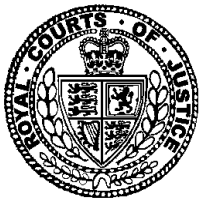

Neutral Citation Number: [2022] EWCA Crim 1589

Case No: 202102757 B2

IN THE COURT OF APPEAL CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT NEWCASTLE
His Honour Judge Adams
T20171036

Date: 2 December 2022

Before:

LORD JUSTICE STUART-SMITH
MR JUSTICE WALL
and
HER HONOUR JUDGE SHANT KC

- -

Between:

STANLEY LESLIE MILLER

Appellant

- and -

REX

Respondent

- -
- -

Nicholas Yeo (instructed by BCL Solicitors LLP) for the **Appellant**

Kennedy Talbot KC and **Robert Dudley** (instructed by CPS Appeals and Review Unit, Special Crime Division) for the **Respondent**

Hearing date: 7 October 2022
- -

Approved Judgment

This judgment was handed down remotely at 10.00 am on 2 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Stuart-Smith:

1. Mr Miller appeals with the permission of the single judge against a confiscation order made against him in POCA proceedings ("the Order") by HHJ Adams ("the Judge") in the Newcastle Crown Court on 30 July 2021. The Order, which was made by consent, stated that the benefit from Mr Miller's general criminal conduct was £6,673,082 and that the available amount was £5,470,258. Accordingly, the Judge made the Order in the same amount as was recorded as the available amount, namely £5,470,258. Pennies are ignored throughout this judgment.

2. The single ground of appeal contends that "the Judge was wrong to attribute to [Mr Miller] the benefit obtained by companies of which he was a director and shareholder." As will become apparent, the appeal raises three main issues. First, was it right for the parties to treat the sum of £6,673,082 as the value of Mr Miller's benefit? Second, even if it was not right for the parties to treat that sum as Mr Miller's benefit and to present it to the Judge as such, was the Judge right to accept it as the value of Mr Miller's benefit given that it was presented to him as part of a consent order agreed by the parties? Third, assuming that the answer to the first question is no, should this Court allow Mr Miller's appeal and remit the case to the Court below given that the Order was made by consent in circumstances where Mr Miller had been advised by counsel, solicitors and accountants during the POCA proceedings up to and including the presentation of the agreed consent order to the Judge?

3. As will appear below, what renders this case unusual is what is said about the involvement of counsel advising and representing Mr Miller in the POCA proceedings below, who had not represented him at trial and did not represent him on this appeal. It is Mr Miller's case that he was wrongly advised that the sum of £6,673,082 was the correct amount of his benefit and that this advice should be taken as subverting his agreement to the making of the Order. It will therefore be necessary to consider the role of counsel, the advice he gave, whether that advice was correct and the impact of that advice upon the second and third of the main issues.

The factual and procedural background

The frauds

4. The case involves three limited companies, to which we shall refer as MGM, SLM, and T-TEC. Mr Miller was the sole director and shareholder of SLM. He and a Mr Moody were the only directors of MGM and T-TEC, with each man being a 50% shareholder in both companies.

5. Each company conducted lawful business with third parties and employed many employees in pursuit of that lawful business. Each company also defrauded the Revenue on a very large scale. In the case of MGM, two frauds were perpetrated. First, false VAT repayments were claimed and obtained from HMRC based on fictitious invoices. This line of fraud amounted to something over £500,000. Second, MGM deducted sums from the pay of its employees as if they were deductions for PAYE and NI. In fact MGM never registered for PAYE or for paying over the NI it had deducted: it simply kept the money, amounting to nearly £5,500,000. SLM conducted a VAT fraud along the same lines as MGM's. Once again the amount wrongly reclaimed and paid was in excess of £500,000. T-TEC too conducted a VAT fraud along the same

lines, netting repayments just in excess of £104,000. The fraudulent claims for repayment of VAT were made in the name of the company concerned and, as indicated above, it was MGM that deducted the sums purporting to be PAYE and NI. Obviously it required human intervention to enable the companies to act as they did.

6. Mr Miller was the director of the companies with control of and responsibility for their financial affairs: in the case of SLM he was responsible for all its affairs. Although Mr Moody was responsible for equipment and the shop floor he was not responsible for financial affairs.

The trial

7. Mr Miller and Mr Moody (and others) were prosecuted. The case against Mr Miller was that he was the guiding and directing mind behind the frauds. Mr Moody was acquitted. Mr Miller was convicted on each of the four counts of the indictment that he faced, as follows:

   i) Count 1: a charge of fraudulent evasion of Value Added Tax contrary to Section 72(1) of the Value Added Tax Act 1994. The particulars of the offence were that "between the 7th day of December 2010 and the 8th day of January 2013, [he was] knowingly concerned in the fraudulent evasion of Value Added Tax in that [he] submitted false VAT returns on behalf of [MGM] and claimed VAT repayments which [he was] not entitled to, totalling £508,151."

   ii) Count 2: a second charge of fraudulent evasion of Value Added Tax. The particulars of the offence were that "between the 12th day of June 2008 and the 16th day of March 2016, [he was] knowingly concerned in the fraudulent evasion of Value Added Tax in that [he] submitted false VAT returns on behalf of [SLM] and claimed VAT repayments which [he was] not entitled to, totalling £459,809."

