Neutral Citation Number: [2020] EWCA Crim 967

Case No: 201901333 B1
201804025 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE WOOD GREEN CROWN COURT
RECORDER BROMPTON QC
S20170477

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2020

Before :

LORD JUSTICE DAVIS
MR JUSTICE FRASER
and
HIS HONOUR JUDGE MICHAEL CHAMBERS QC

- -

Between :

REGINA	**Respondent**
(London Borough of Haringey)	
- and -	
BORUCH ROTH	**Appellant**

- -
- -

Mr Marc Glover (instructed by **Waller Pollins Goldstein**) for the **Appellant**
Mr Joshua Normanton (instructed by **the London Borough of Haringey**) for the **Respondent**

Hearing date: Friday 10 July 2020

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Approved Judgment

LORD JUSTICE DAVIS:

Introduction

1. The appellant, Mr Boruch Roth, appeals against a sentence in the form of a fine of £20,000 imposed on 23 August 2018 by the Crown Court for failure to comply with the requirements of an Enforcement Notice served pursuant to the provisions of the Town and County Planning Act 1990 ("the 1990 Act"). In addition he also appeals, by leave granted by this court, against a confiscation order made in the Crown Court in the sum of £527,887.55.

2. The sole issue raised on the appeal against sentence is that the judge failed to give any due credit to the appellant for his early plea of guilt. The issues raised on the appeal against the confiscation order (including one raised very late in the day as to the form of the summons issued in this case) are more wide ranging. They include arguments that the rents accruing to the appellant in respect of the property in question were not sufficiently linked, in terms of causation, to the breach of the Enforcement Notice so as to justify an order in the amount of the rents received; and in any event that it was disproportionate to make an order in the gross amount of the rents received. These are arguments, it has to be said, of a kind which are not altogether unfamiliar in this context.

3. The appellant was represented before us by Mr Marc Glover, who had not appeared below. The respondent, the London Borough of Haringey, was represented before us by Mr Joshua Normanton, who had appeared below. We are grateful to them for their arguments.

Background Facts

4. The background facts, in summary, are these.

5. In April 2006 the appellant purchased a house at 39 Vartry Road, London N15 for £340,000. He subsequently executed a Deed of Trust with regard to the beneficial interest of the property in favour of a company called Eurobeam Services Limited, which he controlled. However, the property at all times remained in his legal ownership and was registered in his name. The papers would suggest that the appellant in fact owns, directly or indirectly, several properties in London.

6. On 4 May 2007 the appellant was granted planning permission to convert the property into three self-contained flats, comprising one three-bedroom flat on the ground floor and basement and two two-bedroom flats on the first and second floors. Attached conditions stipulated that the "development hereby authorised must be begun not later than the expiration of 3 years from the date of this permission, following which the permission shall have no effect." A further condition required the development thereby authorised to be carried out in complete accordance with the plans submitted to and approved by the Local Planning Authority.

7. The appellant, however, radically departed from, indeed flouted, this planning permission. He chose, without any authorisation, to convert the property into twelve

self-contained flats. This eventually came to the attention of the Local Planning Authority.

8. In due course, the London Borough of Haringey on 6 September 2012 issued an Enforcement Notice. That required the appellant to cease to use the property as self-contained flats. On 27 September 2012 the appellant lodged an appeal against the Enforcement Notice. However, he submitted no statement in support of this appeal and, having failed to comply with the requirement to do so, his appeal was dismissed on 9 November 2012. It was common ground that in the circumstances the time for compliance with the Enforcement Notice expired on 9 March 2013.

9. A visit by a Planning Enforcement Officer on 3 December 2013 revealed that no attempts at compliance had been made. The property was still in use as self-contained flats. For whatever reason, no action was taken at that time. In March 2016 the Planning Enforcement Officer then wrote to the appellant, requiring him to notify a mutually convenient date for further inspection of the property. There was no response; and a further written request in January 2017 was also ignored. Eventually, on 18 May 2017 the Planning Enforcement Officer was able to inspect the property, having been granted admittance by one of the occupants. It was still in use as twelve self-contained flats.

