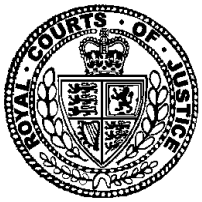

Neutral Citation Number: [2014] EWCA Crim 1658

Case No: 201206783 C4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM the Crown Court at Harrow
HHJ Holt

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2014

Before :

LORD JUSTICE BEATSON
MR JUSTICE WILKIE
and
MR JUSTICE HADDON-CAVE

- -

Between :

Salah Ali	**Appellant**
- and -	
Regina	**Respondent**

- -
- -

Simon Farrell QC (instructed by **Kingsley Napley Solicitors**) for the **Appellant**
Andrew Campbell-Tiech QC and Kriston Berlevy (instructed by **London Borough of Brent**) for the **Respondent**

Hearing date: 17 July 2014

- -

Approved Judgment

Lord Justice Beatson :

1. On 29 September 2010 the appellant, Salah Madhi Ali, now aged 54, was convicted at Brent Magistrates Court of failing to comply with an enforcement notice contrary to section 179(2) of the Town and Country Planning Act 1990. He had converted a house at 211 Willesden Lane, NW6 into 12 flats without planning permission and failed to comply with an enforcement notice served on him on 8 February 2008 by Brent London Borough Council ("the Council") requiring him to cease the use of the premises as more than one dwelling by 20 June 2008.

2. The appellant was committed to the Crown Court at Harrow pursuant to section 70 of the Proceeds of Crime Act 2002 (hereafter "POCA") for sentence and confiscation proceedings. On 25 September 2012, in that Crown Court, sitting at the Crown Court at Norwich, HHJ Holt made a confiscation order against him in the sum of £1,438,180.59. The sum ordered was to be paid within six months with a period in default of 10 years imprisonment. On that date HHJ Holt also sentenced him to a fine of £4,000, to be paid within six months with a period in default of 3 months imprisonment. The appellant appeals by leave of the Full Court ([2014] EWCA Crim 1064) against the confiscation order.

3. The confiscation order was made on the basis that the appellant was to be treated as having a criminal lifestyle and that the assumptions in section 10 of POCA apply so that, unless he showed otherwise, property transferred to him in the six years ending with the date when the proceedings for the offence were started was obtained as a result of his general criminal conduct. The order made was calculated on the basis that the six year period ended on 31 March 2008, the date of the summons. It was also made on the basis that, as well as his benefit from housing benefit/rents obtained from the flats at 211 Willesden Lane, the application of the statutory assumptions meant that some £1.2 million he obtained from housing benefit/rents in respect of three other houses he had also converted into flats without planning permission were obtained from his criminal conduct.

4. The principal issues in this appeal are:

   (a) The circumstances in which the statutory assumptions in section 10 of POCA are to be applied in a case where the defendant is absent from the confiscation proceedings through illness;
   (b) Whether, and if so on what basis, a defendant's particular and general benefit within sections 6 and 10 of POCA includes rent received in respect of a property where no enforcement notice has been served, or in respect of a period before the expiry of the time for compliance with an enforcement notice, and
   (c) Whether the judge erred in not adjourning the appellant's case before proceeding with the confiscation hearing in order to seek further medical evidence about his re-admission to hospital and in refusing to stay the proceedings as an abuse of process in the light of the appellant's circumstances and mental health.

   To the extent that the appeal is allowed, a further issue will arise in relation to 211 Willesden Lane. It is whether, if the order is varied pursuant to section 11(3) of the Criminal Appeal Act 1968, this should be done to reflect the requirement in section 8(2) of POCA that the court must "take account of conduct occurring up to the time

[the Crown court] makes its decision" in the confiscation proceedings (29 September 2012) rather than, as in the existing order, 2 February 2009, the end of the period for which the appellant was charged.

5. The appellant suffers from mental health problems. He was an in-patient at the Park Royal Centre for Mental Health between 9 May 2011 and 10 August 2012 and from 19 September 2012 to an unspecified date after the confiscation hearing on 25 September. Since the grounds of appeal include the submission that the judge erred in refusing to adjourn the hearings scheduled for 24 and 25 September and to stay the confiscation proceedings in the light of the appellant's ill health, we summarise the relevant parts of the procedural history as well as the relevant material on the appellant's benefit and realisable assets. During the hearing, the court was informed that the appellant remains very unwell, lacks capacity, and is now subject to the jurisdiction of the Court of Protection. His son, who has recently been appointed his Interim Deputy, has been fully apprised of this appeal.

I. The material principles of law

6. The following summary of the position under POCA is derived from the decision of the Supreme Court in *Waya* [2012] UKSC 51, reported at [2013] 1 AC 294, and that of this court in *Gavin and Tasie* [2010] EWCA Crim 2727, reported at [2011] 1 Cr App R (S) 126:-

    (1) Under section 6(2) of POCA, it is mandatory to proceed with a view to a confiscation order being considered once two conditions are satisfied, namely that the defendant is convicted of an offence before the Crown Court and that the prosecution applies for the order to be made.

    (2) A central feature of Part 2 of POCA is the distinction between cases in which the defendant is, or is not, to be treated as having a criminal lifestyle (as prescribed by section 75). It is accepted in this appeal that, because the offence of which the appellant was convicted was an offence committed over a period of at least six months and he has a relevant benefit of over £5,000 from the conduct that constituted the offence, that he has, by virtue of section 75(2)(c), benefited from a criminal lifestyle.

    (3) In cases where a defendant has benefited from a criminal lifestyle, the court must determine how much he has benefited from his general criminal conduct. If he does not have a criminal lifestyle, the court must determine whether he has benefited from the particular criminal conduct. In both cases, the first stage is to identify the benefit: see sections 6(4), 8 and 76. Section 8(2) requires the court to "take account of conduct occurring up to the time it makes its decision" in the confiscation proceedings.

    (4) In cases where a defendant has a criminal lifestyle, when deciding whether he has benefited from his general criminal conduct and deciding what his benefit is from the conduct, the courts must, in accordance with section, make the assumptions contained in section 10. Broadly stated, the effect of these assumptions is that property in the possession of a defendant in the six years ending with the day when proceedings for the offence concerned

were started against the defendant is assumed to be the product of his criminal activities unless he can show otherwise on the balance of probabilities. In other words, in such a case the burden of proof is reversed since the defendant has to show how he came by his assets.