   iii) Count 3: a third charge of fraudulent evasion of Value Added Tax. The particulars of the offence were that "between the 4th day of June 2014 and the 5th day of March 2015, [he was] knowingly concerned in the fraudulent evasion of Value Added Tax in that [he] submitted false VAT returns on behalf of [T-TEC] and claimed VAT repayments which he was not entitled to, totalling £87,333."

   iv) Count 4: a charge of cheating the Public Revenue, contrary to common law. The particulars of the offence were that "between the 6th day of April 2009 and the 8th day of May 2016, [he] did, with intent to defraud Her Majesty's Revenue and Customs failing [sic] to pay to Her Majesty and Customs monies owed from National Insurance and Income tax deductions for the business [MGM], totalling £4,897,123."

8. It will immediately be noticed that the allegation in the particulars of each of Counts 1-3 was that Mr Miller was "knowingly concerned with" the fraudulent evasion of VAT and that he had (with others charged on the indictment) submitted false returns and claimed VAT repayments "to which he was not entitled". Similarly on Count 4, it was alleged that he had failed to pay monies owed as NI and Income Tax deductions for MGM. Although the particulars of the offences were expressed in this way, it was the

companies (and not Mr Miller) who came under a liability to pay VAT, PAYE and NI and only the companies could claim repayment of VAT. Mr Miller personally was never under a liability to pay VAT, PAYE or NI; nor did he have standing or purport to reclaim VAT on his own account. Equally, it was no part of the necessary case for the prosecution at trial that Mr Miller had received any of the sums that were the identified proceeds of the fraudulent claims or the withholding of PAYE and NI that were specified in the particulars of the offences. It was never alleged during the trial, so far as this court is aware, that the false VAT claims were paid directly to Mr Miller, either in whole or in part: on the contrary, at trial the Agreed Facts included that the fraudulently obtained repayments were paid into the bank accounts of the companies concerned. For the prosecution to succeed at trial, it was only necessary to prove that Mr Miller was knowingly concerned with the submission of the false claims and (since he was charged with substantive offences rather than attempts) that unwarranted payments had been made on the basis of those false claims. That is what the prosecution set out to prove and is what the jury evidently accepted. Similarly, it was no part of the prosecution case on Count 4 that the monies deducted from the employees' pay packets were paid to Mr Miller: having deducted the monies from the employees' pay packets, MGM held onto the money rather than paying it to the Revenue.

9. Consistently with this approach, the prosecution's opening for the trial described the mechanics of the VAT frauds by the submission of false invoices and that the repayments that are the subject of Counts 1-3 were made to the companies. In answer to the question "who was behind [the MGM VAT] fraud?", the answer given (at paragraph 10 of the opening) was that "[Mr Miller] and [Mr Moody] were the Directors of MGM. The Prosecution say they were the figureheads of MGM responsible for what happened within their company. Each were well aware that the company they jointly directed was being used as a vehicle to commit a large scale VAT repayment fraud." In relation to the MGM PAYE/NI fraud it was said (at paragraphs 15-16) that "Over the years the rewards from the fraud built up. In total those behind the fraud retained deductions totalling £4,897,123 that should have been used to pay the liabilities of the staff working for the company. The prosecution say this second fraud would have been even clearer to those in control of the company. …" The primary involvement of the companies is also made clear elsewhere in the opening e.g. "In total SLM obtained VAT repayments totalling £459,809. Again that was based on false invoices" (paragraph 19) and "what you will hear therefore is that [Mr Miller] directed three companies who were all conducting significant VAT repayment frauds. One of those companies was also engaged in a separate fraud that again targeted HMRC and ultimately those people working for it" (paragraph 23). Despite the possible ambiguity of the phrase "… those behind the fraud retained deductions …" the overall sense is clear: Mr Miller was responsible for the submission of false invoices which resulted in payments to (or retained PAYE/NI deductions) by the companies.

10. Two further features may be mentioned at this stage. First, when the frauds came to light, the companies collapsed. Second, subsequent investigations have evidenced that, while they survived, Mr Miller treated the companies as his personal cash-cow, extracting money from them far in excess of any normal director's emoluments or shareholder's dividends. The picture that emerges from the Crown's evidence is of Mr Miller milking the companies, which were only able to survive his depredations because of the cash flow generated by the frauds until the balloon went up. The precise nature and extent of those depredations are contentious and we do not make any findings about

them. They do not matter for present purposes save that they go to the question of potential risk if Mr Miller's POCA benefit were to be assessed by reference to the benefit he derived from his depredations rather than adopting the aggregate sums alleged in the indictment. In this appeal (where the evidence was admitted for the limited purpose we have outlined), Mr Miller has not challenged the accuracy of the Crown's evidence or offered an explanation of what was going on; but that does not mean or imply that the evidence would be accepted if the question of Mr Miller's actual benefit were to be re-visited.