The Statutory Framework

10. It is convenient at this stage to turn to the statutory framework.

11. The general scheme of the planning legislation in this context is that a breach of planning control is not of itself a criminal offence. It is the service of an Enforcement Notice that can produce that result, if it is not complied with. In this regard, s.172 of the 1990 Act confers the necessary powers on a local planning authority to issue Enforcement Notices.

12. Section 173 contains provisions as to the contents and effect of such a notice. Section 173 in the relevant respects provides:

> "(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.
>
> …
>
> (9) An enforcement notice shall specify the period at the end of which any steps are required to have been taken or any activities are required to have ceased and may specify different periods for different steps or activities; and, where different periods apply to different steps or activities, references in this Part to the period for compliance with an enforcement notice, in relation to any step or activity, are to the period at the end of which the step is required to have been taken or the activity is required to have ceased."

13. Section 179 provides, in the relevant respects, as follows:

> "(1) Where, at any time after the end of the period for compliance with an enforcement notice, any step required by the notice to be taken has not been taken or any activity required by the notice to cease is being carried on, the person who is then the owner of the land is in breach of the notice.
>
> (2) Where the owner of the land is in breach of an enforcement notice he shall be guilty of an offence.
>
> (3) In proceedings against any person for an offence under subsection (2), it shall be a defence for him to show that he did everything he could be expected to do to secure compliance with the notice.
>
> (4) A person who has control of or an interest in the land to which an enforcement notice relates (other than the owner) must not carry on any activity which is required by the notice to cease or cause or permit such an activity to be carried on.
>
> (5) A person who, at any time after the end of the period for compliance with the notice, contravenes subsection (4) shall be guilty of an offence.
>
> (6) An offence under subsection (2) or (5) may be charged by reference to any day or longer period of time and a person may be convicted of a second or subsequent offence under the subsection in question by reference to any period of time following the preceding conviction for such an offence.
>
> …
>
> (8) A person guilty of an offence under this section shall be liable on summary conviction, or on conviction on indictment, to a fine.
>
> (9) In determining the amount of any fine to be imposed on a person convicted of an offence under this section, the court shall in particular have regard to any financial benefit which has accrued or appears likely to accrue to him in consequence of the offence."

14. As to the operation of the Proceeds of Crime Act ("the 2002 Act"), the general scheme of that Act is too familiar to require any exposition here. In the present case, the matter was treated as one of benefit from particular criminal conduct. No reliance was sought to be placed on the criminal lifestyle provisions. For present purposes, the provision which is of central relevance is s.76 (4) of the 2002 Act, which provides:

> "A person benefits from conduct if he obtains property as a result of or in connection with the conduct."

Section 76 (7) provides:

> "If a person benefits from conduct his benefit is the value of the property obtained"

The Criminal Proceedings

15. Proceedings were commenced by summons issued on 28 June 2017 in the Highbury Corner Magistrates' Court.

16. The summons (see Rule 7 of the Criminal Procedure Rules) set out the offence alleged in the following terms:

> "On 18th May 2017 at 39 Vartry Road London N15 6PR you did fail to comply with the requirements of an Enforcement Notice served on you as the owner of the Property by the London Borough of Haringey, which required you to cease using the property as self-contained flats by 9 March 2013. Contrary to Section 179 (2) of the Town and Country Planning Act 1990."

17. The Statement of Facts accompanying the summons set out the background facts, as alleged, in some detail. It concluded by stating that the defendant had been in breach of the Enforcement Notice for 53 months and had gained a financial benefit from non-compliance in the sum of approximately £508,800. The summons, together with appended Statement of Facts, was duly served on the appellant.

18. On 16 November 2017, at a hearing when the appellant was legally represented, he pleaded guilty. The Magistrates' Court then committed the matter to the Crown Court. It did so by reason of the prosecutor's proposal to seek a confiscation order in the amount indicated. It did not do so, on the face of the committal documents, because it considered its sentencing powers insufficient.

19. Very detailed statements, with attachments, were filed pursuant to s.16 and s.17 of the 2002 Act. By his (professionally drafted) s.17 statement the appellant expressly admitted, among other things, the allegation that there had been a continual period of non-compliance from 9 March 2013.