(5) The second stage is the valuation of the benefit. It may fall to be valued (see sections 79 and 80) either at the time when it is obtained, or at the date of the confiscation order.

(6) The third stage is the valuation as at the confiscation date of all the defendant's realisable assets, described in section 9 as "the available amount". The "available amount" operates as a cap on the amount of the confiscation order, termed "the recoverable amount" in section 7.

(7) POCA laid down a procedure to enable the court to obtain the information necessary to make findings as to benefit and assets. The prosecution serves a statement of information pursuant to section 16 ("a section 16 statement"), outlining what it considers to be matters potentially relevant to the inquiry. The defendant may be ordered to indicate to what extent he accepts the matters in the statement, and to particularise those matters which he does not accept in a response: see section 17. A defendant may also be required to provide information to help the court carry out its functions: see section 18.

7. Much of the argument in the appeal focused on section 76 of POCA, which we set out in full:-

"**76 Conduct and benefit**

(1) Criminal conduct is conduct which—

(a) constitutes an offence in England and Wales, or

(b) would constitute such an offence if it occurred in England and Wales.

(2) General criminal conduct of the defendant is all his criminal conduct, and it is immaterial—

(a) whether conduct occurred before or after the passing of this Act;

(b) whether property constituting a benefit from conduct was obtained before or after the passing of this Act.

(3)Particular criminal conduct of the defendant is all his criminal conduct which falls within the following paragraphs—

(a) conduct which constitutes the offence or offences concerned;

(b) conduct which constitutes offences of which he was convicted in the same proceedings as those in which he was convicted of the offence or offences concerned;

(c) conduct which constitutes offences which the court will be taking into consideration in deciding his sentence for the offence or offences concerned.

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

8. The appellant also relied on section 27 of POCA, which deals with a defendant who absconds after *inter alia* he is committed to the Crown Court for sentencing: section 27(2)(b). Where section 27 applies, the court must proceed under section 6 in the same way as it must proceed if the two conditions in section 6 are satisfied but, by section 27(5)(d), the section 10 assumptions to be made in a case of criminal lifestyle "must be ignored". Once the defendant ceases to be an absconder, section 19, which governs reconsideration of a case where the defendant is convicted of an offence before the Crown Court or committed to the Crown Court for sentence, is satisfied if no court has proceeded under that section, and if (see section 27(7)) "there is evidence which was not available to the prosecutor…on the relevant date". In cases not involving an absconder, by section 19(1), where a defendant is convicted before the Crown Court or committed to the Crown Court but no court has proceeded under section 16, reconsideration is only possible if (see section 19(1)(b)) "there is evidence which was not available to the prosecutor on the relevant date".

III. The factual and procedural background

9. The appellant acquired 211 Willesden Lane on 11 January 2005. Absent an appeal against the enforcement notice issued on 8 February 2008, the notice "took effect" on 19 March 2008. The time for compliance with it was three months after that date, i.e. 20 June 2008. The appellant did not comply with the enforcement notice and, on 31 March 2009, he was summoned to attend Brent Magistrates Court. The summons stated that the alleged offence was that "between 20 June 2008 and 2 February 2009, after the end of the period for compliance with the enforcement notice …, [the appellant] was in breach of the notice in that he failed to take the steps required in the notice." As we have stated, he was convicted on 29 September 2010.

10. The appellant's case was first listed at Harrow Crown Court for sentence and consideration of confiscation on 9 November 2010. On that day, an order was made pursuant to section 18 of POCA requiring him to provide information, but the confiscation proceedings and sentencing hearing were adjourned by the court to 1 April 2011. On 7 December 2010 the appellant, through his solicitors, replied to the section 18 order.

11. On 18 January 2011, the prosecution served its first section 16 statement of information. This dealt with its financial investigation into the appellant's affairs for the six year period commencing on 1 April 2003. The notice consists of 22 pages with 753 pages of appendices. It stated that, because the offence of which the appellant was convicted was an offence committed over a period of at least six months and he has a

relevant benefit of over £5,000 from the conduct that constituted the offence, he has, by virtue of section 75(2)(c) of POCA, benefited from a criminal lifestyle It also recorded the appellant's previous convictions in 2003 and 2005 failing to comply with enforcement notices about 19 Brook Avenue, another property he converted without planning permission, and an enforcement notice in 2006 for three instances of smoke nuisance.

12. The appellant's reply to the prosecution's first section 16 statement (his "section 17 statement") is in a witness statement dated 15 March 2011. A few days later, on 21 March 2011, the prosecution served its second section 16 statement. This consists of 12 pages and a 6 page appendix. The prosecution's third section 16 statement was served on 16 June 2011. By this time, the hearing listed for 1 April 2011 had been adjourned until 28 October 2011, as a result of the appellant's mental health. He was admitted to the Park Royal Centre for Mental Health on 9 May.

13. On 5 August 2011 a hearing was listed for 2 December 2011 before HHJ Holt to deal with the legal argument on confiscation. That hearing was adjourned because the appellant's treating doctor, Dr Singh, stated that he was in no fit mental state to attend a court hearing as he would not be able to understand the proceedings or answer questions.

14. In February 2012, the date for the legal argument on confiscation was re-fixed for 2 July 2012. On 2 July, however, there was a further application for an adjournment because of the appellant's health. The judge heard evidence from the defence psychiatrist, Dr Meehan, and the prosecution psychiatrist Dr Romilly, and the appellant's daughter also gave evidence. She stated that she had prepared the appellant's POCA section 17 statement and that he had little input into it because of his health. The judge reserved his decision. On 13 July, in the light of a further letter from Dr Singh about the appellant's health, he adjourned the case to 7 September 2012 in order to hear from Dr Romilly and Dr Meehan about Dr Singh's letter.

15. The appellant was discharged from hospital on 10 August 2012. Thereafter, addendum reports were received from Dr Romilly and Dr Meehan and, on 31 August 2012, the confiscation hearing was re-fixed for 24 September at the Crown Court at Norwich, where HHJ Holt would be sitting.