The POCA proceedings

11. In these POCA proceedings, it has at all material times been the Crown's case that the sums that are said to constitute Mr Miller's benefit were paid into the companies' bank accounts as summarised in the table reproduced below from the Respondent's skeleton argument for the hearing of this appeal:

Element	**Amount**
Transferred by HMRC to bank account of MGM Precision Ltd (**"MGM"**) as VAT reclaim payments (count 1) Appellant and Moody the only directors and each a 50% shareholder	£553,498 (inc CPIH adjustment)
Transferred by HMRC to bank account of SLM Engineering Ltd (**"SLM"**) as VAT reclaim payments (count 2) Appellant sole director and shareholder	£518,752 (inc CPIH)
Transferred by HMRC to bank account of T-TEC Precision Engineers Ltd (**"T-TEC**") as VAT reclaim payments (count 3) Appellant and Moody the only directors and each a 50% shareholder	£104,936 (inc CPIH)
Unpaid PAYE payments withheld by MGM (count 4)	£5,460,278 (inc CPIH)
Cash seized at Appellant's home address	£35,615
Total	**£6,673,080**

Looking ahead for a moment, it can be seen from this table that the sum recorded as benefit in the Order was very largely made up by aggregating the false claims and non-payment by the companies, the balance being the relatively modest sum of cash seized at his home address. The sums in the right hand column differed from those stated in the indictment because they had been updated for CPIH.

12. The Crown's position on Mr Miller's benefit has been consistent throughout, as had Mr Miller's until the launching of this appeal. Paragraph 8.2 of the prosecution's Section 16 Statement dated 21 June 2019 stated: "The total amount of benefit obtained by [Mr Miller] as a result of the offences in these proceedings is calculated as follows …". It then set out the four sums by reference to the offences charged in Counts 1 to 4 of the indictment, totalling £5,952,339. That approach was confirmed by a table appearing at paragraph 9.1, which listed the individual sums as benefit from Particular Criminal Conduct from Count 1 to Count 4, being £5,952,339 in the aggregate. There is a small

difference between the sum of £5,952,339 and the aggregate of the four sums originally listed in the indictment, which is attributable to the prosecution asserting benefit in relation to Count 4 of £4,897,045 in the POCA proceedings rather than the £4,897,123 specified in the indictment. The difference is of no consequence.

13. Mr Miller provided an undated section 17 Response, signed by his solicitors, which stated at paragraph 11: "it is accepted that the value of the particular criminal conduct is £5,952,339, being the total of the amounts alleged in the Counts proved against [Mr Miller]. [Note: this concession is conditional upon a confirmation by the Prosecution that there is no "double counting" of monies, in relation to the Counts on the Indictment.]" He served an expert accountant's report dated 29 October 2020, which included what was described as a re-calculation of his benefit. Although it took issue with the attribution of two properties to Mr Miller, it accepted the figures (as above) that were specified by reference to Counts 1 to 3, "VAT evaded", and to Count 4, "Cheating the Public Revenue".

14. The position was formalised by a Scott Schedule which set out the respective positions of the Crown and Mr Miller on the relevant items of benefit as follows:

Item	**Amount**	**Prosecution Case**	**Defence Case**
Particular Criminal Conduct Count 1 – VAT Evasion …	£553,498	£508,151 plus CPIH adjustment to April 2021	Agreed subject to confirmation there is no double-counting
Particular Criminal Conduct Count 2 – VAT Evasion …	£518,752	£459,809 plus CPIH adjustment to April 2021	Agreed subject to confirmation there is no double-counting
Particular Criminal Conduct Count 3 – VAT Evasion …	£104,936	£87,333 plus CPIH adjustment to April 2021	Agreed subject to confirmation there is no double-counting
Particular Criminal Conduct Count 4 – Cheating Public Revenue …	£5,460,278	£4,897,045 plus CPIH adjustment to April 2021	Agreed subject to confirmation there is no double-counting

15. Other constituent elements of the Crown's case were disputed and were the subject of negotiation that concentrated on the application of the section 10 POCA assumptions and the available amount. In particular, on 4 September 2019 Mr Miller's then wife (who we shall refer to by her present name, Ms Nicholson) successfully applied under section 10A of POCA to be joined and asserted her rights over some of the residual property and chattels held by Mr Miller and in dispute in the proceedings.

16. It is not necessary to trace the development of the Crown's case on the available amount save to mention that it alleged that (a) Mr Miller's identified assets amounted to £5,712,824 including cash, chattels, and 18 properties in the United Kingdom; and (b) there were hidden assets in the sum of £561,321, being sums transferred to a bank in Dubai that had subsequently been transferred on and were alleged to have gone missing. The Crown's case was therefore that Mr Miller's total minimum available assets amounted to £6,274,146.

17. The end result of the negotiations about the available amount and Ms Nicholson's interest was a concession by the Crown that Ms Nicholson had beneficial interest in 6 properties. The effect of the Crown's concession was that the available amount was agreed in the sum of £5,470,258, a reduction of £803,888. While the Crown does not (and could not) submit that its concession was unjustified, it is obvious that, had agreement not been reached and had the disputed issues proceeded to judgment, Mr Miller (and Ms Nicholson) may have been at risk of a less favourable result. So too, at least in theory, may the Crown since litigation is inherently uncertain.