20. The matter came before Mr Recorder Brompton QC, sitting in the Wood Green Crown Court, on 18 August 2018. Both sides were legally represented. In the confiscation proceedings, the amount of benefit was agreed at £527,887.55. The principal issue was whether the rents received had been received beneficially by a limited company called Cazenove Estates Limited. The appellant was contending that they had been: and the only amount of benefit attributable to the appellant himself was the amount passed on by that company to him, and with allowance also to be made for the costs associated with management and maintenance and mortgage payments. The appellant himself gave evidence. The Recorder reserved his decision, producing a clear and thorough ruling on 23 August 2018.

21. As to sentence, at the hearing it had been identified that the powers of the Crown Court in imposing a fine were limited by reason of the fact that the matter had not

been committed to the Crown Court on the basis that the Magistrates' Court's sentencing powers were inadequate. Accordingly, it was common ground, by reference to s.70 and s.71 of the 2002 Act, that the amount of the fine had to be capped at the level available to the Magistrates' Court: which was £20,000.

22. In passing sentence, the Recorder expressly acknowledged that. He went on to say:

> "But for that cap, I should have imposed a fine of £50,000, discounted by one-third to take account of your plea."

He then immediately went on to state that in the circumstances the fine would be £20,000. He also made an order for prosecution costs.

23. Counsel then appearing for the appellant courteously reminded the Recorder that the statutory maximum was £20,000 and that the Recorder had indicated an intent to give full credit for the plea. The Recorder then said that, without the cap, he would have imposed a fine of £50,000, discounted by one-third, and:

> "… in my judgment, I am not therefore required, in my discretion, to give a one-third discount from the £20,000. If I am wrong on that, I am wrong on that, but that is my view."

24. In his written ruling on confiscation handed down on the same occasion, the Recorder rejected the appellant's case with regard to Cazenove Estates Limited. He found, after fully and thoroughly reviewing the evidence, that the appellant had been the principal and that Cazenove Estates Limited had been acting as a commercial property management company as his agent. There is, and can be, no viable challenge to that conclusion on the evidence.

25. An argument had also been raised to the effect that as the appellant had planning permission (granted in 2007) for three flats the benefit figure should at all events be reduced pro-rata to reflect that. It was further argued that to make a confiscation order in the amount of the gross rents received in respect of all twelve self-contained flats was disproportionate.

26. In rejecting those arguments, the Recorder among other things said this:

> "I reject those arguments. The enforcement notice imposed on the Defendant an unqualified requirement to "cease using the property as self-contained flats" and the offence was constituted by his failure to do so. The fact that the Defendant could have done things differently had he chosen to do so is nothing to the point. He did not choose to do so, and I do not consider that an order for confiscation in the full amount of the benefit obtained by the Defendant comes even close to involving a lack of proportionality under the principles expounded by the Supreme Court in *R v Waya* [2013] 2 Cr. App. R. (S)"

The Appeals to this Court

27. The application for leave to appeal against sentence, on grounds prepared by counsel who had appeared in the Crown Court, was granted by the single judge. The application for an extension of time and leave to appeal against the confiscation order, on grounds and with an Advice prepared by Mr Glover (who had not appeared below), followed several months later. The single judge, in dealing with those latter applications, referred those applications to the Full Court. The single judge also gave directions that the applicant must provide a perfected skeleton argument and a paginated bundle of authorities by 17 December 2019.

28. The appellant complied with neither of those directions. On the contrary, when the matter was chased up on behalf of the Registrar of Criminal Appeals, there continued to be non-compliance. Indeed there never has been a perfected skeleton argument lodged; and a bundle of authorities was only provided very shortly before the hearing. On top of that, Mr Glover, shortly before the hearing, indicated that he also wished to advance a yet further Ground of Appeal, on a point never previously raised.

29. This was not the fault of Mr Glover or his solicitors, who it seems were only put in a position to appear at the hearing relatively late in the day. But this was entire non-compliance with the directions of the single judge. What is more, it occurred in the context of an extension of time of some length in any event being needed. Mr Glover did tell us, on instructions, of certain personal difficulties the appellant had been facing. But these did not provide an adequate explanation or justification. As to the entirely new ground of appeal, Mr Glover rather airily asserted that it was a pure point of law, as though that of itself gave a complete justification. But, set in context, that assertion does not provide a justification for its very late introduction.

