

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL DIVISION

IND# 104/2014 & 49/2015 &
49/2015A

BETWEEN:

REGINA

-v-

CANOVER NORBERT WATSON



APPEARANCES: Mr. Patrick Moran with Ms. Toyin Salako for the Prosecution
Ms. Amelia Fosuhene for the Defendant

Before: Hon. Justice Marlene Carter, Acting Judge of the Grand Court

Heard: 19th and 23rd January 2018

Ruling 19 February 2018

TRANSCRIPT OF ORAL CONFISCATION RULING

1. In the endnote to *R v May*¹ the House of Lords set out a three-stage approach to confiscation:

“(i) Has [...D] benefited from relevant criminal conduct?
(ii) If so, what is the value of the benefit D has so obtained?
(iii) What sum is recoverable from D?”
2. Crown has indicated to the court that it is seeking the court’s consideration of the defendant’s particular criminal conduct.² Section 69(4) of the *Proceeds of Crime Law* states:

“a person benefits from conduct if he obtains property as a result of or in connection with the conduct.”

¹ [2008] UKHL 28

² The Crown did not pursue the “criminal lifestyle” benefit as contemplated by Section 68 of the *Proceeds of Crime Law*.

3. The benefit in the context of a confiscation is the value of the property so obtained. In *R v Tibbetts*³ the Learned Chief Justice stated: “*property obtained includes any and all property coming within the possession, custody or control of the offender as a result of or in connection with the commission of the offence. It does not mean that the offender acquires title or ownership to the property.*” It may also be irrelevant whether a defendant retained the property in the sense of it being his actual profit or net benefit.⁴
4. The defendant was charged jointly with Jeffrey Webb and others on two counts of conspiracy to defraud and convicted on those counts. He was also convicted on counts relating to breach of trust, conflict of interest and fraud on the government. The Crown asks the court to consider that a joint benefit was obtained in this case, the consequence being that where property had been obtained as a result of a joint criminal enterprise, a court may hold that each conspirator had obtained the whole of the property; a court would not then apportion the amount to be recovered between co-defendants.
5. The Crown referred to the leading decision of the UK Supreme Court in *R v Ahmad and Another*⁵ on this issue of joint benefit. In *Ahmad* the Supreme Court stated as follows:

“(2)... the word ‘obtain’, used [in the UK legislation] in connection with determining a defendant’s benefit from his criminal conduct, bore its broad, normal meaning of control, not ownership, so that where a defendant obtained property through criminal conduct, he did not acquire title or ownership of it; that the word “joint”, which reflected a criminal enterprise, was to be understood and applied in the same, non-technical way, and not by reference to English property law concepts; that it was appropriate, as a matter of ordinary language, to describe those involved in a criminal joint enterprise which resulted in the obtaining of property as having jointly obtained such property, in the sense of having obtained it between them, even though the item might physically be held by one of them; and that, accordingly, where property was obtained as a result of a joint criminal enterprise, it would often be appropriate for a court to hold that

³ [2006] CILR 308 at para. 33

⁴ See Glatt [2006] EWCA Crim. 605 at para. 96

⁵ [2015] A.C. 299

each conspirator had obtained the whole of the property, although whether a particular defendant had done so would be a matter of evidence.”

(3) ... where the court found that the benefit of the criminal conduct had been jointly obtained it would not apportion the amount to be recovered between co-defendants; that since a defendant who acquired property by his criminal conduct did not acquire ownership, the court in valuing the benefit which he had obtained took the market value of the property because that was the value of what he had obtained; and that, for the purposes of assessing the value of such property, the “interests” of his co-conspirators were not to be taken into account; and that, accordingly, the Court of Appeal had been correct in holding that, in the first case, each defendant had obtained £16.1m as property and that that was the value of his benefit, and, in the second case, that the benefit to be valued in respect of each defendant was the whole amount of the property obtained.”

Has the defendant benefited from relevant criminal conduct?