18. The hearing before the Judge commenced on 28 July 2021. Mr Miller was represented by experienced counsel and chose not to attend the hearing himself. Counsel confirmed that he had full instructions, that Mr Miller was content for the matter to proceed in his absence, and that Mr Miller understood that the effect of his non-attendance was that he was unable to give evidence on any matters in dispute. In those circumstances the Judge decided to continue in Mr Miller's absence; but he adjourned the hearing to enable further discussions to take place.

19. When the Court reconvened on 30 July 2021, Counsel for the Crown presented the Judge with a draft confiscation order, which he indicated was agreed by all parties subject to one point about the monies that were alleged to have gone missing after their transfer to Dubai. After some discussion and the opportunity for Mr Miller's counsel to take further instructions, the point was resolved by Mr Miller's counsel stating in open court "My instructions are that I agree the order." The Judge then proceeded to make the necessary determinations including, by agreement of all parties, that Mr Miller's benefit was £6,673,080 which, it is common ground, was calculated by reference to the sums specified in the counts of the indictment and subsequently as we have set out above.

20. Before the Order was formally made, the following exchange took place between the Judge and Counsel for Mr Miller:

> "Counsel: … I wonder if your Honour would allow me to say a sentence or two?
>
> Judge: Of course.
>
> Counsel: That are really, it's really for the ears of the Miller family who are in court rather than for anyone else. … There was - I had an option, an opportunity, to potentially argue before your Honour the question of the lifting of the corporate veil of MGM. The point that I might have argued but haven't is that in relation to all of the assets that Mr Miller was said to have benefited from in the trial, in these proceedings, the point would have been that MGM, the company, in fact received those assets and that the corporate veil should not be lifted so lightly in relation to what the company did. I have opted, and I have chosen and given strong advice on the point, and not raised that before your Honour. If I am wrong about that, well that's my decision having consulted with those who instruct me, but I thought I should say that in open court because it's a point that has been raised quite properly by members of Mr Miller's family on his

> behalf and therefore I want it to be made clear that it was my decision and of course my instructing solicitor's decision supporting that that I have not raised that point, and I import(?) that if it was supported by the law then of course I would have, but there it is.
>
> Judge: Thank you …"

21. The nature of this appeal has inevitably led to a waiver of privilege over communications between Mr Miller and his lawyers leading up to the POCA hearing before the Judge. It is now possible to piece together part of what was going on in the background.

22. On the materials that have been available to the Court, it appears that Mr Miller's then solicitor first raised the question of the benefit to Mr Miller by an email sent on 13 May 2021. The solicitor made clear that he was under pressure from the client about the level of benefit. He asked "why we cannot challenge the value of benefit" and pointed out that the figure for which the Crown was contending in the POCA proceedings was higher than the figure adopted by the judge who sentenced Mr Miller after trial. Counsel's answer included that "the Court sentenced using a figure of just below £5 million. For a POCA calculation, the Court is obliged to look at the total benefit figure, which includes some assumptions: the 4 Counts Mr Miller was convicted of amount to £5.9 million." In answer to a question about the loss suffered by the revenue, counsel replied that: "the loss is as pleaded in the Indictment … and totals £5.9m. It will be difficult to argue otherwise." In answer to a further question counsel replied that "the Court sentenced on a slightly lower figure than the one that is (properly) used in the POCA proceedings." It is therefore plain that counsel was of the view that the sums alleged in the indictment were properly to be included in the calculation of benefit in the POCA proceedings. However, the precise issue with which we are concerned does not appear to have arisen until shortly before the hearing scheduled for 28 July 2021.

23. On 24 July 2021, Mr Miller's son, Matthew, who is a solicitor, sent a detailed email to Mr Miller's solicitor referring to a conversation the previous day and drawing the solicitor's attention to the case of *R v Boyle Transport (Northern Ireland) Limited* [2016] EWCA Crim 19, [2016] 2 Cr. App R (S) 11. He attached a copy of the judgment and drew an analogy between *Boyle* and his father's case. He identified that the Court of Appeal had held in *Boyle* that it was wrong to attribute to the defendant as benefit sums representing the company's turnover from journeys where falsified tachograph data had been used. Mr Matthew Miller said:

> "It is critical that the same mistake is not made here. The prosecution's methodology of attributing the benefits obtained by the companies … to [Mr] Miller as benefit must be disputed.
>
> It must be emphasised to the judge that (a) MGM, SLM and T-Tec are limited companies so have their own legal status and existence which is separate from [Mr Miller]; and (b) that it was the companies that obtained the benefits from the frauds, not [Mr Miller].

> I appreciate that the prosecution will argue that the doctrine of lifting the corporate veil should be applied but that argument is wrong."

He went on to discuss what he saw as the inapplicability of the "evasion principle" and the "concealment principle" (of which more later); he pointed out that the companies were set up for legitimate purposes; and he asked the solicitor for confirmation that the prosecution's methodology of attributing the benefits obtained by the companies to Mr Miller would be disputed.