30. In such circumstances, this court would have been justified in refusing to entertain at all the application for an extension of time and leave to appeal against the confiscation order. But, perhaps benevolently, we indicated that we would entertain the challenge to the confiscation order. As to the new ground, Mr Normanton very fairly indicated that he had had sufficient time to prepare arguments on it: and thus it was that we gave Mr Glover leave to argue that ground as well.

Appeal Against Sentence

31. We will deal first with the appeal against sentence.

32. The point made is a simple one. Because of the manner in which the case had been committed to the Crown Court, the Crown Court was confined to the sentencing powers available to the Magistrates' Court. That meant that the maximum fine that was available was £20,000. But since, as the Recorder had found, the appellant was entitled to full credit for plea he should have received that credit; and it is objected that it was wrong in principle, or otherwise excessive, to withhold such credit simply because the Recorder had himself taken the view that, absent the technical jurisdictional point, he would have imposed a fine, before credit for plea, of £50,000.

33. We consider that this objection is plainly correct. The fact was that there was available to the Recorder a power to impose a maximum fine of £20,000. But the appellant had pleaded guilty: so he was entitled in principle to credit for that plea, involving the appropriate discount from the maximum fine available. The position is the same, for example, as where a Crown Court judge is sentencing on an indictment

which includes a count of assault, to which the defendant has previously pleaded guilty. The maximum available sentence on such a count is six months imprisonment: and from that the defendant is ordinarily entitled to the appropriate discount for plea. The Crown Court judge cannot properly impose the maximum available sentence of six months imprisonment, and withhold all credit for plea, simply because the judge may have taken the view that the matter should have been charged as, for example, assault occasioning actual bodily harm.

34. We therefore allow the appeal against sentence. We substitute, as the amount of the fine, the sum of £13,333.

The First Ground of Challenge

35. We turn to the appeal relating to the confiscation order.

36. It is convenient to take first the ground of appeal very recently raised: for if it is right, that potentially undermines the whole basis of the confiscation order. Indeed, if it is right it might also undermine the whole basis for the fine imposed.

37. The point raised is entirely technical. It founds itself on the drafting of the summons issued in the Magistrates' Court. What is said is that the charge contained in the summons, when read properly and strictly, is such that the offence charged was of breaching the requirements of the Enforcement Notice on just one day: that is, 18 May 2017. In consequence, a confiscation order reflecting a period of criminality in excess of four years is, it is argued, unsupportable.

38. Mr Glover frankly acknowledged that the point had only been formulated when the appellant's advisers, in preparation for this appeal, had considered the decision of a constitution of this court in the case of *Panayi* [2019] EWCA Crim 413, [2019] 2 Cr. App. R (S) 21. But, he says, that decision governs the present case.

39. *Panayi* was an unusual case on its facts. There, the defendant rented out two flats in an unauthorised roof extension. The Enforcement Notice in question had been issued as long ago as 22 August 2003. Various extensions of time for compliance were granted. In March 2007, an indication was given to the effect that the defendant would not be prosecuted for non-compliance if there were no further breaches. Still there was no compliance. A subsequent appeal by the defendant against a refusal to issue a Certificate of Lawfulness was eventually rejected on 18 February 2016. The summons was issued on 28 June 2016. The offence was described as follows:

> "On or about 18 February 2016, you being owner of [address] breached an Enforcement Notice issued by the London Borough of Islington on 22 August 2003 in respect of unauthorised development at [address] by failing to comply with the remedial action required in Schedule 4 of the Enforcement Notice, contrary to s.179 (1) and (2) of the Town and Country Planning Act 1990."

40. In giving the judgment of the court, Males LJ held that the charge must be interpreted as relating to a criminal offence on a single day (18 February 2016): "the Council chose to charge by reference to a single day" (paragraphs 18 and 19 of the judgment).

It further followed, as the court went on to hold, that for the purposes of the confiscation proceedings the benefit was confined to the rent received on that one day.

