scotland, or
> (b) would constitute such an offence if it had occurred in Scotland.
>
> …
>
> (4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.
>
> (5) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.
>
> (6) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and in some other.
>
> (7) If a person benefits from conduct his benefit is the value of the property obtained."

Submissions for the appellant

[4] It is argued that the sheriff erred in determining the appellant's benefit from her criminal conduct in the sum of £50,981 rather than £15,294. In terms of section 143(4) of the Act a person benefits from conduct if they obtain property as a result or connected with the

conduct. In this connection what is critical is the benefit obtained by the individual offender rather than the measure of loss to the dupe. The appellant requires to have received the benefit and been able to exercise control over its disposition. It was submitted that the sheriff had erred, under reference to *R* v *May* 2008 UKHL 28; *R* v *Waya* [2012] UKSC 51; and *CPS* v *Jennings* 2008 UKHL 29. In the latter case Lord Bingham had observed (para 13):

> "It is, however, relevant to remember that the object of the legislation is to deprive the defendant of the product of his crime or its equivalent, not to operate by way of fine. The rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent. He cannot, and should not, be deprived of what he has never obtained or its equivalent, because that is a fine. This must ordinarily mean that he has obtained property so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else."

It was only where this last sentence applied that a benefit could property be said to have been "obtained" by the offender. In *May* a similar approach had been taken (para 48):

> "D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property. It may be otherwise with money launderers."

[5] The focus is on a power of disposition and control. In the present case the appellant did not have that power; the submitting to HMRC of the details of bank accounts to which the rebates should be paid did not constitute "direction" in the sense required. Following *May*, the UKSC in *Waya* (para 27) emphasised that the issue was whether the benefit had ever been obtained by the offender, as opposed to whether he had retained it. The sheriff sought to distinguish the situation from that in *Waya* on the basis that it was a case in which there had been no actual "loss" to any identified party, but the measure was the benefit to the offender, not the loss to others. The benefit to an individual accused must be a benefit

which that accused has enjoyed. In the present case, for example, had one been assessing the benefit to the taxpayers, they could be said to have benefited to the tune of the full £50,981 notwithstanding that a portion of that sum had been paid to the accused. The sheriff had erred in assessing the benefit to the appellant in the larger sum.

Submissions for the Crown

[6] Contrary to the argument made by the appellant the courts had found that property does not need to pass through the hands of an individual for it to be obtained by them the accused only had to have control over the disposition of that property. *R* v *Kudlip Singh Sander* [2013] EWCA Crim 670 was a case in point. In the present case it was clear that the appellant had this control over the disposition of the property. She was the individual that completed, registered and submitted the fraudulent tax-returns and was aware that by doing so, she was representing a tax overpayment to HMRC who would subsequently repay each individual concerned. "But for" her conduct, there would have been no repayment; and in creating the self-assessment returns she had control over the bank account details input, on each form, thus controlling the flow of the money from HMRC. If she had provided her own bank account details in the self-assessment return, and thus received the rebate and paid this out to each individual after deduction of her fee, there would have been no argument other than she had "obtained" the full amount. In *R* v *Fulton* [2019] EWCA Crim 163 the court held that central role that the offender had played in a money laundering operation was such that it could not be said that he had only benefitted to the extent of the commission he received.

Analysis and decision

[7] Even a brief perusal of the cases to which the court was referred shows the extent to

which a determination of whether there was a "benefit" for the purposes of the Act is highly fact sensitive. In *May* it was pointed out that in very many cases the factual findings made will be decisive. In all the cases it is stressed that a careful analysis of the facts is essential to assessment of whether there has been a "benefit" and what it has consisted of, using the words in the statute according to their ordinary everyday meaning. *R* v *Sivaraman* [2009] 1 Cr App R (S) 80 (para 13) described the court's task as being to determine the facts and to apply the words of the statute to them in as commonsensical a way as possible.

[8] As has been pointed out (*R* v *Ahmad & Fields* [2015] AC 299, paras 41-45; 61; 64) the use of words such as "ownership" (such as explored in *Jennings* v *CPS* [2008] 1 AC 1046) or concepts relating to the law of property do not sit easily with an exercise which is essentially seeking to assess the benefit of criminal activity which could never result in either ownership or any other property rights. In my view, too great a reliance should not therefore be placed on the these concepts, or for the need to show that the individual exercised "rights" over any of the property in question which are akin to such rights. The simple situation may be one where such an analogy may clearly be made. Other circumstances may be more complex, and more difficult to untangle. What is important is the whole factual background, and the inferences which may be drawn therefrom. One should bear in mind the way the matter was put in *Ahmad & Fields* (UKSC, para 47), that the question was:

> "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 its proceeds, and, in that connection, 'the role of a particular conspirator may be relevant as a matter of fact, but that is a purely evidential matter'."