IV. The rulings on the applications to adjourn and to stay the proceedings as an abuse of process

16. We have referred to the fact that the appellant was re-admitted to hospital on 19 September, a few days before the hearing of the confiscation proceedings listed for 24 and 25 September. On 21 September, the defence informed the court that it had unsuccessfully attempted to obtain information from the hospital as to the basis for the re-admission. It applied for an adjournment of the confiscation proceedings so that Dr Singh could give the court an up-to-date assessment of the appellant's condition. That application, and an application to stay proceedings as an abuse of process, came before the court on 24 and 25 September 2012.

17. During the hearing on 24 September, defence counsel unsuccessfully attempted to contact Dr Singh to obtain information about the basis upon which the appellant had

been readmitted to hospital. On that day, further evidence was heard from Dr Romilly and Dr Meehan. Dr Romilly had been in contact with Dr Singh after the appellant's re-admission, and said that she did not think that Dr Singh was involved in arranging it because of the way she spoke about it. She did not know what happened, but said it could have been that the home treatment team wanted to re-admit the appellant. It was not clear whether the admission was under the Mental Capacity Act 2005 or not, but it was certainly not under the Mental Health Act 1983. The judge refused to adjourn the proceedings.

18. The judge stated (vol. I, 22C – D) that "there does not seem to have been any question of [the appellant] being sectioned under a court order or under the powers a psychiatrist can exercise, but it was a voluntary re-admission." As to the application that he adjourn in order to ascertain the up-to-date position of the appellant before making a decision on the application to stay the confiscation proceedings as an abuse of process, he stated that the history of the case was "significant". Proceedings had begun on 17 May 2011, some 18 months earlier, and this was the seventh court hearing. One of the features of all the medical evidence is that the proceedings in themselves were probably causing the appellant a great deal of stress, "and so it is in everyone's interests, but perhaps particularly his interests, that these matters be concluded as soon as possible": vol I, 23B – C.

19. After referring to the prosecution's submission that if there was an adjournment for another month this situation could arise again, the judge stated (vol I, 23D – F) that the decision he had to make on the application to stay the proceedings as an abuse was whether or not the appellant was able to give instructions and put forward his case in relation to the application under POCA. He noted that the appellant had filed a full section 17 reply, set out in terms of "I did this and I did that". The judge stated that he and the prosecution had been told for the first time on 2 July by his daughter that, in fact, the document was her work. He concluded that, taking all those matters into consideration, it was not appropriate to adjourn proceedings again.

20. On the following day, 25 September, the judge refused to stay the proceedings as an abuse of process. The judge stated that the issue he had to decide was whether the appellant "is in fact involuntarily absent through mental health problems, and whether he is unable to issue instructions and follow these proceedings": vol. II, 1D – E. He referred to the evidence of Dr Meehan, on behalf of the defence, who had concluded that the appellant was mentally disordered and incapable of following proceedings. He said the appellant suffered from dissociative disorder, psychosis and depression. His behaviour was involuntary, and his capacity to engage was limited. Dr Meehan also stated that the stress of the proceedings had led to the appellant's present state, and his problems would only reduce once they had concluded: vol. II, 2H – 3B and 5F – G.

21. Dr Romilly's evidence, on behalf of the prosecution, was that the appellant was capable of following proceedings and would be capable of giving instructions. She had stated that she thought there were elements of malingering and there were some symptoms which did not, in her view, make sense. She considered he was capable of following proceedings. Although he might be suffering from some dissociative disorder and depression, this was less than the malingering element: vol. II, 3H – 4A, 4D – G and 5D – E. The judge referred to Dr Singh's unavailability and the fact that

attempts to contact her to obtain information about the basis of the appellant's re-admission to hospital had not succeeded because she was on leave: see vol. II, 1H – 2C. He referred to Dr Romilly's conversation with Dr Singh, and to Dr Singh's apparent surprise about the re-admission: vol. II, 2C – D. He also referred to Dr Singh's report, which he stated coincided remarkably with Dr Romilly's opinion in that both psychiatrists formed the view that there was an element of malingering: vol. II, 5B – D.

22. The judge rejected the evidence of the appellant's daughter about the production of his section 17 response and her view that the appellant was not capable of understanding proceedings as incredible. He stated that it was not until just before the hearing on 2 July 2012 that anyone was told that the section 17 statement (which we remind ourselves was dated 18 January 2011) was prepared not by the appellant but by his daughter. It was, he stated, contrary to common sense that she, a medical student, would not have mentioned to her solicitors or said to anyone that the statement was not the appellant's statement but was her statement and she had done all the work: vol. II, 8A – C.

23. The judge then looked at all the evidence before him. He stated (vol. II, 8B – D) that it was common at Harrow Crown Court, where the confiscation proceedings started:

> "for those in the business of letting properties and dividing properties and subletting rooms in properties, contrary to the planning restrictions…to view the enforcement notices as a business expense. The limited fines that are passed in the Magistrates Court are merely a business expense as far as they are concerned, and it is worth their while delaying and delaying and delaying, because in the meantime they are gaining much larger income from the rent they are receiving from the various tenants in their properties."

He then concluded (vol. II, 8E) that it seemed to him "on all the evidence" that the appellant "was operating his business along exactly those lines"; that is the appellant operated the business on the basis that delaying enforcement notice proceedings was in his interests, because in the meantime he continued to receive rental income.

24. The judge found it significant that two of the three psychiatrists concluded that there was an element of malingering in the appellant's actions, and that he was discharged after the last court hearing but, a few days before the current hearing, was re-admitted to hospital. He concluded that, on all the evidence, the appellant was capable of providing proper instructions and being present if he wished to be. Accordingly, this was not a case where the appellant was involuntarily absent so as to make it just for the court to step in and stop proceedings. He stated that a stay for abuse was an extreme matter and was something which should not be used unless the matter could not be resolved within the trial process. Since the defence had put forward a full section 17 statement, it had effectively put forward the appellant's arguments: vol. II, 9A – C.

V. The confiscation ruling

25. We turn to the hearing of the confiscation proceedings and the ruling. We have referred to the two section 17 statements filed by the defence in response to the section 16 statements filed by the prosecution. Some of the material set out in the defence section 17 statements was not backed up by any independent material such as

bank statements. Exhibits stated to be from members of the appellant's family had been translated into English but not notarised or attested to in some similar way. The judge therefore had the section 17 statements but no evidence in proper form from the appellant or from independent witnesses.