41. Such an outcome, on so literalistic a reading of the charge, can scarcely appeal to a sense of the merits: although it has to be said that (not least in the drafting of a summons or an indictment) sometimes technicality has to prevail. But in any event the present case is, in our opinion, plainly distinguishable from *Panayi*.

42. In *Panayi* (and against a background of uncertainty as to when compliance was being demanded or extended) the only reference dates in the charge were the date when the Enforcement Notice was actually issued (which would not be the actual time by which compliance was required to take place) and the date of the rejection of the challenge to the refusal to issue the Certificate of Lawfulness. In the present case, however, the summons did indeed identify the date from which the (criminal) non-compliance had started: that is, 9 March 2013. Although the summons is undoubtedly clumsily drafted, it thereby sufficiently, in our judgment, identifies the start date (9 March 2013).

43. In our view, the charge was sufficiently worded. But if more was needed, there was more. Because in the accompanying Statement of Facts, it is again made clear that it is the entire period as identified which is the subject of the summons. The matter was clearly committed to the Crown Court on that basis: and the confiscation proceedings were also conducted on that basis. Indeed, the gross amount of the rent receipts for the relevant period was actually agreed for the purposes of calculating benefit. Throughout, therefore, the appellant knew the case he had to meet. So even if there were technical deficiencies in the drafting of the summons they are not fatal. Likewise, for example, one can get a position in the Crown Court whereby what are designed to be specimen counts are incorrectly charged. Sometimes that can be fatal: see *Canavan* [1998] 1 Cr. App. R (S) 243. But where a defendant has positively assented to the counts being treated as specimen counts, even though not specifically so charged, then there is no objection to them being so treated: see, for example, *BDG* [2012] EWCA Crim 1283, [2013] 1 Cr. App. R (S) 26.

44. Finally, for these purposes, we should refer to the decision of the House of Lords in *Hodgetts v Chiltern District Council* [1983] 2 AC 120 (a case not referred to in *Panayi*). That case, importantly, decided that failure under the then planning legislation to comply with an Enforcement Notice by ceasing to desist from a certain use of land as required constituted a continuing offence, and not a succession of individual offences occurring on each day. It was held in that case that an information charging the offence as "on and since May 27, 1980" was validly drafted and was not bad for duplicity. But having so decided, Lord Roskill (with whose speech the other members of the House agreed) went on to say this as to the practice of charging, by reference to s.89 (5) of the Town and Country Planning Act 1971, on the basis of "on and since" a specified date. He said (at p.128E):

> "I see no objection to that practice, but it might be preferable if hereafter offences under the first limb of s.89 (5) were charged as having been committed between two specified dates, the termini usually being on the one hand the date when compliance with the enforcement notice first became due and on the other hand a date not later than when the information

> was hand, or of course some earlier date if meanwhile the enforcement notice had been complied with."

45. That guidance might usefully continue to be borne in mind by these drafting summonses by reference to s.179 of the 1990 Act. It is, at all events, not onerous to draft such a summons in a sufficiently clear way so as to forestall all possibility of a dispute of the present kind.

The Second Ground of Appeal

46. The next ground of appeal raises what was perhaps Mr Glover's principal point.

47. At first sight, and indeed at second sight, the appellant's conduct from 9 March 2013, in flagrant breach of the requirements of the Enforcement Notice, would seem plainly to have given rise to him obtaining property as a result of or in connection with that conduct. Had he not wrongfully converted the property into twelve self-contained flats and then continued to use it as self-contained flats contrary to the requirements of the Enforcement Notice he could not have obtained the rents arising therefrom. The criminal conduct and the receipt of rents are directly causally linked.

48. Mr Glover, however, mounted an elaborate argument to the effect that that was too "blunt" an approach to causation. He submitted, indeed, that the receipt of rents was not because of the breach of requirements of the Enforcement Notice but in spite of it. The true source of the obtaining of the rents, he said, lay in the (lawful) tenancy contracts made between the appellant (or his agent Cazenove Estates Limited) and the individual tenants. The rents thus did not derive from the ongoing breach of the Enforcement Notice.

