Neutral Citation Number: [2021] EWCA Crim 1313

Case No: 201903074 B2, 201903111 B2 & 201903120 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
His Honour Judge Beddoe

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/08/2021

Before:

LORD JUSTICE MALES
MR JUSTICE GOOSE
and
HER HONOUR JUDGE DHIR QC

- -

Between:

REGINA	**Respondent**
- and -	
1) PAUL JOHN ASPLIN	**Appellants**
2) DAVID MARK KEARNS	
3) SALLY ANN JONES	

- -
- -

Adrian Waterman QC and **Eleanor Mawrey** (instructed by **Bindmans**) for **Paul Asplin**
Philip Hackett QC and **Polly Dyer** (instructed by **Hutton's**) for **David Kearns**
Rachna Gokani (instructed by **Birds Solicitors**) for **Sally Jones**
Martin Evans QC and **Henry Hughes** (instructed by **Edmonds Marshall McMahon**) for the **Respondent**

Hearing date: 22nd July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10 o'clock on 25th August 2021

Lord Justice Males:

1. On 9th July 2018 in the Crown Court at Southwark Paul Asplin, David Kearns and Sally Jones were each convicted of conspiracy to defraud an insurance company called DAS Legal Expenses Insurance Company Limited ("DAS"). Asplin was also convicted of false accounting.

2. On 13th July 2018 Asplin was sentenced by the trial judge, His Honour Judge Beddoe, to seven years' imprisonment and was disqualified from acting as a director for 12 years pursuant to section 2 of the Company Directors Disqualification Act 1986. Kearns was sentenced to four years and three months' imprisonment. Jones was sentenced to three years and nine months' imprisonment and was disqualified from acting as a director for eight years.

3. Confiscation proceedings followed. On 19th July 2019 HHJ Beddoe made the following orders pursuant to the Criminal Justice Act 1988:

Defendant	**Benefit**	**Realisable assets**	**Confiscation order**
Paul Asplin	£6,914,257	£5,285,300	£5,285,300 to be paid within 6 months or to serve 8 years in default
David Kearns	£2,285,006	£1,439,729	£1,439,729 to be paid within 6 months or to serve 6 years in default
Sally Jones	£2,449,961	£1,558,155	£1,558,155 to be paid within 6 months or to serve 6 years in default

4. Compensation orders were also made in the same amounts pursuant to section 130 of the Powers of Criminal Courts (Sentencing) Act 2000. The judge found that the total loss suffered by DAS as a result of the conspiracy amounted to £11,231,397, but limited the compensation order to the defendants' realisable assets. As none of the defendants had sufficient means to satisfy both orders, he ordered that compensation be paid out of sums recovered under the confiscation order pursuant to section 72(7) of the Criminal Justice Act 1988.

5. The Registrar has referred the applications for leave to appeal against these confiscation orders, and in the case of Asplin the compensation order, to the full court.

The facts in outline

6. We have summarised the facts when dismissing the appeal against conviction by Sally Jones [2021] EWCA Crim 1195. With some amplification we repeat that summary here.

7. DAS insures the cost of litigation brought by insured clients against third parties, including claims for damages for personal injuries. It is a subsidiary of DAS UK Holdings Limited which is ultimately owned by Munich Re, a major European insurance group with headquarters in Germany.

8. Asplin was employed by DAS throughout the indictment period 2000 to 2014 as the managing director and then the CEO. He was therefore the senior figure within the company throughout the relevant period. Kearns was employed until 31st December 2004 in a senior role as Head of Claims and General Manager. Jones had worked for DAS as Head of Marketing but she left in October 1999 when she began a relationship with Asplin. They married in 2001 but divorced in May 2005.

9. It was the prosecution case, accepted by the jury, that the defendants used their status to exploit the way in which DAS did business and to allow them to make a secret profit without DAS being aware of their actions. This was in breach of fiduciary duties owed by Asplin and Kearns and was contrary to strict policies within DAS to prevent conflicts of interest. The fraud involved a company called Medreport, established by Asplin and Kearns in 2000. In carrying out its business as a legal expenses insurer DAS required medical reports. The conspirators set up Medreport to provide such reports. They kept their interest in Medreport hidden from DAS. Asplin and Kearns worked at DAS while in effect owning Medreport. In their capacity as employees of DAS they arranged that DAS contracted with Medreport for the provision of medical reports. Over 90% of DAS's requirement was directed to Medreport in this way. The prosecution case was that the conspirators earned significant secret profits from Medreport over a period of approximately 14 years. They took careful steps to keep their involvement in, control of and profit from Medreport secret from DAS. They devised systems of routeing funds which concealed the payment of dividends to them and they profited without DAS knowing that Medreport was in substance their business. Sally Jones became a manager of Medreport and later an owner and director, continuing to run the company after Asplin transferred his interest in it to her.

10. Initially, Jones acted to route the secret benefit that Asplin obtained to him, and to conceal the fact of his ownership. Over time, her interest in Medreport grew and that of Asplin and Kearns diminished. In due course, she came in effect to control the company. Throughout the conspiracy, she was the principal point of contact with DAS and dealt with members of its staff on a regular basis. She warned her co-conspirators against attending Medreport in order to prevent any word of a link between them and DAS getting back to DAS and its parent companies.

11. Contracts were entered into by DAS with Medreport. Under a first contract Medreport was entitled to use funding from DAS to cover expenses and fees. Over time, independent staff at DAS began to insist on terms that were more advantageous to DAS. However, Asplin exerted his influence to ensure that the contractual terms were favourable to Medreport. DAS remained in ignorance of the fact that both Asplin and Kearns were on both sides of the fence. Throughout this period, Medreport was

substantially dependent upon DAS for its income. Without the DAS work, it would have had no business.

12. Gradually suspicion arose as to the uncommercial nature of the relationship between the companies and that some form of secret interest existed in favour of DAS directors. An article appearing in a national newspaper in 2006 referred to Asplin's use of the company to benefit his former wives (including Sally Jones). DAS commissioned inquiries and investigations, but the true position that Medreport was improperly profiting from its DAS business was successfully concealed by the conspirators.