26. After giving his stay ruling, the judge asked if the appellant's counsel needed time to consider the position. He asked her if she wished to make a further application for an adjournment to allow the appellant to attend and give instructions. After consideration, no application was made: vol. III, 1E, 2A – B.

27. The prosecution case was that the appellant had a criminal lifestyle pursuant to section 75 of POCA, and therefore the assumptions in section 10 of that Act applied. The prosecution's first section 16 statement of information covered the six year period commencing on 1 April 2003. Section 6 of the report states that there were unsourced bank credits into ten bank accounts totalling £2,609,517.64, including £237,978.08 paid by the Council in relation to 211 Willesden Lane. The statement also refers to two other properties converted without planning permission, 195 Church Road and 19 Brook Avenue. The second section 16 statement of information also refers to 340-342 High Road. The prosecution stated that the section 75 assumptions also applied to a Volkswagen vehicle owned by the appellant, valued at £5,000. It also relied on the appellant's previous convictions in 2003 and 2005 failing to comply with enforcement notices about 19 Brook Avenue and in 2006 for three smoke nuisance offences. In the light of the appellant's responses, the prosecution adjusted its figures and agreed that the general benefit figure is £1,570,138.74. It stated that the value of the properties was greater than this because of the increase in the value of property. The available amount was assessed by the prosecution at £1,755,009.57. By the time of the confiscation hearing, there had been further adjustments, and the prosecution claimed that the general benefit figure was £1,438,180.59.

28. The appellant's original section 18 reply stated that the Brook Avenue was held on trust for his sister, Salima Mahdi Ali, the Church Road property on trust for his brother-in-law, Iqbal Abdul Jaleel, and 80% of the Willesden Lane property on trust for his sister, Salima Mahdi Ali, the remaining 20% being owned by the appellant. 340 – 342 High Road is stated to be owned by Abdul Zahra Al-Mislmani and Jinan Al-Mislmani, but the first three properties are registered to the appellant. Three substantially identical declarations of trust were produced. The prosecution questioned the authenticity of the documents and suggested the trusts were a sham.

29. The defence case was that the section 10 assumptions ought not to apply where a defendant is involuntarily absent and that, had the judge granted the application to adjourn to obtain medical evidence, he would not have found the appellant to be voluntarily absent, and even if he refused to stay the proceedings for other reasons, the determination that the appellant was involuntarily absent would have precluded the prosecution from relying on the assumptions. The second limb of the defence case was that the benefit figure ought to be confined to rental income from 211 Willesden Lane only, and that only the benefit for the period of offending, that is between June 2008 and 2 February 2009, was relevant. On the defence case, the benefit would be £113,316.75. It was submitted that this was a figure so much lower than the benefit figure calculated by the prosecution that there was a serious risk of injustice. Moreover, the beneficial ownership of 19 Brook Avenue and 195 Church Road was in

his sister and brother-in-law, and 80% of the equity in the Willesden Lane property belonged to his sister.

30. In his ruling, the judge stated that the appellant's assertions in his section 17 statements were not supported by any independent evidence. The defence were in a difficult position because of the situation. They had been given ample opportunity over many months to produce further information and further evidence but had failed to do so, and their submissions were necessarily limited. He stated:

> "it seems to me that this is exactly the sort of the case that Parliament considered where section 10 assumptions should apply, and it follows from that that, in my judgment, the correct benefit figure is one that is applied for the prosecution, and that is £1,438,180.59, and I thus find that as the benefit figure in this case" (vol. III, 4A).

31. As to the available amount, he stated that the prosecution had recently carried out a valuation of the properties and the figures for the properties added up to £1,819,876.66, so that was the available amount. As that amount exceeded the benefit figure, the confiscation order would be made for the full amount of the benefit figure; £1,438,180.59.

VI. The grounds of appeal and a summary of the amounts in contention

32. After leave was given by the Full Court, Mr Farrell QC and Ms Naqshbandi, who appeared in the Crown Court on behalf of the appellant, prepared a useful document summarising the grounds of appeal. There are four:

    (a) Whether it is correct in law, and if so in what circumstances, for the statutory assumptions in section 10 of POCA to be applied in a case where a defendant is either voluntarily or involuntarily absent through illness;

    (b) Whether the defendant's benefit (both particular and general benefits) within the meaning of section 6 and section 10 of POCA includes rents received where no enforcement notice has been served or before the time for compliance with an enforcement notice;

    (c) Whether the judge erred in not adjourning the case on 24 September 2012 in order to seek further medical evidence as to the basis of the appellant's re-admission to the Park Royal Centre for Mental Health on 19 September 2012;

    (d) Whether the judge was wrong to refuse to stay the proceedings as an abuse of process.

33. The appellant's case was that it was wrong to apply the assumptions where a defendant was absent from the hearing through illness, but alternatively, that the appellant's particular and general benefit could not include housing benefit/rents received in respect of properties where no enforcement notice was served and, where a notice was served, in respect of the period before the time for compliance, 3 months after the notice takes effect, in the case of 211 Willesden Lane 20 June 2008 and in the case of 195 Church Road 10 January 2007. The prosecution's primary position was that the statutory assumptions were properly applied in respect of all the sums claimed by the prosecution for the period ending 31 March 2009. Mr Campbell-Tiech,

on behalf of the prosecution, submitted that, if the court decided that the appellant's benefit in this case could not include sums received in respect of properties where no enforcement notice was served or for periods before the time for compliance, it should vary the confiscation order pursuant to section 11(3) of the Criminal Appeal Act 1968 and make a new order reflecting section 8(2)(a) of POCA and covering benefit received up to 25 September 2012, when the Crown Court made its order.

34. We have set out the figures given in the prosecution's section 16 statement, and the way the judge arrived at his decision. It became clear during the hearing that view of the appellant's health and all the time that has elapsed, both Mr Farrell QC and Mr Campbell-Tiech QC, on behalf of the prosecution, considered that, should the court set the order aside, it should not remit the case to the Crown Court for redetermination of the benefit, but determine it itself on the basis of the material before it. To this end, the parties agreed the following figures for benefits received by the appellant on different hypotheses reflecting their respective principal and alternative cases. We have proceeded on the basis of these figures, which are:-

211 Willesden Lane: (enforcement notice issued on 8 February 2008 requiring compliance by 19 June 2008)

a. £237,978.08 housing benefit received between January 2005, when the property was bought, and 31 March 2009, the date of the summons.

b. £113,316 housing benefit received between 20 June 2008, the commencement of the time for compliance with the enforcement notice, to 2 February 2009, the end of the period for which the charge was brought.

c. £418,095 housing benefit/rent for the period between 20 June 2008 and 25 September 2012, when the order was made.