49. It is not possible to accept such an argument.

50. It takes as its starting point the decision of a constitution of this court in the case of *Sumal and Sons (Properties) Limited* [2012] EWCA Crim 1840, [2013] 1 WLR 2078. As a starting-point, it meets the initial objection that, in giving the judgment of the court, Davis LJ made clear, at paragraph 30, that for statutory offences:

> "… the availability of a confiscation order will depend on the terms of the statute or regulations creating the offence, read with the terms of the 2002 Act and set in the context of the facts of the case."

That has been repeatedly confirmed in subsequent decisions. Indeed, in *Neuberg (No.2)* [2016] EWCA Crim 1927, [2017] 4 WLR 58 Lord Thomas LCJ endorsed at paragraph 27 of his judgment the remarks made in the earlier decision of *Palmer* [2016] EWCA Crim 1049, [2017] 4 WLR 15 to the effect that it will not necessarily be helpful to look at other statutes and other factual circumstances in order to answer, by analogy, the question that arises in any particular case: "It is the wording of the statute in question that matters." The arguments advanced in the present case might suggest that those words of warning are still not being sufficiently taken on board.

51. Thus *Sumal* (like the case of *Siaulys* [2013] EWCA Crim 2083, also cited by Mr Glover) was a case on the Housing Act 2004. It had nothing to do with the

Enforcement Notice provisions of the 1990 Act. In *Sumal*, receipt of rent by a landlord who had failed to obtain a licence as required by the terms of the statute were held not to be recoverable benefit. But that was in circumstances where the statute had proceeded *explicitly* on the basis that rents received in such circumstances were lawfully retained by an unlicensed landlord. That is quite different from the present situation, where the 1990 Act conspicuously contains no such provisions. Indeed, s.179 (9) requires, for the purpose of setting the amount of a fine, regard being had to any financial benefit accruing to a convicted person in consequence of the offence.

52. This obvious point of distinction was made, and correctly so, in the case of *Hussain* [2014] EWCA Crim 2344 – a case which *did* concern s.179 of the 1990 Act: see in particular paragraph 14 of the judgment. In that case, a landlord had converted a property, for which planning permission had been granted for use as "retail and one flat", into several residential flats. The court in terms rejected arguments, precisely corresponding to those now advanced by Mr Glover, based on *Sumal*. It held that it should apply a "familiar and straightforward test where issues of causation are in play"; and, doing that, it held that "but for his criminal conduct in ignoring the notice the rents in the relevant period covered by the charge would not have come into his hands or within his disposition or control as they did" (paragraph 21 of the judgment).

53. *Hussain*, which also applied the corresponding approach taken in the enforcement notice case of *Del Basso* [2010] EWCA Crim 1119, [2011] Cr. App. R (S) 41, is directly in point. There is no basis or reason for departing from it. To the contrary, we endorse it. The fundamental point remains that had the appellant here complied with the requirements of the Enforcement Notice (as he should have done) by ceasing to use the property as self-contained flats, he could not have rented it out in the way that he did. We further note that a like approach was also taken in *Evangelou* [2019] EWCA Crim 1414: again a case on breach of an enforcement notice served under the provisions of the 1990 Act. As there said (at paragraph 10 of the judgment):

> "… the rental income was clearly a benefit received as a result of the criminal conduct… The continued use of the premises constituted a failure to comply with the notice … His failure to cease to use the property in this way was his criminal conduct. This led directly to the receipt of the rental income from three bedsit units as a benefit."

Precisely so.

54. Mr Glover nevertheless sought to draw some support from the decision of another constitution of this court in the conjoined cases of *McDowell and Singh* [2015] EWCA Crim 173, [2015] 2 Cr. App. R (S) 14. But those were decisions on statutory regimes wholly different from the present context. Moreover, in *Palmer* some doubt was cast on the subtle points of distinction sought to be drawn in that case. In any event, reliance on the outcome in *Singh* (a decision by reference to the Scrap Dealers Metal Act 1964) is misplaced. In the present case, as we have said, receipt of the rents by the appellant was not, for confiscation purposes, to be regarded simply as attributable to lawful tenancy contracts. Rather, his receipt of the rents derived from his prohibited conduct in ceasing to desist from his use of the property for twelve self-contained flats, contrary to the requirements of the Enforcement Notice. His conduct

was criminal conduct and the rents were obtained as a result of or in connection with such conduct; and so were benefit for the purposes of s.76 of the 2002 Act.