13. Kearns sold his interest in Medreport in 2007. Asplin sold his interest in 2008. Sally Jones continued to run Medreport. Contracts were renewed with Medreport after the ending of the interests of Asplin and Kearns.

14. In 2011 certain non-UK executives from within the DAS Group insisted upon a tendering process being carried out for the allocation of expert reports. Medreport failed in this process, but the contract with Medreport was, nonetheless, renewed after Jones caused a letter to be written to Asplin threatening to reveal the truth to DAS, a letter described by Asplin (accurately, as the judge found) as a "classic blackmail letter". In 2012 the board of DAS decided to terminate the relationship. Medreport, led by Sally Jones, sued DAS. Ignorant of the conspiracy, DAS settled the case and paid a sum by way of compromise exceeding £800,000. Documents proving the secret ownership were finally acquired by DAS in 2015 as a result of DAS applying for and obtaining a *Norwich Pharmacal* order.

15. When the police declined to prosecute, DAS commenced a private prosecution. None of the defendants with whom we are concerned (there were others who were acquitted) gave evidence at the trial.

The grounds of appeal

16. Asplin advances three grounds of appeal. The first is concerned with the calculation of benefit for the purpose of the confiscation order, although it is also relied on as showing that the order made was disproportionate for the purpose of Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1"). The second is concerned with the calculation of realisable assets, again for the purpose of the confiscation order. The third is concerned with the compensation order. The grounds are that:

    (1) the judge was wrong to include the entire salary and bonuses paid by DAS to Asplin during the indictment period from 2000 to 2014, amounting to £3,941,559, in the calculation of the benefit obtained by him "as a result of or in connection with the commission of the offence";

    (2) the judge was wrong to find that a pension fund held by trustees for Asplin was his realisable property;

    (3) the judge was wrong to find that (a) secret profits made by Asplin amounted to a loss to DAS; (b) Asplin's salary and bonuses were a loss to DAS; and (c) it was irrelevant, in assessing whether DAS had suffered loss as a result of the commission of the offence, that it had been profitable throughout the indictment period.

17. Kearns advances two grounds of appeal, both of which are concerned with the calculation of benefit for the purpose of the confiscation order. They are that:

    (1) the judge was wrong to include his salary from DAS, amounting to £284,945.26, in the calculation of the benefit obtained by him; and

    (2) the judge was wrong to include in the calculation of benefit obtained by Kearns a sum of £332,832 (a sum which was also included in Asplin's benefit) which was received into Kearns' bank account and paid over to Asplin.

18. Jones advances two grounds of appeal, both concerned with her salary from Medreport during the indictment period. These are that:

    (1) the judge was wrong to treat this salary as benefit for the purpose of the confiscation order; alternatively

    (2) to do so rendered the confiscation order disproportionate for the purpose of A1P1.

Legal principles

19. The confiscation regime applicable in the present case is that contained in the Criminal Justice Act 1988. Section 71 of that Act provides:

> "1) The Crown Court and a magistrates' court shall each have power, in addition to dealing with an offender in any other way, to make an order under this section requiring him to pay such sum as the court thinks fit.
>
> (2) The Crown Court may make such an order against an offender where–
>
> (a) he is found guilty of any offence to which this Part of this Act applies; and
>
> (b) it is satisfied–
>
> (i) that he has benefited from that offence or from that offence taken together with some other offence of which he is convicted in the same proceedings, or which the court takes into consideration in determining his sentence, and which is not a drug trafficking offence; and
>
> (ii) that his benefit is at least the minimum amount.
>
> …
>
> (4) For the purposes of this Part of this Act 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.

> (5) Where a person derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this Part of this Act as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage.
>
> (6) The sum which an order made by a court under this section requires an offender to pay must be at least the minimum amount, but must not exceed–
>
> (a) the benefit in respect of which it is made; or
>
> (b) the amount appearing to the court to be the amount that might be realised at the time the order is made,
>
> whichever is the less."

20. Section 72(7) provides that:

> "(7) Where–
>
> (a) a court makes both a confiscation order and an order for the payment of compensation under section 35 of the Powers of Criminal Courts Act 1973 against the same person in the same proceedings; and
>
> (b) it appears to the court that he will not have sufficient means to satisfy both the orders in full,
>
> it shall direct that so much of the compensation as will not in its opinion be recoverable because of the insufficiency of his means shall be paid out of any sums recovered under the confiscation order."

21. As explained in *R v May* [2008] UKHL 28, [2008] 1 AC 1028, confiscation proceedings involve three distinct questions:

> "8. … The first question is: has the defendant (D) benefited from the relevant criminal conduct? If the answer to that question is negative, the inquiry ends. If the answer is positive, the second question is: what is the value of the benefit D has so obtained? The third question is: what sum is recoverable from D?"

22. The broad principles to be applied in answering these questions, emphasised at [48], include that the legislation is intended to deprive defendants of the benefit they have obtained from relevant criminal conduct, within the limits of their available means, but does not operate by way of a fine or other form of punishment.

23. The statutory test for determining whether the defendant has benefited from his criminal conduct, set out in section 71(4) of the 1988 Act, is whether he has obtained property "as a result of or in connection with" the commission of the offence. This (or its

equivalent in section 76(4) of the Proceeds of Crime Act 2002) has been described as an "apparently loose causal test" (*R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [8]). As Lord Justice Davis explained in *R v Andrewes* [2020] EWCA Crim 1055:

> "73. Generally speaking, the courts in confiscation proceedings have been disinclined to pursue a technical or artificial approach to causation or unduly to restrict the width of the words 'as a result of or in connection with'."

24. However, the width of these words is tempered by the requirement that a confiscation order must not be disproportionate. As held in *Waya*, in order to comply with A1P1, a confiscation order must be proportionate to the legitimate aim of the legislation. *Waya* was concerned with the confiscation regime contained in the Proceeds of Crime Act 2002 which was subsequently amended to provide in terms that a confiscation order should not be made to the extent that it would be disproportionate to require the defendant to pay the recoverable amount. No such amendment was made to the Criminal Justice Act 1988, but it was common ground between the parties, and we agree, that the regime contained in that Act should be read as if there had been.