24. Unsurprisingly, Mr Miller's solicitor forwarded the email to counsel, who replied on 25 July 2021 at 17.50 by annotating his answers in red on Mr Matthew Miller's original email. His advice was clear and included the following:

> "… I should point out that in our case, Mr Miller (and his co-defendants) were charged as individuals (not as company directors who caused the company to commit an offence, as in *Boyle*). It follows that any convictions relate to Mr Miller directly. The convictions are predicated on a finding that Mr Miller benefitted personally from the criminality alleged, even though the companies may have been used as "vehicles" for the criminality. This is a very different situation from that in *Boyle*.
>
> …
>
> Nothing of the *Boyle* error applies to Mr Miller's case. The benefit from particular criminal conduct (from the offences of which Mr Miller was convicted) amounts to £5,952,417. This figure (regrettably) cannot be challenged.
>
> …
>
> Mr Miller has already been convicted of criminality relating to £5,952,417. This is money he is personally said to have defrauded HMRC etc. The fact that money came into company accounts is not relevant once the conviction has taken place.
>
> …
>
> There is no "lifting of the corporate veil" by the Prosecution. All the Prosecution have to do is add the particular criminal conduct to the cash and properties to get their final benefit figure. This follows the legislation."

25. The solicitor has also disclosed part of his attendance note for 30 July 2021 which includes the following:

> "I had received emails from Matthew Miller overnight on the issue of corporate veil … As a consequence of receiving emails from Matthew Miller it was necessary to revisit all aspects of this case including legal argument. [I] sent messages to [counsel for

Mr Miller] and [counsel for Ms Nicholson] copying in the emails from Matthew Miller just so that all parties were understanding the issue with regards to matters being heard at this late stage.

In the meantime [I] had a lengthy telephone conference with Mr Matthew Miller. Mr Miller once again raised the issue of corporate veil. I indicated to Mr Miller that we had discussed this matter previously and that we did not believe that this was a viable argument. Mr Miller insisted that it is a viable argument and he had been instructed by his father to run this argument. I indicated that I would organise a conference with [counsel] later on today to discuss why that is not a viable option.

[I] attended Newcastle upon Tyne Crown Court and had a conference with the family prior to the attendance of all Counsel with the family as follows:

[I] then took Mr Matthew Miller into a room to have a conference with [counsel] on the issue of corporate veil.

[Counsel] went through the reason why the case of *Boyle* was not applicable to this matter and explained to him why the issue of Corporate Veil cannot be argued in this case.

It was very clear that Mr Matthew Miller did not agree with [counsel] on the issue of Corporate Veil and still wished the argument to be put.

[Counsel] refused to put the argument on the basis that it was not an argument that was sustainable and that the case of *Boyle* was not applicable in this particular matter for the following reasons:

1. The client was prosecuted in his own name as having benefitted directly from the fraud.

2. This was not an argument that was put forward during the course of the Trial and the company itself was not prosecuted in anyway [sic].

3. The issue of Corporate Veil can only be addressed if it is assets of the company that is being sought on relation to the POCA and the assets of the company in this particular case are not being sought they are personal assets belonging to Mr Miller and therefore the value of the corporate assets are not in argument.

Consequently the issue of *Boyle* does not relate.

Mr Matthew Miller was clearly unimpressed by this argument and does not understand the imposition in relation to POCA. Consequently, it was made clear that [counsel] would raise the matter in court but would not argue the matter.

> He would simply put it on the basis that the issue had been considered, discounted by Counsel and if he was wrong, which leaves it open to the Judge and all concerned and Counsel in the future to reconsider that particular issue.
>
> This was acceptable to Mr Matthew Miller though he does not agree with the argument."

26. After this appeal had been commenced, counsel produced a document entitled "Defence Counsel's Response to Grounds of Appeal" with the added rubric that "This is based on a written advice after the POCA hearing dated 21st August." In his Response, counsel said that the Order "was not agreed on behalf of Mr Miller but was not challenged either." This is contradicted by the transcript of the hearing on 30 July 2021 and is wrong: see [19] above.

27. Under the heading "The Criminal Case against Mr Miller" counsel outlined counts 1 to 4 of the indictment and the amounts alleged in those counts, concluding that "[the] total value of the criminality was therefore £5,952,340." Counsel's opinion on the question of benefit is clear from the following extracts from his response:

> "9. The Prosecution case was that the offences were carried out by Mr. Miller personally and that he used the companies merely as vehicles for the offending behaviour. There was therefore no question of "lifting the corporate veil" during the trial. Had the defence raised the point, it was certain to fail. It follows that during the POCA hearing, the benefit of the criminality was entirely the defendant's and cannot be said to be that of the companies he ran.
>
> **Proceeds of Crime Application**
>
> **Benefit: Particular Criminal Conduct.**
>
> 10. The Prosecution case was that the total value of Mr. Miller's criminality was in the sum of £5,952,340. …
>
> …
>
> 12. This figure could not be challenged as a "particular benefit" figure as it properly reflects the offences that Mr. Miller was convicted of by a Jury in 2018.
>
> …
>
> 17. I am invited to answer the question: "could the benefit figure have been challenged?". The simple answer is "no" for the following reasons:
>
> (a) The main part of the £6,673,080.35 figure is made up of a particular benefit (£6,637,465.35). This is the amount of benefit of which the defendant was convicted. …

…

Corporate Veil

27. I am asked to answer the following question: Explain why we could not argue the corporate veil issue. As with a previous question, I have answered this one many times and once in writing, but I am content to do so again in the hope that this time I may be better understood. The criminality of which Mr. Miller was convicted related to his own actions and not those of the companies that he ran. He used the companies as his vehicles, as a means by which to commit the crimes. It was not argued at trial, nor could it properly have been argued, that the companies were committing the offences and that the Court would have to lift the corporate veil to find out who was behind the companies' actions. The Prosecution case at trial was simply that Mr. Miller was acting fraudulently and used the companies to do so. It follows that the question of lifting the corporate veil does not arise in these circumstances.