[9] The extent to which the individual may exert, or have exerted, a power of control or disposition over the assets in question in such a way that they may be described as having

obtained a benefit therefrom may be relevant. As may be the distinction may arise between someone who acts only as a courier, for example, and someone who has taken a more central role, accepting that this too will not be determinative. The capacity in which an individual acts is nevertheless important – compare, for example a mere employee with a proprietor or joint trader (*Sivaraman*, para 17). In the present case, the appellant was not just the main or a significant but the sole driving force. This is an important distinction between the present case and *Sivaraman,* about which I agree with the observations made by Lord Turnbull. She had submitted the returns and made calls to HMRC call centres whereby she pretended to be the individuals using dates of birth and National Insurance numbers or, in respect of male claimants, their family members. Her action's alone had resulted in the rebates being paid and had provided her with a percentage of the sum paid out. Her conduct was so intrinsically linked to the disposition of the total sum, that she could be deemed to have "obtained" it. As with the appellant in *Fulton* she was not receiving a fixed fee as her profit, but a share of whole proceeds of crime in the form of commission. She had operational control over the creation and submission of the self-assessment returns without which no rebates would have been paid. It seems clear that there is no easy answer simply based on the amount of money which ends up in the appellant's bank account, or in her possession, or even her individual gain. In *Fulton* the total funds were laundered into the hands of co-conspirators, but Fulton had been responsible for laundering the money for the benefit of those individuals, and was receiving not a fixed fee, but commission which constituted "a share of the proceeds". His lack of interest in the account into which the money was deposited did not mean he had not obtained those funds. The differing factual situations, and the different nature of the control exerted in *Fulton* as opposed to that exercised by the appellant, do not seem such as to

require the cases to be distinguished. In the terms referred to in para 47 of *Ahmad & Fields*, the appellant clearly shared in the whole proceeds. The fact that a portion of the total sum defrauded required to be paid to the taxpayers, and was done so directly, may simply be viewed as part of the expenses of the criminal enterprise being undertaken by the appellant.

[10] It would be easy to allow the fact that several cases, including *Fulton,* involve co-conspirators to blur the picture. In *May* there were numerous co-conspirators, some before the court, others not (para 4) yet the court had made a confiscation order against the appellant reflecting the whole sum defrauded. The committee observed (para 46) that:

> "The sum which the appellant, jointly with others, was found to have fraudulently obtained from HM Customs and Excise was, in law, as much his as if he had acted alone."

[11] Equally, as Lord Turnbull has noted, the appellant is in a vastly different position from the mere custodian or courier whom Lord Bingham had in mind in *May.* It is difficult to see why she alone was responsible for the entire fraudulent scheme, and on whose instigation and actings the whole sums were dispensed by HMRC should be in any less favourable position than she would have been had the recipients been co-conspirators. Counsel for the appellant submitted that had the money passed through the appellant's account and been paid to the recipients under deduction of her cut, there would be no argument that she had not obtained the whole sum. However, the mere fact that the payment arrangements were otherwise meant that she could not be described as having obtained the total sum. That the question should turn on such an artificial distinction, when the end result in either situation is exactly the same, appears to offend against common sense. In other words, a fraudster who has been clever enough to structure their fraudulent scheme in a particular way would not come within the scope of the section, whereas one who has been less meticulous or cunning in the arrangement of the scheme would. In

reality, the appellant has shared the proceeds with the other recipients just as would have been the case were they co-conspirators.

[12] The appellant controlled the amount of her profit from the crime by maximising the repayments to be made by HMRC. The sum paid directly to her was inextricably bound up with the total sum. By her actions she was in control of the total sum to be disbursed by HMRC. To receive her share of the proceeds, she had to secure payment from HMRC of all the funds. In my view she could be said to have obtained them. I accept entirely that the essence of "benefit" is to be found in the word "obtain". Furthermore, I also accept that in many cases Lord Bingham's analogy , in *May*, with ownership in the sense of a power of control or disposition, as opposed to the situation of a mere courier or custodian, may be a useful one sufficient to the circumstances of a given case. However, I do not read that analogy, or subsequent discussion of it within the authorities, as suggesting that this is the only test by which the question whether proceeds were obtained by an appellant may be determined. Lord Bingham himself qualified the application of the analogy by use of the word "ordinarily"; and recognised that there may be circumstances in which it was not adequate, such as in the case of money launderers, to whom the position of the present appellant is not dissimilar. Whilst agreeing in general with dicta relating to predecessor legislation which suggested that the obtaining must be by the appellant personally, Lord Bingham was at pains to note that "such statements … should not be understood ... as excluding … cases where payment is made to a third party at the behest of the defendant." This is apt to cover the position of the present appellant. The latter describes the situation of the appellant, and the question whether someone in such a category may be described as having obtained the whole sum so secured is clearly one which hinges on the facts of the individual case.