25. The question when a confiscation order will be disproportionate was discussed at some length in *Waya*. Giving the majority judgment, Lord Walker of Gestingthorpe and Lord Justice Hughes said:

> "20. The difficult question is when a confiscation order sought may be disproportionate. The clear rule as set out in the Strasbourg jurisprudence requires examination of the relationship between the aim of the legislation and the means employed to achieve it. The first governs the second, but the second must be proportionate to the first. Likewise, the clear limitation on the domestic court's power to read and give effect to the statute in a manner which keeps it Convention compliant is that the interpretation must recognise and respect the essential purpose, or 'grain' of the statute.
>
> 21. Both Mr Perry and Lord Pannick submitted that it would be very unusual for orders sought under the statute to be disproportionate. Both drew attention to the severity of the regime and commended its deterrent effect. The purpose of the legislation is plainly, and has repeatedly been held to be, to impose upon convicted defendants a severe regime for removing from them their proceeds of crime. It is not to be doubted that this severe regime goes further than the schoolboy concept of confiscation, as Lord Bingham explained in *R v May* [2008] 1 AC 1028. Nor is it to be doubted that the severity of the regime will have a deterrent effect on at least some would-be criminals. It does not, however, follow that its deterrent qualities represent the essence (or the 'grain') of the legislation. They are, no doubt, an incident of it, but they are not its essence. Its essence, and its frequently declared purpose, is to remove from criminals the pecuniary proceeds of their crime. Just one example of such declarations is afforded by the explanatory notes to the statute

(para 4): 'The purpose of confiscation proceedings is to recover the financial benefit that the offender has obtained from his criminal conduct.'

22. A confiscation order must therefore bear a proportionate relationship to this purpose. …

23. Some general propositions may be offered in the light of the submissions of Mr Perry and Lord Pannick.

24. For the reasons given above, it must clearly be understood that the judge's responsibility to refuse to make a confiscation order which, because disproportionate, would result in an infringement of the Convention right under A1P1 is not the same as the re-creation by another route of the general discretion once available to judges but deliberately removed. An order which the judge would not have made as a matter of discretion does not thereby *ipso facto* become disproportionate. So to treat the jurisdiction would be to ignore the rule that the Parliamentary objective must, so long as proportionately applied, be respected. …

26. It is apparent from the decision in *May* that a legitimate, and proportionate, confiscation order may have one or more of three effects: (a) it may require the defendant to pay the whole of a sum which he has obtained jointly with others; (b) similarly it may require several defendants each to pay a sum which has been obtained, successively, by each of them, as where one defendant pays another for criminal property; (c) it may require a defendant to pay the whole of a sum which he has obtained by crime without enabling him to set off expenses of the crime. These propositions are not difficult to understand. To embark upon an accounting exercise in which the defendant is entitled to set off the cost of committing his crime would be to treat his criminal enterprise as if it were a legitimate business and confiscation a form of business taxation. To treat (for example) a bribe paid to an official to look the other way, whether at home or abroad, as reducing the proceeds of crime would be offensive, as well as frequently impossible of accurate determination. To attempt to enquire into the financial dealings of criminals as between themselves would usually be equally impracticable and would lay the process of confiscation wide open to simple avoidance. Although these propositions involve the possibility of removing from the defendant by way of confiscation order a sum larger than may in fact represent his net proceeds of crime, they are consistent with the statute's objective and represent proportionate means of achieving it. Nor, with great respect to the minority judgment, does the application of A1P1 amount to creating a new governing concept of 'real benefit'.

27. Similarly, it can be accepted that the scheme of the Act, and of previous confiscation legislation, is to focus on the value of the defendant's obtained proceeds of crime, whether retained or not. It is an important part of the scheme that even if the proceeds have been spent, a confiscation order up to the value of the proceeds will follow against legitimately acquired assets to the extent that they are available for realisation.

28. The case of a defendant such as was considered in *R v Morgan* [2008] 4 All ER 890 is, however, a different one. To make a confiscation order in his case, when he has restored to the loser any proceeds of crime which he had ever had, is disproportionate. It would not achieve the statutory objective of removing his proceeds of crime but would simply be an additional financial penalty. That it is consistent with the statutory purpose so to hold is moreover demonstrated by the presence of section 6(6). This subsection removes the duty to make a confiscation order, and converts it into a discretionary power, wherever the loser whose property represents the defendant's proceeds of crime either has brought, or proposes to bring, civil proceedings to recover his loss. It may be that the presence of section 6(6) is capable of explanation simply as a means of avoiding any obstacle to a civil action brought by the loser, which risk would not arise if repayment has already been made. But it would be unfair and capricious, and thus disproportionate, to distinguish between a defendant whose victim was about to sue him and a defendant who had already repaid. If anything, an order that the same sum be paid again by way of confiscation is more disproportionate in the second case than in the first. Unlike the first defendant, the second has not forced his victim to resort to litigation.

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

32. Under the POCA rules for lifestyle offences, the trigger for the assumptions would now be four, not two, offences of this kind from which the defendant had benefited, but otherwise the position is unchanged. If, however, an order were sought independently of the lifestyle provisions and the concomitant assumptions, and to the extent that it were based solely on the momentary benefit of obtaining goods which had been restored intact to the true owners, that order would be disproportionate

> and ought not to be made: it would not serve the aim, or go with the grain, of the legislation. Such a defendant's proceeds of crime would already have been restored to the loser in their entirety. An order in the same sum again would simply impose an additional financial penalty upon him. If such a defendant deserves an additional financial penalty, as in some cases he may, it ought to be imposed openly by way of fine, and whether or not he is also sent to prison, providing he has the means to pay. …
>
> 34. There may be other cases of disproportion analogous to that of goods or money entirely restored to the loser. That will have to be resolved case by case as the need arises. Such a case might include, for example, the defendant who, by deception, induces someone else to trade with him in a manner otherwise lawful, and who gives full value for goods or services obtained. He ought no doubt to be punished and, depending on the harm done and the culpability demonstrated, maybe severely, but whether a confiscation order is proportionate for any sum beyond profit made may need careful consideration. Counsel's submissions also touched very lightly on cases of employment obtained by deception, where it may well be that difficult questions of causation may arise, quite apart from any argument based upon disproportion. Those issues were not the subject of argument in this case and must await an appeal in which they directly arise; moreover related issues are understood to be currently before the Strasbourg court."