195 Church Road: (Enforcement notice issued on 25 August 2005, appealed and compliance due by 10 January 2007)

- £376,435.32 housing benefit received between 1 April 2003 and 31 March 2009 (the six year period).

- £126,263 housing benefit received between 10 January 2007, when compliance was due, and 25 September 2012.

184 Church Road: (No enforcement notice issued)

- £526,448.69 housing benefit for the six year period from 1 April 2003 to 31 March 2009.

340 – 342 High Road: (No enforcement notice issued)

- £405,472.99 housing benefit for the six year period between 1 April 2003 and 31 March 2009.

VII. Analysis and decision

35. We first consider grounds 3 and 4

(a) Grounds 3 and 4: adjournment and stay

36. Mr Farrell relied on the medical evidence available on 24 and 25 September and also adduced further evidence obtained since the ruling. No objection was taken by the prosecution to the new evidence. It consisted of a report by Dr Amin, which appears to have been written on 15 October 2012, a further report by him dated 29 October 2012 and a report by Dr Waheed dated 27 November 2012. Dr Amin's reports make it clear that the appellant was admitted to the Park Royal Centre for Mental Health on 19 September under the Mental Capacity Act as he was found to be lacking capacity to make decisions regarding his admission to hospital. Dr Waheed's report explained the use of the Mental Capacity Act to admit a person who is compliant with the admission and the treatment to a hospital.

37. Mr Farrell submitted that this evidence shows that the judge erred in regarding the appellant's admission as voluntary, and that there was no evidence to suggest that he was re-admitted by psychiatrists. He submitted that the judge was wrong to refuse the application to adjourn because the further evidence would have been significant to his assessment of whether or not the appellant was voluntarily or involuntarily absent, and thus to his decision on abuse of process. Essentially, this was also the ground on which he submitted that the judge was wrong to refuse to stay proceedings as an abuse of process.

38. When giving leave, the Full Court stated (at [9]) that it had reservations about the grounds of appeal challenging the judge's exercise of discretion, not least given the acceptance by Mr Farrell on that occasion that the appellant's sickness could not be used forever to stave off the confiscation proceedings, and the fact that the judge had before him a detailed section 17 statement. It did not, however, limit leave.

39. We agree with the indication given by the Full Court and reject Mr Farrell's submissions. The judge concluded, on the medical evidence before him and the background of adjournments, that the appellant might never be able to attend. He also concluded that a fair hearing could take place because he had the appellant's full defence case in the section 17 statements. We do not consider that, in all the circumstances of this case, the judge erred in the exercise of his discretion in concluding that the appellant could have a fair hearing. The only real criticism of the refusal to adjourn is that it denied the appellant an opportunity to present himself as involuntarily absent, and thus to assist his characterisation of the proceedings as an abuse of process.

40. As to abuse of process, we start by reminding ourselves that, while the court retains the jurisdiction to stay an application for confiscation where it amounts to an abuse of the court's process, as this court has said on a number of occasions, "this jurisdiction must be exercised with considerable caution, indeed sparingly". See, in particular, *Shabir* [2008] EWCA Crim 1809 at [24], a constitution presided over by Hughes LJ (as he then was) and *CPS (Durham) v N(1) and others* [2009] EWCA Crim 1573 at

[36], a constitution presided over by the then Lord Chief Justice. In *Shabir's* case this court stated that the jurisdiction should be confined to cases of true oppression.

41. In this case, as in all cases, the question for the judge was whether, in all the circumstances, it was fair to proceed in the absence of the appellant. The reason for that absence was only one factor in the way the judge assessed the fairness of the proceedings as a whole. He took into account what evidence and information had been placed before him by and on behalf of the appellant: vol. I, 6B – 8E. He also took into account the medical evidence that had been called, and the fact that two of the three psychiatrists had come to the conclusion that there was an element of malingering in the appellant's actions.

42. It is also of importance that any contention that the assessment of benefit was inaccurate, for example because one or more of the houses had been the subject of an application for planning permission, could have been addressed without recourse to evidence from the appellant personally. The appellant's case as to the assessment of the available amount was also not dependent on evidence from him. He claimed he did not own three of the properties and only had a small interest in the fourth, and relied upon the declarations of trust. It would have been possible to call other witnesses, in particular the beneficiaries of the trusts and the solicitor who had drafted, to attest to their validity, but this was not done.

(b) Ground 1: Application of the statutory assumptions

43. Mr Farrell submitted that, whether the appellant was absent voluntarily or involuntarily, the statutory assumptions do not apply. His submission relied on the analogy of the position of an absconder where, as a result of section 27 of POCA, and in particular section 27(5)(d), the statutory assumptions in section 10 are disapplied. He argued that the judge had no power to apply the assumptions and thereby erred. Alternatively, insofar as the judge had a discretion whether to apply the assumptions, in the light of cases such *Gavin and Tasie* [2010] EWCA Crim 2727, reported at [2011] Crim LR 239 and *Bhanji* [2011] EWCA Crim 1198, in the case of absence through sickness or otherwise that discretion is one which should only be exercised highly exceptionally. It should virtually never be exercised where there is a risk of imprisonment arising in default of payment. Mr Farrell submitted that to do otherwise would be to punish the sick, but to reward those who deliberately abscond.

44. We reject the proposition that there is a principle of law that prevents a confiscation order being made in the involuntary absence of the defendant or in applying the presumptions where it is so made. The question for the court is again one of fairness: see *Bhanji* at [14]. It is true that, in *Gavin and Tasie*'s case, this court stated that, in the case of absconding defendants, even if their absconding constituted a waiver of the right to attend trial and be legally represented, it did not amount to a waiver of the right to the basic elements of a fair trial and did not relieve the court of the duty to satisfy itself that the defendant in question would receive the basic elements of a fair trial notwithstanding his absence. But this court also stated (at [19]) that the discretion to proceed in the absence of a defendant "may be exercised more readily where the issue concerns sentence rather than the question of guilt itself, and in particular where the proceedings have already been commenced". We add, in the light of Lord Bingham's speech in *Jones* [2002] UKHL 5, reported at [2003] 1 AC 1, that the

discretion may also be exercised more readily where a defendant has been represented and will remain represented. In this appellant's case, the judge, when considering the application for a stay, considered that he had sufficient information in the section 17 defence statements to weigh the competing interests. The judge had rejected the appellant's daughter's evidence that it was she who prepared the section 17 statements, and it therefore followed that he found that the appellant had done at least some of the work necessary to produce those statements.