[13] As Lord Turnbull has noted, benefit is linked with "obtaining", not "receiving". The former covers both securing and procuring, and to hold the appellant as having obtained the funds in question in the present case does not in my view offend against the normal meaning of the word. It is not a question of profit which must be addressed: the sums paid over to the third parties were a necessary part of the appellant's scheme; they may essentially be viewed as equivalent to the expenditure of committing the fraud, which in other cases has clearly been viewed as part of the total "obtained" by the fraudster. That the appellant's scheme was designed so that these payments were made directly by the dupe rather than processed through her own accounts does not in my view deprive her of the requisite degree of control which enables one to say that she has "obtained" the total proceeds. This interpretation is also consistent in my view with the "broad" meaning to be accorded to the word "obtain" (*Ahmad & Fields* para 45), bearing in mind the need to have regard to the overall aim of the statute to recover assets acquired through criminal activity (*ibid*, para 38). In *Ahmad & Fields* Lord Mance noted that criticism of the drafting of the Act was partly explained by the real difficulties inherent in the process of recovering the proceeds of crime from those convicted of offences. That proceeds of criminal activity could be excluded from the operation of the section merely because the scheme devised and operated by the appellant functioned in such a way that payment of sums necessarily fraudulently obtained to secure the running of the scheme were made directly by the dupe rather than channelled through the medium of the appellant would simply be to enhance and encourage those difficulties. As with any interpretation allowing an offender to set off the cost of his criminal activity, it would lay the process of confiscation wide open to simple avoidance (see *Waya*, para 26). I do not consider that the interpretation which I suggest

conflicts in any way with the statutory provisions or the way in which they have hitherto been construed.

[14] I do not consider that the case of *R* v *Frost* [2010] 1 Cr App R (S) 73 assists the appellant to a material degree. In that case a business manager with responsibility for a school's finances fraudulently signed cheques in favour of himself. To cover up these thefts he raised fraudulent invoices resulting in payments to the school of reclaimed VAT. The trial judge held that the benefit included the VAT repayments. On appeal the court determined that although he was able to bring about the Vat repayments, he had no interest in the school account and thus no interest in the sums repaid as VAT. The extent of his benefit was assessed as the sum total of the fraudulent cheques. There is a certain suggestion that the court was swayed by the argument that there was only a benefit in respect of money which the appellant "had got in hand", a proposition with which we would be unable to agree, and which was not advanced on behalf of the present appellant. Counsel for the appellant made it clear that his argument was not that the appellant required to "get her hands" on the funds. In addition it may be that the court in *Frost* placed undue emphasis on the ownership analogy (see para 13). However, leaving these issues aside, the case is clearly distinguishable on the facts. In *Frost* the court held that only by committing a further criminal offence – more fraudulent cheques – could it be said the appellant had an interest in the VAT payments such as might be considered a benefit. In the present case, the appellant did not require to take any further step: in accordance with the agreement reached the recipients had undertaken to pay her 30% - a cut, some might say – of the sum secured from the revenue. There was a clear interdependence between the sum secured from the revenue and the amount which would end up as the appellant's net gain.

[15] For the reasons given above, I consider that the sheriff was entitled to reach the conclusion she did. I propose that the appeal should be refused.

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 49
HCA/2018/559/XC

Lord Justice Clerk
Lord Glennie
Lord Turnbull

OPINION OF LORD GLENNIE

in

Appeal against Sentence

by

JOANNE MOONEY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: J Scott QC, Sol Adv; Brown, Sol Adv; Faculty Services Limited, Edinburgh for Bridge Litigation, Glasgow
Respondent: J Farquharson QC AD; Crown Agent

18 July 2019

[16] I regret that I find myself in disagreement with your Ladyship as to the outcome of this appeal. I am firmly of the opinion that, on a correct application of the law to the undisputed facts of this case, the appellant only "benefited" from her criminal conduct in the amount of £15,294.30. That was the only amount which she "obtained" as a result of or in connection with that criminal conduct. The sheriff was wrong to determine that she

benefitted from her criminal conduct in the sum of £50,981 and the appeal should be allowed.