26. Thus the Supreme Court contemplated, albeit without deciding, that a confiscation order will be disproportionate if, despite obtaining a benefit from his criminal conduct, the defendant has given full value to the victim for that benefit; or if the benefit obtained has been fully restored to the victim. That topic was discussed in *Andrewes*, where the defendant obtained employment as the Chief Executive Officer of a hospice by making false representations about his qualifications and experience, without which he would not have obtained the post. Nevertheless, despite his complete absence of medical qualifications, his performance was regularly appraised as either strong or outstanding during the ten years in which he held this post. The issue was whether it was disproportionate to treat the salary which he had been paid as a benefit obtained from his criminal conduct. It was held as a matter of causation that the salary had been obtained as a result of or in connection with the defendant's criminal conduct, but that because he had given full value for his salary, a confiscation order would be disproportionate.

27. Lord Justice Davis said that the courts have generally been strict in requiring restoration to be in full before a confiscation order may be mitigated on grounds of disproportionality:

> "58. … Thus if a stolen car is restored in a damaged state the value of it in such damaged state will not be taken into account. … (That is not to say that in some cases partial restoration may not suffice. For example, if a burglar steals six valuable items of

> jewellery and restores three of them when apprehended, a confiscation order in the amount of all six items is not, post-Waya, to be anticipated. Likewise, if a thief steals £10,000 and restores £5000 a confiscation order in the sum of £10,000 is not to be anticipated.)"

28. This point was further developed, as applied to the facts of the case, as follows:

> "91. It can surely appeal to no sense of the merits in the present case if the appellant, had he had sufficient realisable assets, had been made subject to a confiscation order in the full amount of the benefit, representing all his earnings obtained over the 10 year period, and inflation-adjusted. As the Recorder himself said, 'few would regard as proportionate' such an order. Of course, merits, as such, is not the test. But the reason why such an order would be disproportionate is, we think, precisely because the appellant is to be taken as having over the years given full value, in terms of the services he provided, to the hospice and Trusts in return for the remuneration which he obtained (remuneration which they would have had to pay to others if they had not employed or appointed him). Issues of *quantum meruit* have no part to play in this case: as the Recorder rightly held."

29. Lord Justice Davis also referred to *R v Sale* [2013] EWCA Crim 1306, [2014] 1 WLR 663. That was a case where the defendant obtained valuable contracts for his company from Network Rail by bribery, but the company nevertheless carried out the work satisfactorily. The issue was whether a compensation order should be made for the full amount payable under the contract, none of which would have been obtained without the bribery. It was held that such an order would be disproportionate. The confiscation order should be limited (in the absence of evidence to quantify other advantages which the company had obtained) to the amount of the company's profit.

30. Commenting on the issue of partial restoration, Lord Justice Treacy said:

> "54. Post *R v Waya* decisions of this court in *R v Axworthy* [2012] EWCA Crim 2889, *R v Hursthouse* [2013] EWCA Crim 517, and *R v Jawad* [2013] 1 WLR 3861 all demonstrate that in cases of total restoration, the property originally obtained should not be treated as benefit, as to do so would be disproportionate. However, it is implicit from *R v Jawad*, para 27 that in the event of only partial restoration, the whole order for confiscation should stand. The recent decision of this court in *R v Harvey* [2013] EWCA Crim 1104 affirmed this approach, having considered the approval of the decision in *R v Morgan* in *R v Waya*."

31. Referring to *Sale* in *Andrewes*, immediately before the passage cited above, Lord Justice Davis acknowledged that *Waya* had left open "the possibility of cases of disproportion 'analogous' to those of the goods or money entirely restored to the victim". He continued:

> "90. *Sale*, we consider, is an important and illuminating example of that. The defendant was not required to restore, by confiscation, the gross value of the contracts dishonestly obtained. Rather, he was only required to restore his net profits on those contracts (with a further sum, had it been capable of assessment, for any additional pecuniary advantage obtained). The rationale for that is clear: Network Rail was regarded as recompensed by its receiving full value for its monetary outlay (see paragraph 56 of the judgment). Providing full value, by performing lawfully the services under the contracts, thus was taken, to that extent, as analogous to restoration; and thus in turn required limitation of the confiscation order accordingly, on grounds of disproportionality. A corresponding approach underpins cases where it is adjudged disproportionate to make a confiscation order in the amount of gross proceeds or turnover where the overall business has been operated legitimately: as cases such as *King (Scott)* [2014] EWCA Crim 621, [2014] 2 Cr App R (S) 54 and *Reynolds* [2017] EWCA Crim 1455 illustrate."

32. *King*, to which Lord Justice Davis referred in the passage just cited, was a case where a motor car dealer falsely advertised himself to buyers as selling privately, in order to avoid giving any warranty or guarantee. The issue arose whether his benefit consisted of the full revenue from the vehicles which he sold in this way. This court held that it was not disproportionate so to hold, drawing a distinction at [32] between "cases in which the goods or services are provided by way of a lawful contract (or when payment is properly paid for legitimate services) but the transaction is tainted by associated illegality (e.g. the overcharging in *Shabir* [2008] EWCA Crim 1809, [2009] 1 Cr App R (S) 84 or the bribery in *Sale*), and cases in which the entire undertaking is unlawful (e.g. a business which is conducted illegally, as in *Beazley* [2013] EWCA Crim 567)". The distinction was not necessarily determinative, but was "a relevant factor when deciding whether to make an order that reflects the gross takings of the business". The relevance of that distinction was endorsed in *Andrewes*.