45. More fundamentally, we accept Mr Campbell-Tiech's submission that Mr Farrell's analogy with the position of an absconder is misconceived. We are satisfied that the application of the assumptions to a person in the position of the appellant would not treat him less favourably than an absconder. This is because, although section 27(5)(d) of POCA provides that the assumptions in section 10 are to be ignored in the case of an absconder, when the absconder is caught the prosecution can continue with the confiscation. Significantly, as a result of section 27(6), it is able to do so on the basis that it had not proceeded at the time of the conviction or committal with a view to a confiscation order being considered, and to deploy the section 10 assumptions in relation to all the evidence. By contrast, in the case of a person who is unwell and absent, if no order is made because of the absence of the defendant on account of illness, the effect of sections 19 and 20 of POCA is that, when the case is reconsidered after his recovery, it will only be possible to deploy the assumptions in relation to evidence which was not available to the prosecutor at the earlier time. Accordingly, acceding to Mr Farrell's submission would not treat a sick person in the same way as an absconder. It would put him or her in a much better position.

46. Finally, in relation to fairness, we observe that the appellant's legal team were offered the opportunity to apply for an adjournment to seek evidence, for example as to the beneficial ownership of the properties, from witnesses other than the appellant. They did not take up the judge's invitation. For these reasons, we do not consider that the judge erred in the exercise of his discretion in concluding that the appellant did have a fair hearing.

(c) Ground 2: The position where no enforcement notice has been served and before the time for compliance

47. Ground 2 involves the determination of two questions. The first is whether the appellant's benefit (both particular and general benefit), within the meaning of section 76 and section 10 of POCA in this case, includes rents received where no enforcement notice has been served or where, if one has been served, the time for compliance has not yet lapsed. The second is whether, if the basic position is that such rents do not generally qualify as the appellant's benefit under POCA, they will do so where the conduct amounts to the commission of an inchoate offence, either a conspiracy to disobey an enforcement notice or an attempt to do so. The point of law raised by these questions is of practical importance because breaches of planning law may not be discovered for a considerable time.

48. Mr Farrell argued that rental income received where no enforcement notice has been issued or before the time for compliance has expired cannot, in law, be treated as the proceeds of crime. He submitted that, at worst, the rents received were revenues legitimately received by the appellant, albeit that he might have been in breach of

planning regulations or administrative obligations. His case was that, in assessing whether a person has benefited from his general or particular "criminal conduct" under POCA, the Court may not take into account proceeds received from activities prior to the expiry of the time for compliance with the enforcement notices because only then is the continuance of such activities an offence.

49. Mr Farrell also relied on the decisions of this Court in three money laundering cases, *Loizou* [2005] EWCA Crim 1579 reported at [2005] 2 Cr App. Rep 618, *Geary* [2010] EWCA Crim 1925, reported at [2011] 1 Cr App. Rep 73, and *Amir and Akhtar* [2011] EWCA Crim 146 reported at [2011] 1 Cr App. Rep 464. He submitted that these cases show that a defendant's benefit from criminal conduct within section 340(2) did not embrace property which was not "criminal property" at the time he or she acquired it, and that this is so even where the defendant intended to acquire it by criminal conduct. Those decisions concerned sections 327 and 328 of POCA, and the definition of criminal "conduct" and "property" in section 340(2) and (3). Mr Farrell submitted that the fact that the definition of "criminal conduct" in section 340(2) is the same as that in section 76(4), with which this case is concerned, is a powerful indication that the inchoate analysis does not suffice in the context of the strict approach to the construction of POCA: see e.g. the statement in *Waya* referred to at [53] below. He maintained that, in the present context, the rents or housing benefit received cannot be benefit from criminal conduct if, at the time they were received, they were not criminal property because at that time no offence had been committed because no enforcement notice had been served and become effective.

50. Mr Campbell-Tiech submitted that the argument on behalf of the appellant that there was no offence until his conduct was discovered and an enforcement notice served is fallacious. He argued that the appellant's conduct was criminal conduct within section 76 of POCA because the appellant, with others, set out to defeat the statutory planning regime in general and in particular not to comply with any enforcement notices. He maintained that in the circumstances of this case the appellant's conduct, which was more than merely preparatory, amounted to the commission of an inchoate offence, either a conspiracy to disobey an enforcement notice or an attempt to do so. Mr Campbell-Tiech acknowledged that the judge made no specific finding to this effect in the confiscation ruling itself, but relied on the fact that, in his abuse ruling on the same day (see vol. II, 8B – E and [23] above), he found that the appellant viewed "the limited fines that are passed in the Magistrates Court [as] merely a business expense". Mr Campbell-Tiech submitted that this was a finding that the appellant was operating his business on the basis that it was in his interest not to comply with enforcement notices and to pay the fines because the income he continued to receive from the properties was greater than the fine. Accordingly, the judge was entitled in his confiscation ruling to treat rents derived from all the properties converted without planning permission as derived from "criminal conduct".

51. Mr Campbell-Tiech emphasised the scale of the appellant's activity. The appellant had converted four properties into a total of 38 flats without applying for planning permission. He had taken no action in respect of the enforcement notices served in relation to two of those properties, and he has a history of failing to comply with enforcement notices in the past and of convictions for such failures. Mr Campbell-Tiech argued that the appellant's activity qualified as "criminal conduct" within POCA because the only sensible inference from the entirety of the circumstances is

that he never intended to comply with an enforcement notice and had a business model involving wholesale disregard of the planning regime. He ran a family business which purchased properties and converted them into flats without planning permission. He rented those flats out and profited from the rents. If his activity did not come to the attention of the local authority the profit from the rents would be substantial, often at the expense of the local authority which made payments of housing benefit. If the conduct did not come to the attention of the local authority for four years, at the end of that period, he would make a very substantial additional profit because he would be able to get planning permission for the flats.