[17] I focus on the words "benefited" and "obtained" advisedly, since these are the words used in section 143 of the Proceeds of Crime Act 2002 ("the Act" or "the 2002 Act"). It is convenient to set out the relevant parts of that section. After defining "criminal conduct" as conduct which constitutes an offence in Scotland or would constitute such an offence if it had occurred in Scotland, that section provides as follows:

> "**143 Conduct and benefit**
>
> …
>
> (4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.
>
> (5) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.
>
> (6) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and in some other.
>
> (7) If a person benefits from conduct his benefit is the value of the property obtained."

The 2002 Act is a UK statute and these provisions are in precisely the same terms as those to be found in section 76 of the Act which applies to England and Wales.

[18] Before turning to the legal question in this appeal, it is necessary to explain very briefly the nature of the fraud to which the appellant pled guilty. Put simply, she persuaded a number of individuals that she could negotiate with HMRC on their behalf and obtain tax rebates for them. About 28 individuals were involved. Acting on their behalf – and sometimes making calls to HMRC pretending to be the individual in question or a family

member of that individual – she fraudulently misrepresented the employment status of those individuals and/or misrepresented their levels of pay and work related expenses, and thereby persuaded HMRC to pay out to those individuals by way of tax rebates a total sum of £50,981.00 which was not in fact due. The payments were made by HMRC to the relevant individuals. The appellant routinely charged a commission of about 30% on the amount of such rebates, and this commission was paid to the appellant by each individual, presumably after that individual had received his or her rebate from HMRC. The amount of these commissions totalled £15,294.30.

[19] Because the 2002 Act is a UK statute, decisions of, and on appeal from, the English courts on equivalent provisions in the Act are directly relevant to the interpretation to be given to section 143. Among the authorities to which we were referred were four decisions of the House of Lords or Supreme Court: *R* v *May* [2008] 1 AC 1028, *Jennings* v *Crown Prosecution Service* [2008] 1 AC 1046, *R* v *Waya* [2013] 1 AC 294 and *R* v *Ahmad* [2015] 1 AC 299. Those cases identify authoritatively the exercise which the court is required to undertake in assessing whether and, if so, in what amount the person in question has benefitted from his criminal conduct. They set out the test to be applied. Whether that test is met in any particular case will depend on the facts of the case. To this extent the exercise is highly fact sensitive, though perhaps no more so than in many situations faced by the courts in coming to a decision. There will be cases which on their particular facts appear to present difficulties of analysis. In this context we were also referred to four decisions of the Court of Appeal: *R* v *Mylupillai Sivaraman* [2008] 1 Cr App R (S) 80, *R* v *Frost* [2010] Cr App R (S) 73, *R* v *Sander* [2013] EWCA Crim 670 and *R* v *Fulton* [2019] EWCA Crim 163. Many other cases are referred to in the authorities to which we were referred, particularly in *May*

and *Ahmad*. But whatever the difficulties of analysis in any particular case, the question to be answered in each case is straightforward.

[20] In order to put the matter within its proper context, it is worth referring to the remarks of Lord Bingham delivering the Opinion of the House of Lords in *May* at para 8. After pointing out that the essential structure of the confiscation regime had been substantially retained from previous enactments, he said that before making a confiscation order the court was required to address and answer three questions: (1) has the accused benefited from the relevant criminal conduct; if yes, (2) what is the value of the benefit which the accused has so obtained; and (3) what sum is recoverable from the accused. Those questions, he emphasised, are distinct and should not be elided. In the present case there is no dispute that the first question should be answered in the affirmative. The appellant accepts that she benefited from her criminal conduct. The third question does not give rise to any dispute: the sheriff fixed the recoverable amount in the nominal sum of £1 – reflecting the fact that the appellant had no funds with which to pay any more – and made an order for payment of that sum. That is not challenged. This appeal relates only to the second question: what is the value of the benefit which the accused obtained from her criminal conduct. The sheriff found that she had benefitted in the sum of £50,981, that being the total sum paid out by HMRC to the various individuals as tax rebates as a result of her fraudulent activities. The appellant argues that she benefitted only in the amount of £15,294.30, that being the total of the sums actually paid to her by those individuals by way of commission (at the rate of 30%) on the tax rebates negotiated by her with HMRC.