33. Accordingly the cases establish that, if full value has been given for the benefit received, it will be disproportionate to make a confiscation order. That position has been contrasted with a case where the defendant has given some but not full value; or if he has restored some but not all of the benefit obtained. We would not exclude the possibility that there may be cases where full restoration has not been made or full value has not been given, but where a confiscation order for the full value of the benefit obtained may nevertheless be disproportionate. Further, there may be cases where the partial restoration which has been made is readily quantifiable, as in the example of the burglar who restores three out of six stolen items or who steals £10,000 but pays back £5,000. Similarly, there may be cases where a clear distinction can be drawn between the services provided by a defendant in return for the benefit obtained. Leaving such cases aside, however, in general the fact that a defendant has given some value, or even significant value, in return for the benefit which he has obtained from his criminal conduct will not mean that it would be disproportionate to make a confiscation order based on the full amount of the benefit obtained. This accords with the emphasis in the cases to which we have referred on the need for full restoration or full value.

34. Further, just as it is inappropriate to embark upon an accounting exercise in which the defendant is entitled to set off the cost of committing his crime against the benefit received, so too it is inappropriate to attempt to ascribe value to the victim from the defendant's criminal conduct or to attempt to separate out lawful and criminal conduct when in reality these are inextricably mixed. Nor is there any room for a kind of *quantum meruit* approach. The law's refusal to undertake such exercises leaves open "the possibility of removing from the defendant by way of confiscation order a sum larger than may in fact represent his net proceeds of crime", but this is consistent with the statute's objective and represents a proportionate means of achieving it (see *Waya* at [26], cited above).

35. Finally by way of general point, and at the risk of stating the obvious, it is relevant to note that confiscation and compensation are different. The purpose of confiscation is to deprive criminals of the benefit of their criminal conduct, while the purpose of compensation is to compensate victims for losses or injuries suffered as a result of crime. Confiscation focuses on the benefit which the criminal has obtained from the crime, with a loose causal test ("as a result of or in connection with") tempered, as we have explained, by considerations of proportionality. Compensation, on the other hand, focuses on the losses suffered by the victim with a more conventional test of causation ("compensation for any personal injury, loss or damage resulting from that offence …": section 130(1) of the Powers of Criminal Courts (Sentencing) Act 2000; or see now section 133 of the Sentencing Act 2020). The benefit obtained by the criminal will not necessarily correspond to the losses suffered by the victim.

36. In the light of these principles, we turn to the various grounds of appeal.

The salary issues

37. We deal first with the issues concerning salary and bonuses (Asplin's ground 1, Kearns' ground 1, Jones' grounds 1 and 2).

The judge's rulings

38. In a ruling made on 17th July 2019 the judge rightly reminded himself that whether a benefit has been obtained as a result of or in connection with criminal conduct and, if so, in what amount, depends on the evidence in the particular case and that comparison with the facts of other cases can be no more than illustrative. He analysed the particulars of criminal conduct contained in the indictment and the evidence in support of the allegations, and made two important factual findings. The first was that Medreport was wholly dependent on the business directed to it by Asplin and Kearns for its existence. The second was that if the true nature of Asplin's and Kearns' interest in Medreport had been known, both defendants would have been sacked, as they well knew, a conclusion which was reinforced by the concerted efforts which the defendants had made to keep that interest secret. Mr Adrian Waterman QC for Asplin challenged this latter finding, but in our judgment it was a finding which the judge, who heard extensive evidence, was entitled to make.

39. On these facts the judge found that all sums received by Jones from Medreport, whether described as salary or dividends, amounted to a benefit obtained from her participation in the conspiracy throughout the whole period in which she was part of it. There was, he said, "inescapably a direct causal link between her offending and all the sums that

she received from Medreport however they may have been described". The judge had greater hesitation in relation to the salaries received by Asplin and Kearns, but nevertheless concluded that "each retained the salary that they did following the creation of Medreport only as a result of the fraud identified and their determined and successful efforts to conceal" their interest in Medreport, contrary to the fiduciary duties which they owed to disclose that interest. The salaries of all three defendants were therefore to be treated as benefit for the purpose of section 71(4) of the 1988 Act.

40. The judge dealt with the issue of proportionality in a separate ruling made on 25th July 2019, for which, therefore, he did not have the benefit of *Andrewes*, decided on 7th August 2020. Nevertheless, he anticipated much of its reasoning. In the case of Jones, he held that nothing which she did in performing her duties at Medreport, however effectively she may have performed them, involved any restoration of benefit to DAS so as to render a confiscation order disproportionate. In the case of Asplin, he recognised that the salary which he was paid by DAS was for the performance of his duties as CEO and that DAS had prospered under Asplin's leadership despite the fraud. He continued:

> "However, having ruled that none of that salary would have come to him had the fraud been known, … there would, in my judgment, have to be something conspicuously identifiable that DAS received in return, as would probably amount to restitution or restoration and as could be properly quantifiable. In my judgment, there is in fact, no evidence of this at all. … The case of *Waya* in the House of Lords [sc. Supreme Court] indicates to me that there has to be a firm factual basis for the discount of a sum, either identified as a sum paid in restoration or in restitution or something akin to that, for the application of A1P1, and when all is said and done, on what I have been given, I cannot find that there is any such firm factual basis for what I have been asked to do."

41. The judge concluded that Asplin had, to some extent, done a good job as CEO and added that, if he had a general discretion, he would have exercised it by discounting about one third of Asplin's salary from the calculation of benefit. However, he recognised correctly that he did not have any such discretion and noted, importantly, that any discretionary discount "would, in effect, be plucking a figure out of the air".

The appellants' submissions

42. For Asplin Mr Waterman emphasised the purpose of the confiscation regime, including that it is not a punishment. Leaving aside his submission, which we have already rejected, that the judge was wrong to find that Asplin and Kearns would have been sacked if the their interest in Medreport had been known, he submitted that Asplin's role as CEO was wide-ranging, and that his fraudulent conduct took up a very small amount of his time and represented a small part of his role. In these circumstances the judge was wrong to find that Asplin had obtained his salary as a result of or in connection with the fraud. He had been employed for many years before the fraud began and even after it began had continued to work successfully creating profits for DAS. That was what he was paid to do and that is what he did. To treat his salary as a benefit from his crime would be no different from depriving a shop assistant who stole from

his employer from time to time of the entire salary earned during his employment, a conclusion which could not be right even though, if he had been caught, the shop assistant would have been sacked in the same way as the judge had found that Asplin would have been sacked.