52. It is clear, for example from the decision of the Supreme Court in *Waya* [2012] UKSC 51, reported at [2013] 1 AC 284, that the purpose of POCA is to ensure that criminals, especially professional criminals, do not profit from their crimes. As Lord Walker and Sir Anthony Hughes stated (at [8]), "because POCA covers a wide range of offences, Parliament has framed the statute in broad terms with a certain amount of…'overkill'". They also stated (at [2]) that POCA "sends a strong deterrent message" and "although the statute has often been described as 'draconian', that cannot be a warrant for abandoning the traditional rule that a penal statute should be construed with some strictness". However, their Lordships also stated that, subject to that and to the Human Rights Act, the task of the Crown Court judge is to give effect to Parliament's intention as expressed in the language of the statute, which must be a given a fair and purposive in order to give effect to its legislative policy: see [8].

53. We turn to the questions before us with that in mind. The relevant provisions of POCA are section 6(2) and 6(4). Section 6(2) is clearly satisfied because the appellant was committed to the Crown Court for sentence in respect of his offence. Section 6(4)(a) requires the court to decide whether the defendant has a "criminal lifestyle" (s.6(4)(a)). The Court then has to go on to decide whether the defendant has benefited from his "general criminal conduct" or "particular criminal conduct" depending on the answer to the first question (see sub-sections s.6(4)(b) and (c)).

54. In our judgment, the answer to the question whether, in assessing whether a person has benefited from his general or particular "criminal conduct" under POCA, the Court may take into account proceeds received from activities prior to service of enforcement notices which render the continuance of such activities illegal, lies in having close regard to the relevant definitions in the statute itself. We consider those definitions before turning to Mr Campbell-Tiech's submission that the appellant's conduct in relation to all the properties amounted to an inchoate offence.

55. The definitions in Part 2 of POCA, which deals with confiscation, are to be found in sections 75 and 76. Section 76(1)(a) and (b) gives "criminal conduct" a simple and straightforward meaning in the interpretation section of the Act, namely "conduct which… constitutes an offence in England and Wales" or "would constitute an offence if it occurred in England and Wales". Section 75 deals with criminal lifestyle and provides, in sub-section (2)(b), that a defendant has a criminal lifestyle where the offence, or any of the offences, constitutes "conduct forming part of a course of criminal activity". It is, however, important to note that the opening words of section 75(2) require the relevant "conduct" in question to comprise an "offence" or "offences". The term "offence" is also used in section 75(2)(c) and in the provision in section 75(3) concerning conviction of three or more other "offences". The definition

of "criminal conduct" in Part 7 of POCA, which deals with money laundering, is the same as that in section 76(1): see section 340. It is, thus, clear from the Act itself that "criminal conduct" simply means conduct which amounts to a criminal offence under our criminal law.

56. Sections 179(1) and (2) of the Town and Country Planning Act provide that "[w]here, at any time after the end of the period for compliance with an enforcement notice, any step required by the notice to be taken or any activity required by the notice to cease is being carried on … the owner of the land is in breach of the notice" and is "guilty of an offence". The position under POCA of benefit derived from a breach of planning control was considered by this court in *Del Basso and Goodwin* [2010] EWCA Crim 119. The appellants in that case had pleaded guilty to offences of failing to comply with an enforcement notice as a result of their use without planning permission of land at Bishop's Stortford as a "park and ride" facility for Stansted Airport. Confiscation proceedings were commenced in respect of benefits derived from the unauthorised use of the land. The trial judge stated (see [14] that "the activity of conducting a 'park and ride' operation was entirely and criminally unlawful **from the moment** the enforcement notice became effective" (emphasis added). In a judgment delivered by Leveson LJ, this Court stated (at [45]) that "**from the moment** that [the appellant] had exhausted his rights of appeal against the enforcement notice, it was his duty to obey the law: he chose deliberately, not to do so" (emphasis added).

57. Mr Campbell-Tiech was correct in observing that, in that case there was no dispute about the position before the expiry of the time for compliance with the enforcement notice because (see [11]) the prosecution proceeded on the basis that the operation of the "park and ride" facility only became **criminally** unlawful from the moment when the local authority enforcement notice became "effective". But, even on the assumption that what was said is not strictly binding, the assumptions upon which the prosecution, the trial judge and this court proceeded are clearly correct. A breach of planning control is not *per se* criminal. Sub-sections (1) and (2) of section 179 of the Town and Country Planning Act expressly provide that it is the failure to comply with the enforcement notice the local planning authority issues by the expiry of the time for compliance that renders the unauthorised use criminal. The result is that a person who is served with an enforcement notice will know whether and when his conduct amounts to the commission of an offence.

58. The position is illustrated by the decision of the Divisional Court in *Maltedge Ltd and Frost v Wokingham DC* (1992) 64 P & C.R. 487. Two convictions for failing to comply with enforcement notices were set aside because the informations laid before magistrates did not allege the date by which there had to be compliance with the notices. Laws J (as he then was) stated (at 489-490) that the date by which an enforcement notice was to be complied with was part of the definition of the offence in the statutory predecessor of section 179 of the Act. It followed that, without an averment and proof of the date on which the periods for compliance expired, the informations and the convictions were defective. Although the language of section 179 differs from that of the Town and Country Planning Act 1971, the nature of the offence in the 1990 Act remains the same in this respect.

59. Leaving aside the argument based on the commission by the appellant of an inchoate offence, the same is true in the present case. The appellant was obtaining rent for

houses which he had converted into flats without having first obtained the requisite planning permission. His activities may have been in breach of planning and other regulations. His conduct did not, however, constitute "an offence in England and Wales" within the meaning of s.76(1)(a) in relation to any particular property until any enforcement notice was actually served and became effective in relation to that property, *i.e.* the relevant notice period in relation to that property had expired. Unless and until that moment in time arrived, the appellant could not be said to have been engaged in general or particular "criminal conduct" within the meaning of s.6(4) of POCA. Accordingly, subject to Mr Campbell-Tiech's argument based on an inchoate offence, any rents or proceeds derived from tenants in such properties *prior* to the expiry of any enforcement notice period cannot, in law, constitute relevant proceeds of "criminal conduct" for the purposes of POCA.