[21] It is clear from sub-sections (4) and (7) of section 143 that the benefit to a person from his criminal conduct for the purposes of the Act is measured by the value of property "obtained" by him: *Jennings* at para 12, *Ahmad* at para 41. One is concerned with what the

particular accused obtained (*Ahmad* at para 141), regardless of whether he has obtained it by himself or "jointly or through a third party at his behest": *May* at para 28. What the particular accused obtained from the criminal conduct is, of course, not necessarily the same as the totality of what was obtained by the criminal enterprise of which he or she was a part: *Ahmad* at para 41. The critical question is: what is meant by "obtained" in this context?

[22] That question was answered in *Jennings* at paras 13-14. That case was concerned with the validity of a restraint order made while the defendant was awaiting trial, and the relevant statutory provision was section 71(4) of the Criminal Justice Act 1988, which was in substantially the same terms as section 143(4) of the 2002 Act. The Court of Appeal had held that the word "obtain" did not import any requirement that the defendant should be shown to have control over the property; all that was required was that "the defendant's acts should have contributed to a non-trivial (that is, not de minimis) extent to the getting of the property" (see *Jennings* at para 12). The leading judgment in the Court of Appeal was given by Laws LJ. In challenging this approach, the appellant argued that "obtains" in this context meant that at some point the defendant "had come into possession or in some way controlled the property in question in connection with the offence." "He has had his hands on it." Lord Bingham summarised the appellant's case in this way: "The appellant treats 'obtains' as equivalent to 'receives' but does not contend that it is necessary to retain the property." In accepting the "broad thrust" of the appellant's argument, Lord Bingham said this:

> "13 … The focus must be and remain on the language of the subsection [i.e. section 71(4)]. … There is a real danger in judicial exegesis of an expression with a plain English meaning, since the exegesis may be substituted for the language of the legislation. It is, however, relevant to remember that the object of the legislation is to deprive the defendant of the product of his crime or its equivalent, not to operate by way of fine. The rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent. He cannot, and should not, be

> deprived of what he has never obtained or its equivalent, because that is a fine. This must ordinarily mean that he has obtained property so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else.
>
> 14 The committee does not, with respect, find the formulation of Laws LJ in his para 38, quoted above, to be helpful or entirely accurate. A person's acts may contribute significantly to property (as defined in the Act) being obtained without his obtaining it. But under section 71(4) a person benefits from an offence if he obtains property as a result of or in connection with its commission, and his benefit is the value of the property so obtained, which must be read as meaning "obtained by him". While the committee would not adopt the appellant's submission *ipsissimis verbis* (the defendant need not have had his hands on the property) it accepts the broad thrust of the appellant's criticism of the Court of Appeal's formulation. …"

He went on to say that it remained to be decided whether the appellant had obtained the benefit of the fraud jointly with his co-defendant, but there was clearly sufficient material to support the making of a restraint order at that stage.

[23] The reference in the last sentence of para 13 to ownership ("This must ordinarily mean that he has obtained property so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else") was repeated in para 48(6) of *May* where Lord Bingham said this:

> " D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else."

[24] With one qualification, that analysis has been accepted and applied in all subsequent cases. That qualification is in relation to the analogy of ownership used by Lord Bingham in the last sentence of para 13 in *Jennings* and in *May* at para 48(6). As was said in *Ahmad* at para 42:

> "42 At least in a technical, legal, sense, there are two problems with this analysis. The first involves a generally applicable point; the second applies in cases such as the present ones, where the facts are complex and there are several conspirators involved. Whilst a criminal may sometimes become the owner of property obtained

> through crime, in many cases he does not do so. When a person "obtains" a chattel, money, a credit balance or land through criminal dishonesty, he does not acquire title to, or ownership of, the item in question, although he does acquire control over it. As was pointed out by Lord Walker and Hughes LJ in *Waya*, para 68 a person who dishonestly obtains property has "at most a possessory interest good against third parties, and thus of no significant value". When Lord Bingham spoke of obtaining something "so as to own it" he was doing so in the context of contrasting the position of someone who unlawfully assumes the rights of an owner (ie "a power of disposition or control") with the position of a mere courier or custodian of stolen property – see *May* at para 48(6). In *Allpress* [reported at [2009] 2 Cr App R (S) 58] at para 64 the Court of Appeal helpfully interpolated the words "assumes the rights of an owner" to make this clear.