43. Although Asplin's written grounds were largely confined to the issue of causation, in oral argument Mr Waterman focused in addition on the issue of proportionality. He submitted that the judge's requirement of "something conspicuously identifiable that DAS received in return" was not found in the case law and was wrong in principle and that this was a case, applying the distinction referred to in *King* and endorsed in *Andrewes*, where Asplin was performing a lawful function as CEO of DAS but with associated illegality ("something on the side" as Mr Waterman put it), as distinct from a case where the entire undertaking was unlawful. To deprive him of his salary for a period of 14 years' hard work as a successful CEO would be penal and disproportionate. The benefit should be confined to the dividends and other payments which he had received from Medreport as a direct result of the fraud.

44. Mr Philip Hackett QC for Kearns made substantially similar submissions, but with the additional point that although the judge had dealt expressly with the position of Asplin when considering the issue of proportionality, he had given no separate consideration to the position of Kearns. He submitted that the scheme devised by Asplin and Kearns whereby Medreport had paid commissions to DAS for the work which was referred to it had represented substantial value for the company which could be quantified.

45. The position of Sally Jones differed from that of her fellow conspirators in that her salary had not been paid by the victim, DAS, but by Medreport which was the instrument by which the fraud was committed. Nevertheless the submissions made by Ms Rachna Gokani on her behalf were similar. Ms Gokani submitted that Jones had worked hard over a long period to make Medreport a success and that its business was not inherently unlawful. On the contrary the provision of medical reports was wholly legitimate; there was no sufficient causal link between the conspiracy and the payment of her salary; and to count her salary for the purpose of confiscation proceedings would be disproportionate when she had caused Medreport to provide a legitimate service to DAS in the form of the medical reports which it needed. It would leave her dependent for the future on state benefits.

Decision

46. Identification of the benefits obtained as a result of or in connection with the commission of an offence will always depend on the particular facts of the case. In the present case the following facts are particularly relevant, as Mr Martin Evans QC for the prosecution submitted:

    (1) Medreport only received its initial contracts with DAS because of the influence of Asplin and Kearns.

    (2) Throughout the indictment period, Medreport's business was wholly dependent on referrals from DAS which were obtained (at least until Kearns left on 31st December 2004) by Kearns using his authority as Head of Claims to direct work to Medreport.

(3) As a result Medreport obtained over 90% of DAS's requirement for medical reports during the indictment period.

(4) The Medreport contracts were only renewed because of Asplin's and Kearns' active and repeated use of their influence to ensure that no other supplier was used, regardless of the commercial merits.

(5) Asplin and Kearns caused DAS to provide funding to Medreport for no good commercial reason, in order to enable them to buy out one of the Medreport shareholders.

(6) Asplin and Kearns provided commercially sensitive information to Medreport, including information about the terms offered to DAS by competitors.

(7) All defendants took active steps to frustrate DAS's enquiries into the relationship with Medreport and to ensure that the truth did not become known.

(8) Jones sought in effect to blackmail Asplin into continuing the contract with Medreport.

47. Dealing first with the issue of causation, it is true that (in contrast with the defendant in *Andrewes*) Asplin and Kearns did not obtain their employment as a result of their fraudulent conduct. On the contrary, it was their existing roles at DAS which enabled them to conceive the idea of the fraud and to carry it out. Nevertheless it is clear, given the judge's finding that they would have been sacked if the true position had been known, that from the time when Medreport was first established, they retained their employment, and therefore obtained their salaries, as a result of concealing their interest in it. That concealment, in circumstances where they owed fiduciary duties to disclose their interest, was an integral part of the conspiracy and formed one of the particulars of fraud set out in the indictment. In these circumstances, we consider that the judge was right to conclude that the salaries obtained by Asplin and Kearns were obtained as a result of or in connection with their commission of the offence. As we have explained, this is recognised to be a "loose" causal test and the statutory words should not be interpreted restrictively. However, it is not necessary in this case to resort to the looseness of the test in order to reach the conclusion which we have reached. Asplin's and Kearns' employment by DAS was critical to the fraud.

48. Turning to proportionality, we accept that a considerable part of Asplin's and Kearns' work at DAS was unconnected with the direction of work to Medreport and the receipt of secret profits; and that in many respects Asplin and Kearns contributed to DAS's overall success. It follows, therefore, that they can be said to have provided at least some and perhaps significant value for the salaries which they received. However, it is impossible to sever legitimate work promoting DAS's interests from illegitimate work connected to the commission of the fraud. Rather, on the facts here, the two were inextricably linked. Nor is it possible to quantify that part of their work which can be regarded as legitimate. It is impossible, therefore, to allocate part of their salaries to legitimate work. As the judge said, any attempt to do so would involve plucking a figure out of the air in circumstances where there is no factual basis for drawing such a distinction. In the circumstances it is clear, in our judgment, that Asplin and Kearns cannot be regarded as having given full value for the salaries which they received. During much of their employment, even if we assume in their favour that this

represented a minority of their time, they were engaged in perpetrating and concealing the fraud, exploiting their position as senior employees in order to do so. Their position is not comparable to the shop assistant stealing from his employer.

49. Accordingly we cannot regard this as a case where the salaries were properly paid for legitimate services, but the commission of the fraud was merely an associated illegality "on the side". Rather, the commission of the fraud meant that Asplin's and Kearns' employment, and hence their right to their salaries, was fundamentally flawed.

50. The judge referred to the need for "something conspicuously identifiable that DAS received in return" for the salaries paid. However, when the passage from his ruling which we have set out above is read in full, it is apparent that he was not introducing some novel legal requirement, but was recognising that full value could not be regarded as having been given for the salaries received, and that it was impossible to quantify any partial value given without some clear evidential basis for so doing. He was correct so to find.