55. We permitted this ground to be argued although it was not argued in the court below. Counsel below had been correct not to pursue such a point. Had it been pursued, it should, and doubtless would, have been rejected, and rightly so, by the Recorder. We hope that this will be the last time an argument of this kind is advanced on this basis in confiscation proceedings, in the context of s.179 of the 1990 Act.

Third Ground of Appeal

56. By this ground, it was sought to be argued that it was wrong for the Recorder to have calculated benefit by reference to gross rental income, rather than net profit. It was asserted that this gave rise to a disproportionate outcome.

57. One underpinning premise for this argument again is that the underlying transactions – viz the tenancy contracts – were themselves lawful. Moreover, it was said, the tenants had received "full value", in that they had been permitted to occupy the flats. But, for the reasons given above, all this does not meet the real point: which is that the appellant derived all these rents from his unlawful and criminal activity in ceasing to use the property as twelve self-contained flats. Precisely such an argument on proportionality, as now advanced in the present case, had also been advanced but rejected in *Hussain*: see paragraph 29 of the judgment.

58. As stressed in cases such as *Waya*, the focus of the confiscation legislation is on what is obtained: not on what is retained. There may be some instances (of which *Sale* [2013] EWCA Crim 1306, [2014] 1 Cr. App. R (S) 60, is an example) where the vast majority of a particular business undertaking is lawful; and therefore it may, depending on the circumstances, be disproportionate to make a confiscation order in the amount of the entire turnover or gross profits of the business for the relevant period, when only a small part of its operation was tainted by the criminality in question. On the other hand, there will be cases where the entirety of the relevant turnover or gross profits can properly and proportionately be the subject of a confiscation order: see, for example, the discussion by Fulford LJ, giving the judgment of the court, in *King (Scott)* [2014] EWCA Crim 621, [2014] 2 Cr. App. R (S) 54.

59. It is clear how the present case is to be categorised. Here, as we have indicated, the entire activity of letting out the twelve flats and receiving rents therefrom involved, and was inherently founded on, the criminally unlawful failure to comply with the requirements of the Enforcement Notice. The Recorder was, in such circumstances, unquestionably justified in assessing benefit by reference to the gross rents received. As stated in paragraph 26 of the judgment in *Waya* (and has been frequently stated in other cases), a proportionate order is capable of having the effect of requiring a defendant to pay over the whole sum which he has obtained by crime without enabling him to set off expenses. The benefit in the present case was properly adjudged to be the total value of the rents obtained, not the appellant's net profit after deduction of expenses and outgoings. The Recorder was accordingly justified in concluding that such a confiscation order was proportionate.

60. Finally, we note that there was raised before the Recorder the proposition that at least benefit should be limited so as to reflect the fact that, under the 2007 planning permission, the appellant could lawfully have converted the property into three self-contained flats.

61. As the Recorder crisply had said, the fact that the defendant could have done things differently had he chosen to do so was nothing to the point. That was correct. It is a general principle in confiscation proceedings that where a person obtains a benefit as a result of or in connection with his criminal conduct the benefit ordinarily is to be assessed as the full amount constituting that benefit, not the excess over any benefit which otherwise might lawfully have been obtained: see, for example, *Shabir* [2008] EWCA Crim 1809, [2009] 2 Cr. App. R (S) 84. That approach was specifically applied in the enforcement notice case of *Evangelou*, where precisely such an argument as was run before the Recorder in the present case was rejected. Mr Glover fairly accepted that the *Evangelou* decision was indistinguishable from the present case on this point. The lack of substance or merit in this point is also reinforced in this case by the fact that the 2007 planning permission had in any event altogether ceased to have effect by reason of non-compliance with its conditions.

Conclusion

62. For the reasons given, the appeal against sentence is allowed and the amount of the fine is reduced to £13,333. The grounds of appeal against the confiscation order are all rejected; and that appeal in consequence is dismissed.