What the court was there emphasising, and it went on to make this abundantly clear, was that in *May* and *Jennings* Lord Bingham was not intending to introduce technical English law property concepts. He was contrasting the position of someone who obtained the benefit of the criminal conduct for himself with that of a mere courier or custodian of stolen property. Following a discussion of the conceptual difficulties in the idea of joint ownership in cases where there are several conspirators acting together, the point was emphasised again in para 45 of *Ahmad*:

> "45 The basic point made by Lord Bingham, and discussed in paras 41-42 above, therefore appears to us to be, to put it at its lowest, sustainable, given the statutory language, which is not concerned with ownership but with obtaining. As just demonstrated, it is perfectly acceptable, as a matter of ordinary language, to describe the people involved in a criminal joint enterprise which results in the obtaining of a chattel, cash, a credit balance or land, as having jointly obtained the item concerned, in the sense of having obtained it between them. The fact that the item may have been physically taken or acquired by, or held in the name of, one of them does not undermine the conclusion that they jointly obtained it. The word "obtain" should be given a broad, normal meaning …"

I emphasise the point that the word "obtain" should be given a broad normal meaning. While it may be that the language of ownership should be avoided, particularly in Scotland where English law property concepts have no application, the idea sought to be conveyed by it is, in my view, perfectly clear. A person "obtains" property in the sense in which that term is used in this part of the Act when he receives it, either alone or jointly or through

another, in such a way as to assume over it a power of disposition or control. That is the natural meaning of the word. That is the meaning which should be applied in a case such as the present.

[25] Giving the word its broad, normal meaning I can see no possible basis upon which it can be said that the appellant "obtained" from her criminal conduct more than the £15,294.30 paid to her as commission by the individuals for whom she had dishonestly secured tax rebates from HMRC. Indeed I cannot conceive of any legitimate construction of the word which would enable me to say that the accused in this case had "obtained" more than that sum.

[26] The fact that the appellant was herself (and by herself alone) responsible for the entire fraudulent scheme is, with respect, nothing to the point. As Toulson LJ said in *Sivaraman* at para 19:

> "The greater the involvement of a defendant in a conspiracy, the greater will be the appropriate level of punishment. But it does not follow that the greater the involvement the greater the resulting benefit to that defendant. Within the statutory definitions contained in the Act, what benefit a defendant gained is a question of fact."

The question of what benefit the accused has obtained is quite separate from her level of culpability or her centrality to the fraudulent scheme. This is consistent with the remarks of Lord Bingham in *Jennings*, already quoted, to the effect that the object of the legislation is not to operate by way of fine commensurate with her culpability – this will have been taken into account in the sentence passed on him for the offence – but to deprive the accused of the product of her crime. For this reason I am not impressed by the consideration that an alert fraudster could so arrange the structure of her criminal activities as to reduce the amount which could be said to be "obtained" by her and made the subject of an order under the Act. I doubt that this would be in the forefront of the criminal mind when devising a fraudulent

scheme – the main focus would surely be on obtaining the ill-gotten gains and avoiding detection – but even if it was something to which the fraudster paid regard, so be it; this legislation is only designed to deprive the criminal of what she has obtained by her conduct, not to fine her by reference to what she has helped others to obtain (which is, as has been pointed out, a matter to be taken into account in passing sentence).

[27] For the avoidance of doubt, it should be emphasised that this case is not concerned with "joint" obtaining such as is discussed in *Ahmad* and other cases. It is easy to see why, in a case where the fraud is committed by a number of co-conspirators but the money is paid into an account operated by only one of them, it might properly be said that the conspirators as a whole jointly or "together" (see *Ahmad* at para 44) obtained the whole property secured by commission of the crime. That was the position in *Fulton*, where the defendant was laundering money for the benefit of members of the conspiracy and for himself (see in particular paras 47 and 51). But there is no suggestion here that the individuals for whom the appellant acted in dealings with HMRC knew that she was fraudulently misrepresenting their position to HMRC or knowingly participated in any fraudulent scheme. As far as they were concerned, she negotiated with HMRC on their behalf and obtained a rebate which was due to them, in return for which they paid her a commission of 30%. There is no suggestion in this case that the accused acted with others at all. The fraudulent scheme was hers and hers alone. On that basis the money paid by HMRC into the accounts of the individuals for whom she acted was never obtained by the appellant herself (except, of course, for the commission on such sums paid on to her by the relevant individuals).

[28] Nor in this case does the problem arise which featured in some of the earlier cases, where the accused, having initially received the whole benefit of the criminal enterprise, thereafter passes on some part of it to others who may or may not have assisted her in her

crime. In such cases it is clear that she is treated as having obtained the whole amount, no matter what he did with it afterwards: see the cases referred to in *May* at paras 27-34 and see also *Waya* at para 27. The present case differs from that in that the appellant never received or obtained anything other than the commission paid to her by the individuals for whom she had acted.