51. It is true, as Mr Hackett pointed out, that the judge did not deal separately with the position of Kearns when considering the issue of proportionality, although he had said that he would do. However, it is apparent (making allowance for the fact that Kearns' employment at DAS ended on 31st December 2004 and that, although very senior, he was not as senior within DAS as Asplin was) that the judge's reasoning in relation to Asplin was equally applicable to Kearns. Accordingly we do not regard the judge's omission to deal separately with the position of Kearns as invalidating his conclusion. Mr Hackett submitted also that overall the service provided by Kearns was beneficial to DAS and enabled it to be profitable. However, that submission is not readily reconcilable with the judge's finding as to the overall loss suffered by DAS as a result of the conspiracy.

52. Accordingly to treat the salaries received by Asplin and Kearns as part of the benefit which they received from the commission of the offence does not render the confiscation order disproportionate.

53. As we have explained, the position of Sally Jones is different in that she was employed by Medreport and not by DAS, the victim of the offence. However, in her case too the judge was right to say that her salary was obtained as a result of or in connection with the commission of the offence. That follows from her active involvement in the conspiracy and from the judge's finding that, without the conspiracy, Medreport would have had no business. The analysis of proportionality in her case is similar to that which applies in the cases of Asplin and Kearns. She can perhaps be regarded as having provided some value to DAS in that the medical reports which Medreport provided under her direction enabled or assisted DAS to conduct its business, but this falls far short of anything like full value, not least as any value which she provided for her salary was in reality provided to Medreport and not to DAS. In her case too, therefore, her salary is rightly to be regarded as part of the benefit which she received from the commission of the offence and it is not disproportionate to order confiscation on this basis.

54. This may well mean, as Ms Gokani submitted, that Jones will be reduced to living on state benefits if she cannot obtain employment. But that is the inevitable consequence of a confiscation regime which deprives a defendant of all of her realisable assets if

these are less than the benefit obtained from the crime. This does not render confiscation disproportionate for the purpose of A1P1. Rather, it is an intrinsic feature of the statutory scheme, the alternative to which would be to allow criminals to retain part of the benefit obtained from their criminality.

55. That said, there is one adjustment which must be made to the figures. In all three cases the salaries included in the calculation of benefit are gross salaries and not, as in our judgment they should be, salaries paid net of tax. In *Andrewes* the prosecution accepted that benefit in the form of salary should be the net figure (see at [88]) but Mr Evans did not make that concession in this case. Nevertheless, we consider that the net figure is the correct figure. The benefit which the defendants received was the amount of salary net of tax and, in a case such as the present where the PAYE system applied, the defendants never even received the tax deducted at source, although we would not necessarily rest our judgment on this latter point.

The £332,832 paid into Kearns' bank account

56. We deal next with the issue concerning the payment of £332,832 into Kearns' bank account, which was then almost immediately paid over to Asplin (Kearns ground 2). Asplin accepts that this should be, as it has been, included in the calculation of his benefit, while Kearns submits that it should not be included in his, on the ground that he was merely passing on Asplin's share of the proceeds of the conspiracy.

57. Mr Hackett submitted that this money was not "obtained" by Kearns, because obtaining connotes a power of disposition or control of the money; Kearns' position was akin to that of a courier transferring the money to Asplin. Further, it was disproportionate to include this within Kearns' benefit figure when the money was properly to be regarded as part of Asplin's benefit.

58. We can deal with this point shortly. In agreement with the judge, we consider that this payment is properly to be regarded as a joint benefit, obtained by each of Kearns and Asplin. The money was paid into Kearns' account and was a direct consequence of the conspiracy to which he was an active party. It was therefore obtained by him as a result of or in connection with his criminal conduct. To the extent that "obtaining" connotes a power of disposition or control of the money, Kearns had that control. He chose to pay the money over to Asplin, pursuant to the agreement between the conspirators, but it cannot be said that Asplin had any lawful right to receive the money. Plainly he did not.

59. On the authorities, the position is clear. A person who receives money into his bank account obtains it from the source from which it is derived and, where he is the sole signatory on the account, he obtains the money and has possession of it for his own benefit (*R v Sharma* [2006] 2 Cr App R (S) 416, approved in *May* at [34]). A confiscation order which requires the defendant to pay the whole of a sum which he received jointly with others is both legitimate and proportionate (*Waya* at [26], cited above).

60. In such circumstances the confiscation order should be made against each defendant for the whole value of the benefit obtained, but should provide that it is not to be enforced to the extent that a sum has been recovered by way of satisfaction of another confiscation order made in relation to the same benefit (*R v Ahmad* [2014] UKSC,

[2015] AC 299 at [74]). This was the order which the judge made. He was right to do so.

The pension issue

61. We turn next to the question whether Asplin's pension should be regarded as part of his realisable assets (Asplin ground 2).

62. Asplin was the prospective beneficiary of a pension fund arising from his employment with DAS. The fund was held by trustees. After Asplin's employment was terminated, he sought to have the fund transferred to an independent SIPP. However, before the fund could be transferred, DAS requested the trustees to postpone its distribution pending contemplated civil proceedings against Asplin. The trustees, in the exercise of their discretion, acceded to that request. In effect, therefore, the fund remains in the hands of the trustees and has been frozen, so that it is not immediately accessible to Asplin. The trust deed contains provisions which enable the trustees to forfeit the pension in some circumstances, but they have not as yet made any decision whether to do so.

63. In these circumstances the judge held that the trustees' action had the effect of suspending Asplin's right to access the funds, but that it was nevertheless to be included as part of his realisable assets for the purpose of the confiscation order.

64. Despite Mr Waterman's submissions to the contrary, we agree with the judge's analysis.

65. It was common ground before the judge that the transfer value of the fund was some £4.7 million, although this figure will by now be out of date. This was a gross figure, although if Asplin were to take the pension, tax would be payable. In an accountant's report produced very shortly before the appeal hearing on behalf of Asplin, which was not available below, it has been suggested that if the whole pension were taken in one go (for example, to satisfy a confiscation order) tax of some £1.8 million would be payable, leaving a net receipt of £2,722,919.