28. Further, Mr. Miller was sentenced on the basis that his criminality involved £5,952,340. The Court dealing with proceeds of crime was bound to use this figure as part of the benefit figure with an uplift to reflect the current value of the benefit, namely £6,637,465.35. …

29. In these circumstances. It could not possibly be argued that it was the company that benefitted and that Mr. Miller could only be pursued if the corporate veil was lifted. It follows that none of the corporate veil case law was of any relevance either."

28. It will be noted that these responses equate "criminality" with "benefit". Counsel's view was that (a) the Court dealing with the POCA application was *bound* to use the figures in the indictment as part of the benefit figure and that (b) the contrary could not possibly be argued.

29. Despite the reference in the rubric to the Response being based on a written advice after the POCA hearing, we have been assured by the solicitor that no other relevant documents are in existence. We are not in a position to go behind that assurance; and we are in any event limited to the materials which have been provided to us. What appears from the contemporaneous documents and counsel's Response document is that counsel gave very firm advice that the suggestion that the Crown's methodology was wrong in adopting the sums involved in the four indicted frauds as Mr Miller's benefit was unarguable: "it could not possibly be argued that it was the company that benefitted and that Mr Miller could only be pursued if the corporate veil was lifted." When pressed, he "refused" to argue the point. He maintained that position even though Mr Matthew Miller made plain that he thought counsel was wrong, with the result that a compromise was reached: counsel would not argue the point but he would tell the Judge that it was his decision and, by implication, his responsibility. Hence the passage set out above at [20] where counsel told the Court that he, counsel, had "opted and chosen" and had not raised the point before the Court.

30. Both Mr Miller's then solicitor and counsel have provided witness statements. Each confirms in virtually identical terms that "at no stage was it suggested that the corporate veil was a bargaining chip which could be given away in exchange for a better deal. Rather, [counsel/I] advised in clear terms that it was a non-starter, and [we/I] therefore did not argue it on Mr Miller's behalf." This confirmation is entirely consistent with the documents we have seen, and we accept it for the purposes of this appeal.

The applicable principles

Calculation of benefit and "piercing the veil"

31. The basic provisions of the Proceeds of Crime Act 2002 governing POCA applications ("the 2002 Act") are very well known. Where the necessary conditions are satisfied, the Court must decide whether the defendant has benefited "from his general criminal conduct" or "from his particular criminal conduct" as defined: see section 6(4) of the 2002 Act. Section 76 of the 2002 Act provides:

> "(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."

Section 84(2)(b) of the 2002 Act provides that "property is obtained by a person if he obtains an interest in it."

32. It is fundamental that the confiscation regime, though undoubtedly draconian in some of its effects, is intended to deprive defendants, within their available means, of a sum representing the benefit they have gained from their relevant criminal conduct: see *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [9] per Lord Bingham of Cornhill delivering the opinion of the House of Lords. Fundamental principles were outlined in the Endnote at [48] of *May*, of which the following are of prime relevance for the issues in this appeal:

> "(5) In determining, under the 2002 Act, whether D has obtained property or a pecuniary advantage and, if so, the value of any property or advantage so obtained, the court should (subject to any relevant statutory definition) apply ordinary common law principles to the facts as found. The exercise of this jurisdiction involves no departure from familiar rules governing entitlement and ownership. …"
>
> (6) D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject."

33. One basic tenet of the common law is that "a person's acts may contribute significantly to property (as defined in the Act) being obtained without his obtaining it": see *R v Jennings* [2008] UKHL 29, [2008] 1 AC 1046 at [14] per Lord Bingham, again giving the opinion of the House. It comes into sharp focus whenever a defendant's criminal conduct causes property to be obtained by a third party, whether human or corporate.

34. It frequently happens that a defendant whose conduct has caused property to be obtained by a corporate third party may concede that the company's property should be treated as his own, as in *R v Harvey* 2017 AC 105. Where he does not, it is common ground that, because a company is a separate legal entity, an obtaining by a company pursuant to a natural defendant's crime is not ordinarily an obtaining by the defendant for the POCA purpose of calculating benefit. However, a number of potential routes may open the way to a conclusion that the obtaining of property by the company is to be treated as obtaining property by the defendant, of which the route provided by agency is just one example. For the present appeal, the relevant route is said to be by "piercing the corporate veil." As with other routes, where that route is adopted, normal common law rules should apply: see *May* at [48(5)] set out above.