[29] Nor can there be any suggestion in this case that in some way she had some measure of control over the accounts into which the money paid by HMRC to the relevant individuals was paid. It is true that the amount of the tax rebates, on the basis of which her 30% commission was calculated and paid, was a matter in which she was directly involved, and to this extent, by negotiating the amount of the rebate, she exercised a measure of control over the amount she would be paid. It is true that, no doubt at her direction, HMRC paid the tax rebates into the bank accounts of the individuals for whom she acted, but this is no different from what happens in every case where tax rebates are paid. It is also true that, on receipt of the rebate from HMRC, the individuals paid commission to the appellant at the agreed rate, but this does not indicate that the appellant had any control over their bank accounts. The money was paid by HMRC to the relevant individuals and it required some positive act by those individuals to effect payment to her in accordance with the agreement between them. None of this points to the appellant having "obtained" the tax rebates when they were paid by HMRC into the accounts of the relevant individuals. She "obtained" a part of the property, and only a part, when she received the commission paid to her by those individuals. That is the sum total of the property which she obtained by her criminal conduct.

[30] As stated earlier, I agree that the exercise in each case is highly fact sensitive. The facts must, of course, be looked at with care. But they must be looked at only for the

purpose of answering the relevant question, which is simply whether the accused benefited by "obtaining" property as a result of her criminal conduct and, if so, in what amount. Questions of culpability are of interest only if they help to answer this question. If this is borne in mind then, in my view, there can only be one answer in this case. The appellant benefited from her criminal conduct by obtaining property in the amount of £15,294.30 and no more.

[31] I, for my part, would allow the appeal. However, I recognise that your Ladyship's opinion to the contrary is supported by Lord Turnbull, and it therefore follows that the appeal will be refused.

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 49
HCA/2018/559/XC

Lord Justice Clerk
Lord Glennie
Lord Turnbull

OPINION OF LORD TURNBULL

in

Appeal against Sentence

by

JOANNE MOONEY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: J Scott QC, Sol Adv; Brown, Sol Adv; Faculty Services Limited, Edinburgh for Bridge Litigation, Glasgow
Respondent: J Farquharson QC AD; Crown Agent

18 July 2019

[32] As a consequence of the appellant's plea of guilty to the charge of forming a fraudulent scheme to obtain money from HMRC, and the motion then made by the prosecutor, the sheriff was required to act under section 92 of the Proceeds of Crime Act 2002 ("the Act"). In the appellant's case it was admitted that she had benefited from her criminal conduct for the purposes of subsection (5)(c) of that section. The sheriff was

therefore required, in terms of subsection (6), to decide the recoverable amount and make a confiscation order requiring the appellant to pay that amount.

[33] Section 93 of the Act provides in subsection (1) that:

> "The recoverable amount for the purposes of section 92 is an amount equal to the accused's benefit from the conduct concerned."

[34] Section 143 of the Act explains how the court is to arrive at a figure reflecting the accused's benefit. Reading subsections (4) and (7) together, a person is taken to benefit from criminal conduct if he obtains property as a result of that conduct and the extent to which he benefits is identified by reference to the value of the property so obtained.

[35] As noted by your Ladyship in the Chair, in the case of *CPS* v *Jennings* Lord Bingham observed that the rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent. He went on to state that:

> "This must ordinarily mean that he has obtained property so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else."

As your Ladyship also pointed out, the question of whether a person has benefited for the purposes of the Act is a highly fact sensitive matter. The "ordinary" situation is not reflected in all circumstances.

[36] It is, for example, accepted that for the purposes of this legislation the extent to which a person benefits is not necessarily measured by the extent to which he is enriched through his particular criminal conduct. It is not profit after deduction of expenses or payments to third parties which matters (See for example *R* v *May* at paragraph 34 and 48). Nor is it necessarily measured by the extent to which legal ownership is acquired over property (see for example *R v Fulton* at paragraphs 53 to 54). Property does not need to pass

through the hands of an individual for it to be obtained by them (*R* v *Kudlip Singh Sander* at paragraphs 7 and 9).

[37] Since the focus in the legislative provision is on the concept of obtaining property, the answer to the question of whether a person obtains property as a result of their criminal conduct determines whether the person has benefited. It is precisely because the statutory provision links benefit with obtaining, rather than receiving, that the question of what is obtained as a result of the criminal conduct concerned becomes such a fact specific matter and can be such a contentious issue.