66. In principle, it is the value of the pension net of tax which should be included in the figure for realisable assets. We propose to give the parties an opportunity to agree this figure, based on the agreed transfer value in the court below. It is this figure which will be relevant for the purpose of the confiscation order. In the event that the actual value of the pension when paid by the trustees in satisfaction of the confiscation order proves to be less than this, an appropriate application can be made for a certificate of inadequacy (just as would be the case, for example, if the sale of a house were to realise less than had been anticipated).

67. Kearns did not include any issue as to his pension in his grounds of appeal, but its gross value was included in his realisable assets. In principle, therefore, the same point applies to him: the figure to be included should be net of tax. Again, we will give the parties an opportunity to agree this figure, on the same basis.

Compensation

68. Finally, we deal with the compensation order made against Asplin. The judge accepted the figures put forward by the prosecution, which showed a total loss to DAS of £11,231,397. This figure included not only the secret profits obtained by the conspirators, but also the gross salaries paid to Asplin (during the whole indictment period) and Kearns (until he left DAS on 31st December 2004), amounting to £3,941,559 and £284,945.26 respectively.

69. Subject to the question whether these salary payments should have been included in the loss caused to DAS, we consider that this was a conclusion which the judge was entitled to reach. Although Mr Waterman for Asplin submitted that DAS's relationship with Medreport had been profitable, it does not follow that DAS did not suffer a loss as a result of the conspiracy and the judge was best placed to determine this issue. In particular, the secret profits made by the conspirators are properly to be regarded as a loss suffered by DAS in view of the conspirators' fiduciary obligation to account to DAS for those profits (*FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250 at [6] to [8]).

70. Accordingly DAS is entitled to compensation in the amount of the secret profits made by the conspirators. However, we accept that the salary payments should not have been included in the calculation of DAS's loss. It is true that Asplin and Kearns obtained their salaries as a result of their fraudulent concealment of their ownership of Medreport and that, if they had acted honestly by disclosing their interest, DAS would have dismissed them and therefore would not have paid their salaries. However, DAS would have paid equivalent salaries to another CEO and Head of Claims in any event. To make an award of compensation in the full amount of the salaries paid would therefore provide DAS with an unwarranted windfall. It would have obtained the services of a CEO and Head of Claims over a considerable period for nothing. Further, as we have explained when dealing with confiscation, this is not a case where Asplin and Kearns gave no value for the salaries which they received. In relation to confiscation, the fact that they gave some but not full value means that it is not disproportionate to include their salaries in the calculation of their benefit from the crime. However, when making an order for compensation, at any rate in a case of purely financial loss, it needs to be proved that the offending has caused loss to the victim in a reasonably quantifiable amount. The prosecution did not attempt to identify any part of Asplin's or Kearns' salary for which no value was given and in any event such an exercise would have run counter to its case on confiscation that their legitimate and fraudulent activities were inextricably linked. Instead the prosecution rested on the submission that the entire salaries represented a loss to DAS.

71. The fact that the salary does count as part of a defendant's benefit for the purpose of confiscation but does not count as part of the victim's loss for the purpose of compensation may seem superficially odd, but in reality it merely illustrates the differences between these two regimes. When considering confiscation in a case such as the present, the question arising will be whether full value has been given for a salary obtained as a result of fraud or, if not, whether the employee defendant can demonstrate that there is a readily identifiable part of the salary which can be properly ascribed to legitimate activity, so that it would be disproportionate to deprive him of the full salary. When assessing compensation for the employer, however, a different question arises, namely whether the employer can show that it has suffered a loss, either in the full amount of the salary paid or to the extent of some reasonably identifiable proportion of

the salary. In this case DAS has not, on the facts, suffered a loss in the full amount of the salaries paid to Asplin and Kearns and, as we have explained, has not attempted to make out a case for payment of any lesser sum by way of compensation.

72. Strictly speaking, it is only Asplin who has challenged the inclusion of the salaries paid in the calculation of the loss suffered by DAS as a result of the conspiracy. However, the same calculation was applied to all three defendants by the judge and, if it mattered, an adjustment would have to be made to the orders made in all three cases. Ultimately, however, this point does not matter. Removing the salaries, totalling £4,226,504.26 from the calculation of loss found by the judge results in a loss figure of £7,004,892.74. In view of the defendants' realisable assets, the compensation actually ordered against each of them was less than this (and in the cases of Asplin and Kearns, the realisable asset figure will need to be reduced to some extent as a result of our decision on the pension issue). Accordingly, notwithstanding Asplin's success on the point of principle, the compensation order made against him (and against the other defendants) must stand.

Disposal

73. The result of the appeal will be as follows.

Asplin

74. In the case of Asplin, we grant permission to appeal on grounds 1 (salary) and 2 (pension).

75. We affirm the judge's rulings on the points of principle, that is to say:

(1) the judge was right to make a confiscation order based on a calculation of benefit which included the salary paid to Asplin during the indictment period; and

(2) the judge was right to include Asplin's pension in the calculation of his realisable assets.

76. However, we allow the appeal to the limited extent indicated above, that is to say that the salary to be included in the calculation of benefit and the pension figure to be included in the realisable assets should be net of tax.

77. We refuse permission to appeal on ground 3 (compensation). While the calculation of loss should not have included the salaries paid to Asplin and Kearns, this does not affect the amount of compensation ordered to be paid.

Kearns

78. In the case of Kearns, we grant permission to appeal on ground 1 (salary), but not on ground 2 (joint benefit).

79. As in the case of Asplin, the judge was right to make a confiscation order based on a calculation of benefit which included salary, but the salary figure to be included in the calculation should be net of tax. Because the realisable assets will remain considerably less than the benefit obtained, this point will not affect the amount of the confiscation order. However, the realisable amount, and therefore the amount of the confiscation order, will need to be adjusted so that the pension figure included is a figure net of tax.

Jones

80. We grant permission to appeal on both grounds (salary), but dismiss the appeal.

81. The parties must within 21 days of the handing down of this judgment either agree the figures and consequential orders which need to be made as a result of this judgment or, if they are unable to do so, provide brief written submissions identifying the points of difference.

Postscript

82. These post-trial proceedings were complex and challenging and required a series of rulings which, with only limited exceptions, we have affirmed. We commend the judge's handling of them.