35. The leading case on "piercing the veil" is now acknowledged on all sides to be *Prest v Petrodel Resources and others* [2013] UKSC 34, [2013] 2 AC 415, even though (as has been pointed out before) the relevant passages were strictly obiter. Previously there had been a tendency to rely upon statements such as that the corporate arrangements were "a device", "a stratagem", "a façade", "a cloak" or "a sham": see *Gilford Motor Co v Horne* [1933] Ch 935 at 956, 961, 965; *Jones v Lipman* [1962] 1 WLR 832, 833, 836; *Snook v London and West Riding Investments* [1967] 2 QB 786, 802; *Trustor AB v Smallbone and others (No 2)* [2001] 1 WLR 1177. It was generally recognised that the question whether these epithets were satisfied was a question of fact and that companies could be (and often were) involved in improprieties without there being good grounds to pierce the veil: see, for example, *Trustor* at [20], [22].

36. In *Prest* Lord Sumption JSC formulated what was evidently intended to be a statement of principle of general application. At [27]-[28] he said:

> "27. In my view, the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities. It is true that most of the statements of principle in the authorities are obiter, because the corporate veil was not pierced. It is also true that most cases in which the corporate veil was pierced could have been decided on other grounds. But the consensus that there are circumstances in which the court may pierce the corporate veil is impressive. I would not for my part be willing to explain that consensus out of existence. This is because I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse. I also think that provided the limits are recognised and respected, it is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law.

> 28. The difficulty is to identify what is a relevant wrongdoing. References to a "façade" or "sham" beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the "façade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil."

37. And at [35] he said:

> "I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil."

38. Lord Neuberger PSC at [81] agreed with the formulation Lord Sumption had set out at [35]. Baroness Hale JSC, with whom Lord Wilson JSC agreed, at [92] doubted whether all cases where the veil had been pierced could be fitted into the evasion or the concealment principle. Lord Mance JSC, at [99] left open the possibility that there might be other situations that might arise in the future. Lord Clarke JSC at [103] reserved judgment as the point had not been fully argued. And Lord Walker JSC at [106] expressed the view that "piercing the corporate veil" is not a doctrine at all in the sense of a coherent principle of law, preferring the view that it is merely a label attached to disparate occasions on which apparent exceptions to the rule of separate legal

personality are held to exist. Some support for Lord Walker's view is to be found in *Hurstwood Properties v Rossendale* [2021] UKSC 16, [2022] AC 690 at [71] where the members of the Supreme Court, without reaching any final view, stated themselves to be "inclined to share Lord Walker's doubts." This observation, too, was obiter.

39. What, however, is clear is that the Supreme Court did not identify any principled basis for "piercing the veil" other than that provided by Lord Sumption. It is therefore reasonable to assume that other principled bases, if they exist, are likely to be extremely rare. We agree that the principles enunciated apply across the board and that they are to be applied on a fact- and circumstance-specific basis in each case: see *R v Sale* [2013] EWCA Crim 1306, [2014] 1 WLR 663 at [20], *Boyle* at [91]

40. It is convenient at this stage to mention two cases which may appear to be in tension with the principles subsequently articulated in *Prest.*

41. The first is *Jennings,* which was decided in 2008. The case concerned an advance fee fraud carried on through a company which had originally been in legitimate business but which at the relevant time was exclusively used for the purposes of the fraud. A Mr Phillips was the sole director and controlling shareholder of the company. The appellant was neither a director nor a shareholder: he was an employee who received a salary and other payments, but the prosecution case was that he too was a prime mover in the conspiracy. The prosecution alleged that each had benefitted to the full extent of the monies obtained from the fraud, amounting to over £580,000. The appellant submitted that he could not have received more than about £50,000, made up of salary, a payment from the company's loan account, and some postal orders that he had cashed when Mr Phillips was away. He was made subject to a restraint order before trial. After his conviction, the Crown pursued POCA proceedings asserting that the appellant's benefit was the full sum of over £580,000. The appellant contended for the lower figure of about £50,000 on the basis that he had not obtained the larger amounts received by the company because he had not come into possession or in some way controlled the larger sums.

42. At [13] Lord Bingham stated the normal principle as follows:

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

43. Having noted that the appeal concerned the making of the restraint order, and that "whether the appellant obtained the benefit of the fraud jointly with his co-defendant remains to be decided", the House went on to consider "piercing the corporate veil". At [16] Lord Bingham said:

> "In the ordinary way acts done in the name of and on behalf of a limited company are treated in law as the acts of the company, not of the individuals who do them. That is the veil which incorporation confers. *But here the acts done by the appellant and his associate Mr Phillips in the name of the company have led to the conviction of one and a plea of guilty by the other.* Thus the veil of incorporation has been not so much pierced as rudely torn away. The crux of the appellant's case, moreover, is that the prime mover in the company was Mr Phillips, not himself, a case which can only be explored by examining the internal management of the company, an examination inconsistent with the treatment of the relevant acts as those of the company." (Emphasis added)

44. For this passage to be properly understood, it must be remembered that the prosecution's case at trial had been that the appellant had benefited to the extent of the full £580,000: see above. That explains Lord Bingham's reference to the defendants' conviction and plea of guilty, which involved a finding (or acceptance) of the prosecution's case. Accordingly, although the acts had been done in the name of the company, the conviction and plea of guilty precluded any reference to the separate legal personality of the company. Hence the reference to the veil of incorporation being "rudely torn away" – the corporate veil was irrelevant to the facts as established. It is not authority for the proposition that anyone knowingly concerned with a fraud is necessarily to be taken in POCA proceedings as benefitting to the full extent of the proceeds of the fraud. On any view, as subsequently identified, *Jennings* was a case where the concealment principle was applicable on the facts: see *R v McDowell* [2015] EWCA Cro, 173, [2015] 2 Cr. App. R (S) 14 at [41]; *Boyle* at [94(ii)(b)]; and *R v Powell* [2016] EWCA Crim 1043 at [27].