6. The Crown raised a number of matters in evidence relevant to the level of the defendant’s involvement in the two conspiracies for which the Defendant was found guilty at trial. The crown pointed to the evidence which was adduced at trial of the defendant’s role in jointly obtaining public funds for AIS Cayman Ltd (“AISC”).
7. The Crown summarized the evidence presented and accepted at trial as follows:
 - i. he was involved in setting up AISC as a corporate entity;
 - ii. he and Mr. Webb were the joint beneficial owners of AISC;
 - iii. he Chaired the Committee that recommended the award of the contract to AISC;
 - iv. he signed the contract with AISC on behalf of the HSA;
 - v. he was instrumental in setting up the AISC account into which the funds were paid;
 - vi. he persuaded the Ministry of Health to agree to the so called “National Rollout” of Carepay, by creating a falsified copy of the original Carepay contract;





- vii. he personally arranged for the payment of implementation fees to be deposited in the AISC account (including 3 cheques worth over US\$2.4 million alone), either by paying them in himself or by directing others to do so;
- viii. he was personally involved in the preparation of AISC invoices to HSA and CINICO in order to secure the payments of transaction fees under the Carepay contract; and
- ix. he had access to the AISC cheque book and was in a position to direct Mr. Webb to sign blank cheques to be kept under his control.

8. The Crown also submitted that the court should note that:

“...count 4, of which this Defendant was also convicted by the jury, alleged that he had a personal interest in the award of the Carepay contract, by virtue of his beneficial ownership in AISC and in the W Group Ltd (a company of which he and Mr. Webb were also 50% owners and which was intended to receive the funds of this fraud).”

9. The Crown was unable to identify the ultimate destination of all of the funds that was paid to AISC but they offered the following for the court’s consideration:

- i. A significant amount of funds were withdrawn in cash (approximately US\$600,000) and simply cannot be traced; and
- ii. A significant amount of funds were transferred to other entities/individuals, some outside this jurisdiction; it would appear clear that these payments were made in furtherance of the criminal enterprise.

10. On the issue of benefit and specifically whether the court should consider that a joint benefit had been obtained arising from the commission of the offence, counsel for the defendant did not argue with the general principle as stated in *Ahmad* but instead submitted that the defendant’s role in the conspiracy was not as deeply rooted as the prosecution claims. Counsel noted that in *Ahmad* the court was live to a situation in which a defendant may be convicted of an offence which involved several conspirators and resulted in the obtaining of property, that could result in a court having to decide on the basis of the evidence *“whether the defendant in question obtained the property in the sense of assuming the rights of an owner over it, either because he received it or because he was*

to have some sort of share in it or its proceeds, and, in that connection, “the role of a particular conspirator may be relevant as a matter of fact, but that is a purely evidential matter”.⁶

11. The court in *Ahmad* noted that in such cases: “one or more of the conspirators may be able to show that he was only involved to a limited extent, so that he did not in any way obtain the property which was obtained as a result of the crime. Examples include acting as a paid hand in the enterprise – e.g. an intermediary, a courier or a drugs “mule” ...or a latecomer to a conspiracy in which nothing was obtained after his arrival....”

12. Among the matters that counsel for the defendant raised going to this issue of joint benefit were:

- i. That AISC was a legitimate company and was still in operation today. That the court must look to what is a legitimate cost or expense to the company in considering the benefit. While she conceded for example that the defendant was involved in setting up the company, she argued that it was not set up only to defraud the HSA as the prosecution has asked this court to find.
- ii. That the court should look at what the defendant himself received from the conspiracy and not the overall loss to the HSA in considering the benefit.
- iii. That the defendant was paid a sum for his assistance and that it is this amount that the court should regard as his benefit.
- iv. That when the court considers the sum that he actually received that the court can find that this sum was a reflection of his limited role in the criminal enterprise. Counsel submitted that the Court should look at the statement of offence at Count 4 where there defendant was charged with Fraud on the Government to support this latter contention. The statement of offence speaks to the reward that the defendant accepted in his position as a public officer to the value of at least \$348,051.60. It was submitted that because the defendant was only a paid participant that that should be found to be the value of any benefit that he received.
- v. That the company was not set up in a manner which disguised the involvement of the defendant. The court should consider that because he was in some way involved does not indicate that he jointly obtained the benefit.



⁶ R v Ahmad and another [2014] UKSC 36, at paragraph 47



- vi. Counsel also raised the issue of proportionality in relation to the joint benefit and its effect on the extent of the defendant's involvement.⁷

13. In reply to the defendant's submissions, the Crown replied that it was never asserted that the figure of US\$348,051.60, referred to in Count 4 of the Indictment, represented the defendant's benefit for confiscation proceedings but rather that the figure was the sum of those payments which were directly traced to the defendant and his family.