60. We turn to the submission that the appellant's conduct with others amounted to the commission of inchoate offences of either conspiracy or attempt or both, and therefore amounted to criminal conduct. We can see that in principle the conduct of a person who sets out to defeat the statutory planning regime and any enforcement notice could amount to such an offence. We note Mr Farrell's submission that the inchoate offence analysis is inconsistent with (or at its lowest does not sit comfortably with) the approach this court has taken in money laundering offences in respect of the identically worded definition in section 340. But we also observe that those cases did not consider the inchoate offence analysis, and that in *Waya's* case it was stated that the task of the court is to give effect to Parliament's intention and that POCA's language must be given a fair and purposive (if somewhat strict) construction. The dividing line drawn in POCA is between conduct that is "criminal" and conduct that is not. There is no indication on the face of the statute that conduct which is criminal because it amounts to an inchoate offence is to be treated differently from other criminal conduct.

61. The nature of inchoate offences and their particular requirements, however, mean that the inchoate offence analysis may not be straightforward. The potential difficulties that analysis may pose have led us to conclude that it is necessary for there to be a clear finding in the confiscation proceedings that the conduct under consideration amounts to an attempt or a conspiracy. Quite apart from the need to construe POCA with "some strictness", an important reason for requiring a clear finding is that, when applied to breaches of planning control, the inchoate offence analysis involves questions of conditional intent and conditional agreement because the conduct is not intrinsically criminal. In relation to attempt, it also involves potentially difficult questions of proximity. What the appellant intended was to make money from his breaches of planning control in the form of rents from the converted premises and, absent the service of an enforcement notice, he would do so without committing an offence.

62. The conditionality or contingency planning element of a person's intention or the agreement made with another does not necessarily preclude there being a criminal attempt or conspiracy: see *A-G's Reference (Nos 1 & 2 of 1979)* [1980] QB 180, *Reed* [1982] Crim L.R 819, *Jackson* [1985] Crim LR 442, and *O'Hadhmaill* [1996] Crim LR 509. But what has to be shown is that there was an *ex ante* intention or an agreement not to comply with any enforcement notice served. The example given in *Reed* of A and B agreeing to drive from London to Edinburgh in a time which can be

achieved without exceeding the speed limits, but only if the traffic which they encounter is exceptionally light, which was stated not necessarily to involve the commission of any offence, shows that a conditional intent or agreement about something which is not intrinsically criminal will not always constitute an inchoate offence.

63. In this case there are no such findings on the face of the judge's ruling. Mr Campbell-Tiech in effect invited the Court to infer that there were. But, in the confiscation proceedings, the prosecution based its case against the appellant on the way he ran his business. Even on Mr Campbell-Tiech's submission, the judge's finding was only that he ran his business on the basis that delaying enforcement notice proceedings was in his interests because he continued to receive income from the properties. There was no suggestion that the appellant conspired with anyone else or who that person might be, and no finding of an agreement satisfying the requirement in section 1 of the Criminal Law Act 1977 that, if it is carried out, "will necessarily amount to or involve the commission of an offence or offences by one or more parties to the agreement". Similarly there is no finding of attempt.

64. We have concluded that there was no finding of attempt or conspiracy, and that on the evidence before the judge, and in particular the failure to identify an agreement with one or more co-conspirators or the ingredients of an attempt, it would be wrong to infer one. We consider that, in the particular circumstances of this case, the evidence before the judge, and the terms of his ruling, Mr Campbell-Tiech's valiant attempt to reconfigure the decision below as proceeding on the basis of an inchoate offence does not succeed.

65. The benefit relied on by the prosecution is rent derived from four properties converted into flats in breach of planning regulations. Our decision on this ground means:-

    (a) In respect of 184 Church Road and 340 – 342 High Road there has been no enforcement notice issued and the order must be set aside insofar as it reflects the housing benefit/rents attributable to those properties. These were stated by the prosecution to have been respectively £526,448.69 and £405,472.99.
    (b) In respect of 211 Willesden Lane, where the time for compliance with the enforcement notice lapsed on 19 June 2008, the failure to comply with the notice was only criminal conduct from 20 June 2008 and the receipt of housing benefit/ rent was only the benefit from such conduct from that date. The agreed figure for the period from that date to 2 February 2009, the end of the period for which the appellant was charged, is £113,316.
    (c) In respect of 195 Church Road, the receipt of housing benefit/rent could only be criminal conduct from 11 January 2007. The agreed figure for the period from that date is £126,263.

66. Two questions remain. The first is whether, as Mr Farrell submitted, the conduct comprising the criminal offence in respect of a property for which an enforcement notice has been issued is limited to the period that is actually charged, in the case of 211 Willesden Lane between 20 June 2008 and 2 February 2009. In our judgment, the conduct is criminal, whether or not charged, once the time for compliance with the

enforcement notice has elapsed, here after 19 June 2008, and it remains criminal, so that the order need not be limited to the period ending on 2 February 2009.

67. The second question is whether, when varying the order pursuant to section 11(3) of the Criminal Appeal Act 1968 to reflect our decision, we should, as Mr Campbell-Tiech submitted, do so by reflecting the requirement in section 8(2) of POCA that the court must "take account of conduct occurring up to the time it makes its decision" in the confiscation proceedings. On that basis, the relevant end date for the calculation of benefits is 25 September 2012. The agreed figure for 211 Willesden Lane for the period from 20 June 2008 until 25 September 2012 is £418,095. Mr Farrell submitted that we are precluded from varying the order to reflect this because to do so would mean that the part of the order attributable to 211 Willesden Lane would deal with the appellant more severely on appeal than he was dealt with by the court below and thus be contrary to section 11(3). We reject this submission. What the proviso to section 11(3) prohibits is the exercise by the court of its powers under the sub-section so that, "taking the case as a whole", the appellant is "more severely dealt with on appeal than he was dealt with by the court below". The order made was in the sum of £1,438,180.59. It cannot be said that, taking the case as a whole, the appellant would be dealt with more severely by an order reflecting the benefit in respect of 211 Willesden Lane for the period ending 29 September 2010.

VIII. Conclusion

68. For these reasons, and to the extent we have stated, the appeal on ground 2 is allowed. The confiscation order made against the appellant is set aside, and in place of it we make a confiscation order in the total sum of £544,358 to be paid within six months, with a period of imprisonment in default of 5 years.