[38] In order to identify the extent to which the present appellant obtained property I consider it necessary to begin by scrutinising what she did and what the consequences of her conduct were. In undertaking this exercise I appreciate that an accused person may play an important role in a conspiracy without obtaining property for the purpose of the test of benefit. However, that does not diminish the importance of understanding the extent of the appellant's role in the offence to which she pled guilty.

[39] The fact specific circumstances of this case were that the appellant's own actions comprised the entirety of the relevant criminal conduct. It is, in my opinion, necessary to have a clear understanding of what the criminal conduct involved was so that the question of what she "obtained" can be addressed in the correct context. She was the person responsible for devising and perpetrating the fraud. It was her actions which caused HMRC to be deceived and to make payments which were not due. It was she who directed where those payments were to be made.

[40] Despite all of this, the appellant's proposition is that she neither obtained the total sum of £50,891 nor had any control over the disposition of that sum. For her to have benefited to this extent, in the sense envisaged by the statute, she asserts that she required to

have enjoyed that particular benefit, rather than just the sum of £15,294 paid to her by way of commission.

[41] Despite this contention, it was accepted that if the total sums paid by way of false rebate to each of the appellant's clients had been paid by HMRC directly to her for payment of the relevant portion to the individual clients, then she would have benefited as defined by the statute to the extent of the total sum. The fact that the structure of payment operated in a different manner meant that she did not. As was candidly accepted by senior counsel for the appellant, on this argument the statutory scheme would either have effect or not according to the particular structure which the fraudster decided to put in place. I do not find this to be an attractive argument and the artificiality of it, or the opportunity which it provides to defeat the aim of this important statutory scheme, tends to suggest to me that it cannot be correct.

[42] To describe the appellant as being instrumental in obtaining the funds from HMRC would, in my opinion, run the risk of failing to properly identify her level of responsibility and the extent of her criminal conduct. The scheme involved the pretence that tax rebates were due which were not. It was in the nature of this particular fraud that the appellant required access to personal and financial details pertaining to a number of other taxpayers. Without taxpayers whom she could correspond with the HMRC about there was no method by which the fraud could be committed. The taxpayers who permitted the appellant to gain access to their details, including the details of their bank accounts, constituted the building blocks upon which the fraud was erected. The sums which she obtained by way of commission were directly related to the extent to which she was able to dupe HMRC into making payments into the bank accounts to which she had directed their attention. The more she managed to fraudulently claim the more she personally gained. In my opinion,

this is a description of someone who was receiving a share of the whole proceeds of crime in the sense described in the case of *R* v *Ahmad and Fields* at paragraph 47.

[43] The appellant's circumstances are quite different from the situation of someone who plays an important role in a criminal enterprise through which property is obtained but who is not the person who obtains it, such as a courier or an employee. As was said in *Jennings v CPS* at paragraph 13:

> "It is, however, relevant to remember that the object of the legislation is to deprive the defendant of the product of his crime or its equivalent, not to operate by way of fine."

[44] In my opinion, to attribute to the appellant the benefit of the whole sum which HMRC was persuaded to pay out would be to deprive her of the product of her crime. In my opinion this would not conflict with the statutory language. Nor would it be in conflict with what was said in the decisions to which we were referred. In particular, I do not consider that this approach would be at odds with what was said by Toulson LJ in the passage quoted by Lord Glennie from the case of *R* v *Sivaraman*. In that case the court was dealing with an employee who provided assistance to his employer in the commission of a conspiracy to avoid excise duty. It seems to me that the statements made in the first three sentences of paragraph 19 of the decision of the court were made by way of introduction to the fact specific issue which the court was dealing with. The sentence which follows appears to me to give these statements meaning:

> "…, the critical question in relation to the conduct of the appellant in supervising the bunkering operations carried out under his control was the capacity in which he was acting. Was he, in point of fact, a joint purchaser of the fuel for resale as DERV who, by his conduct, jointly gained the pecuniary advantage of being able to resell it as DERV without having incurred the duty which would have had to be paid on purchasing DERV; or was he acting just as an employee?"

[45] I do not read what was said by Toulson LJ as inferring that the nature and extent of a person's conduct can never cast light on the question of whether that person obtained property as a result of that conduct. In my opinion, no assistance is gained in the present case from considering statements made in the context of an employee acting under the instructions of his employer. Although none of the cases to which we were referred are on all fours with the present, the approach which I have taken is, in my opinion, consistent with the approach taken in *R* v *Fulton*.

[46] For these reasons, and for those given by your Ladyship in the Chair, with which I agree, I too consider that the sheriff was entitled to reach the conclusion she did and that the appeal should be refused.