If so, what is the value of the benefit D has so obtained?

14. The next issue is the extent of the jointly obtained benefit. The Crown argues that the court should consider the conduct of the defendant within the scheme which gave rise to counts 1 and 2, and find that this conduct directly led to the payment to AISC of public funds to the value of US\$6,789,884.00.
15. The Crown also submitted that if the court found that the defendant had jointly obtained the funds that it was not a part of the court's consideration at this stage whether this defendant had retained all of the funds or the amount of any expenses which may have been incurred in the course of offending. The Crown also referred to the case of *Waya* wherein the Court cited *May*:⁸ *"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."*
16. The defence is entitled to present evidence in order to refute the crown's position. The defence presented for the court's consideration on this hearing two further sets of documents, one representing the bank statements for AISC during the period and the other a document prepared by the defendant showing details of withdrawals from the AISC bank account. Counsel states that the court's consideration of these documents would show that most of the withdrawals did not go to the defendant and further that they relate to what in some instances were legitimate transactions of the business.

⁷ Counsel referred to the Supreme Court judgment in *Waya* [2012] UKSC 51

⁸ [2008] UKHL 28



17. Counsel for the defendant also made further submissions relating to the benefit that should be found in this case. Counsel for the defendant referred the court to the case of *R v Sale*⁹ in support of her proposition that this court should not find that the entire amount of the Carepay and national rollout contract payments should be considered to be the criminal benefit in this case. In *Sale* the issue was whether the court, in its consideration of whether the Appellant had benefitted from his particular criminal conduct, should “*lift the veil of incorporation and declare the total benefit of the Appellant to be in that sum received by the company*” or whether the court should choose not to do so because the company into which the monies now taken into account had been paid was not a sham, that the payee had received value and also because the appellant had not hidden behind the company in order to carry out the crimes. Counsel for the defendant submitted that in *Sale* although there was a fraud perpetrated, the expenses which occurred in running the legitimate company were not considered part of the criminal benefit and that the Defendant’s position was similar to that of the Appellant in *Sale*.¹⁰

18. For the Crown it was argued that AISC was a sham company and the basis of the Crown’s case was that the defendant had made dishonest representations in order to secure the Carepay contracts to AISC so that the contracts themselves were inherently unlawful. The Crown therefore argued that the confiscation order sought should be made with regard to what were the gross proceeds. The Crown drew a number of authorities to the Court’s attention on this issue. In this regard see *Hampshire County Council v Beasley*¹¹, *R v King*¹² and *R v Halbrook Ltd*,¹³ cases concerned with piercing the corporate veil in confiscation proceedings. In *King*, it was held that a court had to take account of the difference between cases where the goods or services provided were provided by way of a lawful contract and cases in which the entire undertaking was unlawful. The court also held that: “*If a transaction was inherently unlawful because of the manner in which it was conducted, that finding militated in favour of making an order that was directed at the gross takings of the business.*”

19. Counsel for the defendant raised the issue of proportionality not only as it relates to whether the benefit was jointly obtained but also in relation to the value of the benefit in this case.

⁹ [2013] EWCA Crim. 1306

¹⁰ Coupled with her submissions on the level of the defendant’s involvement in the joint criminal enterprise, Counsel submitted that the principles relating to the disproportionate finding of the criminal benefit in that *Sale* were relevant.

¹¹ [2013] EWCA Crim. 567

¹² [2014] EWCA Crim. 621

¹³ [2015] EWCA Crim. 1908

20. In *Waya*, the Supreme Court reiterated that the principles as stated in *May*¹⁴ were proper and did not offend against proportionality. The court stated further that:



*"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."*¹⁵

21. The Supreme Court also referred to "two cases decided in the Court of Appeal, Criminal Division, in which it was held that a disproportionate confiscation order might in limited circumstances be prevented by the application of the court's jurisdiction to prevent an abuse of process". The first of those cases, *R v Morgan* and *R v Bygrave* [2008] EWCA Crim. 1323; [2009] 1 Cr App R (S) 60, was a case in which the benefit was limited to the loss that had been occasioned to a single victim and where the offender stood ready to repay or had repaid the victim in full while the other case *R v Shabir* [2008] EWCA Crim. 1809, [2009] 1 Cr App R (S) 84, was a case in which the defendant "whose defalcations were accepted to amount to £464 but from whom the Crown sought a confiscation order of over £400,000" In both of those cases it was found that a disproportionate confiscation order ought not to have been sought by the Crown.
22. *Waya* was itself a case in which "money [was] lent because of fraud, but subsequently repaid in full and always fully secured. If, in such a case, the fraud were discovered immediately any confiscation order which included the same sum as had been repaid in full would be disproportionate on the principles set out above." *Waya* is distinguishable on the facts from the instant case and cannot invite any finding of a disproportionate confiscation order. In the instant case the monies were dissipated from the account into which they were first paid and have never been repaid.

¹⁴ These are referred to at paragraph 15 herein

¹⁵ At paragraph 26

23. In *Sale*, to which Counsel for the defendant also referred, the Court of Appeal affirmed the principles noted above, approved the decision in *Waya* and also referred to a post *Waya* decision of *R v Jawad*¹⁶ and stated:



“Waya requires the court to consider whether a POCA confiscation order is disproportionate. We are satisfied that it generally will be disproportionate if it will require the defendant to pay for a second time money which he has fully restored to the loser. If there is no additional benefit beyond that sum, any POCA confiscation order is likely to be disproportionate. If there is additional benefit, an order which double counts the sum which has been repaid is likely, to that extent, to be disproportionate, and an order for the lesser sum which excludes the double counting ought generally to be the right order.”

24. Apart from Counsels’ arguments and the authorities cited therein, this court has also considered:
- i. The “statements of information” provided by the prosecution;
 - ii. The response to the Disclosure Order provided by the defendant;
 - iii. The response to the Statement of Information provided by the defendant;
 - iv. Any evidence provided by the parties in the course of these proceedings.
25. On an application for a confiscation order this court is not tasked with determining whether Mr. Watson was part of a joint criminal conspiracy to defraud to a criminal standard of beyond a reasonable doubt. This court has to determine only on a balance of probabilities whether the Crown has shown that Mr. Watson received a benefit as a result of his criminal conduct or in connection with that conduct. In so doing and as *Ahmad* counsels, “*the court has to decide on the basis of evidence often relying on common sense inference whether the defendant in question obtained the property in the sense of assuming the rights of an owner over it...*”
26. The facts of this case are not of a man who unwittingly entered into an enterprise but of a man who may have actually conceived of it himself and then did all in his power to ensure that the unlawful enterprise came about. The timing of the setting up of AISC cannot be coincidental in light of what followed. The fact that he chaired the committee that recommended the award of the contract to AISC and signed the contract with AISC on behalf of the HSA cannot be downplayed as “*well he*

¹⁶ [2013] EWCA Crim. 644 at paragraph 21

was the Chairman". He was intimately involved with the company. He had access to its cheque books, he paid for its registration and company fees; he played a part in setting up the AISC account into which the funds were placed. He went further to prepare AISC invoices for payment by HSA.

27. The trial judge will ordinarily deal with confiscation proceedings as evidence adduced at trial can be taken into account at the confiscation hearing. It is evident that the trial judge would have been best paced to evaluate this evidence and is entitled to comment on the defendant's credibility and dishonesty,¹⁷ and in this case his level of involvement in the enterprise. The evidence against this defendant is not that of a man who had only a limited role in the criminal enterprise, or a "*latecomer to the conspiracy*" as described in Ahmad which may have caused this court to find that he was not liable for the full extent of the joint benefit.

28. At the trial of this defendant the trial judge noted as follows:

2. *The evidence against you was overwhelming. You conspired with Jeffrey Webb to steal money from the Cayman Islands Government through the Cayman Islands Health Services Authority and the Cayman Islands National Insurance Company. You were able to succeed because of your position of power and trust as Chairman of the Health Services Authority. You must have had very little regard for the abilities of others to think that you could get away with your dishonesty in the long term. On the other hand, you were supremely confident of your own abilities. You used your position and your reputation to ensure that the staff, including senior officials, would simply accept your word and not question your conduct.*

.....

5. *You are a certified accountant, yet you behaved shamelessly – falsifying presentations, e-mails, letters, contracts, references, and a signature. You fooled a number of senior civil servants and possibly a minister. You tried to fool the jury, but there you failed. You were already a wealthy man when this started. It was sheer greed and contempt for your fellow Caymanians that caused you to act as you did. I am prepared to accept that, to some extent, as between you and Jeffrey Webb, Webb, a convicted racketeer and former vice president of FIFA¹⁸, was, in some ways, the senior partner, controlling, as he did, the bank account. But you played your part in full, and I am satisfied that, of the two, you are the cleverer.*"¹⁹



¹⁷ See R v Sudharan [2012 EWXCA Crim. 739; R v Sangha [2009] Crim. LR 212

¹⁸ Fédération Internationale de Football Association (FIFA)

¹⁹ Sentence Judgement of Mettyear J. (Actg.) 5th February 2016



29.

This court finds that there are sufficient facts available to this court to make a determination as to whether on a balance of probabilities the defendant has jointly obtained a benefit from his criminal conduct or in connection with that criminal conduct. I find that this defendant obtained a joint benefit as a result of a joint criminal enterprise. I find that the value of the joint benefit must be the full figure for the monies paid in consequence of the fraudulent Carepay Contract and the National Rollout and Pharmacy contracts.

What sum is recoverable from D?

30. The Defendant is found to have benefited from his particular criminal conduct in the amount of US\$6,796,096.50.
31. The amount of the benefit at paragraph 1 is a joint benefit obtained as a result of or in connection with the defendant's conduct in the joint criminal enterprise at Counts 1 and 2 of the Indictment.
32. The recoverable amount is found to be CI\$925,995.58. I have had regard on this issue to the Statements of Information provided by the prosecution as well as a statement submitted by the Defendant pursuant to Section 26(1)(b) of the *Proceeds of Crime Law*. The Defendant has not submitted or proved to this court that the recoverable amount is less than his criminal benefit. The cash, investments, assets and property which are found to be available to satisfy the confiscation order are as follows:

	ASSET/PROPERTY	VALUE
1.	2128 Adel Drive, Loganville GA 30052 USA	US\$ 552,000.00
2.	2124 Adel Drive, Loganville GA 30052 USA	US\$ 31,000.00
3.	Bank of Butterfield account in the name of Defendant	US\$ 987.00
4.	Bank of Butterfield Bank Suspense Account (Returned HSBC monies)	US \$ 107,181.21
5.	CIBC First Caribbean Bank Account in name of Defendant	KYD\$ 228.01
6.	CIBC First Caribbean Bank Account in the name of Defendant	US\$ 1,748.38
7.	CIBC First Caribbean Bank Account in the name of Defendant	US\$ 128,110.07
8.	Colonial Life Investment #MIP4004913	US\$ 101,902.70
9.	Colonial Life Investment #MIP4004914	US\$ 101,902.70

10.	Colonial Life Investment #FP4005121	US\$ 62,783.77
11.	Mercedes Motor Vehicle Index 95081	US\$ 5,434.00
12.	Porsche Motor Vehicle Index 154723	US\$ 35,935.00
	TOTAL KYD	KYD\$ 228.01
	TOTAL IN USD	US\$ 1,128,984.83
	GRAND TOTAL IN KYD	\$925,995.58

33. The defendant shall have 6 months in which to pay the recoverable amount at paragraph 3, in default of which he shall serve a term of 6 months imprisonment.

34. With respect to the issue of proportionality the Court in *Ahmad* noted that:

“(4) where a finding of joint obtaining was made, whether against a single defendant or more than one, the confiscation order should be made for the value of the whole benefit so obtained; but that, since it would be disproportionate and contrary to article 1 of the First Protocol [of the European Convention of Human Rights] for the state to take the same proceeds twice over, the order would provide, consistently with the courts general guidance, that it was not to be enforced to the extent that a sum had been recovered by way of satisfaction of another confiscation order made in relation to the same joint benefit.”

35. This court having found that there was joint obtaining in its determination of the benefit in this case, the Confiscation Order is not to be enforced to the extent that any sum is recovered by way of satisfaction of any other Confiscation Order made in relation to the same joint benefit.


HON. JUSTICE MARLENE I. CARTER
ACTING JUDGE OF THE GRAND COURT