45. The second case is *R v Seager & Blatch* [2009] EWCA Crim 1303, [2010] 1 WLR 815 (to which we will refer simply as *Seager*), on which the Crown places heavy reliance. The appellants were convicted of, respectively, (a) acting in contravention of a disqualification undertaking by running a company after giving an undertaking not to do so, and (b) acting in contravention of a disqualification order by acting as a director of six companies after being disqualified from doing so. In POCA proceedings in each case the Crown Court concluded that the defendant's benefit was equal to the total turnover of the relevant companies during the period of the contravention and imposed confiscation orders in sums equal to the total turnover.

46. The Court of Appeal allowed the appeals because, on the facts found by the Judges below there was no basis in either case on which the corporate veil could be pierced. At [68] ff the Court reiterated most of the basic principles to which we have referred above; and at [76] it addressed the basis upon which the corporate veil may be pierced, as follows:

> "… It is "hornbook" law that a duly formed and registered company is a separate legal entity from those who are its shareholders and it has rights and liabilities that are separate from its shareholders: *Salomon v A Salomon & Co Ltd* [1897] AC 22; … . A court can "pierce" the carapace of the corporate entity and look at what lies behind it only in certain

> circumstances. It cannot do so simply because it considers it might be just to do so. Each of these circumstances involves impropriety and dishonesty. The court will then be entitled to look for the legal substance, not just the form. In the context of criminal cases the courts have identified at least three situations when the corporate veil can be pierced. First, if an offender attempts to shelter behind a corporate façade, or veil, to hide his crime and his benefits from it: … . *Secondly, where an offender does acts in the name of a company which (with the necessary mens rea) constitute a criminal offence which leads to the offender's conviction, then "the veil of incorporation has been not so much pierced as rudely torn away": per Lord Bingham in Jennings v Crown Prosecution Service [2008] AC 1046, para 16.* Thirdly, where the transaction or business structures constitute a "device", "cloak" or "sham", i.e.an attempt to disguise the true nature of the transaction or structure so as to deceive third parties or the courts: *R v Dimsey* [2000] QB 744, 772, per Laws LJ, applying Snook v London and West Riding Investment Ltd [1967] 2QB 786, 802, per Diplock LJ." (Emphasis added)

47. In the present case, the prosecution relies on what it calls the second way, which we have highlighted above. It is important to note that the basis for this second route is said to be what Lord Bingham said in *Jennings*, which we have set out and considered above.

48. In Mr Blatch's case, the prosecution advanced three strands of argument that are clearly echoed in the submissions made to us by the prosecution in the present case:

> "First, the defendant had used the companies as the vehicle for his offence of acting as a director when it was unlawful for him to do so. He was therefore attempting to shelter behind a corporate façade, or veil, to hide his crime and his benefits from it. Secondly, the acts done by Mr Blatch in purporting to act as a director in running the companies were acts done in the name of those companies. Those acts have led to Mr Blatch pleading guilty to the offences under section 13 of the 1986 Act. Therefore, by analogy with the remarks of Lord Bingham in *Jennings v Crown Prosecution Service*, at para 16, "the veil of incorporation has been not so much pierced as rudely torn away", thereby entitling the judge to regard all the turnover of the companies as "benefit obtained" by Mr Batch. Thirdly, because Mr Blatch had de facto control of the companies and so de facto power of disposition or control over their property (including money paid to them), therefore he can be taken to have obtained such property or money himself and so obtained a benefit as a result of or in connection with his offence. This will be equal to the total turnover of the companies. In this regard, Mr Mitchell relied on the remarks of Lord Bingham in *R v May* [2008] AC 1028, paras 45—46. He also relied on what Lord Bingham said

> at para 48(6): "D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else."

49. In our judgment, the response of the Court in rejecting each of the three strands is instructive:

    i) As to the first, Mr Blatch was not hiding behind the companies to conceal his offence: he was doing the opposite "brazenly continuing to operate and control the companies behind his ban. That was the essence of his offence. There was no question of Mr Blatch using the companies for any illegal purpose such as avoiding the payment of VAT … from which he benefitted. There was no evidence before the judge that Mr Blatch used the companies as a shield to hide benefits that he had obtained from his offence of contravening the disqualification."

    ii) As to the second, *Jennings* was distinguished on the basis that, in that case, the corporate structure was, effectively, a sham. "In the present case the acts of Mr Blatch, when purporting to be a director, were done on behalf of the companies and they meant that he contravened his disqualification. But the existence of the companies themselves and the legitimacy of their business cannot be in doubt." In other words, the mere fact that a company director is convicted of an offence that generates turnover (or other funds) for the company does not mean that the benefit to the company is to be treated as the director's.

    iii) As to the third, it was said to involve a misreading of [48(6)] of *May*, which we have set out above at [32] above. Lord Bingham's first proposition is that "D ordinarily obtains property if in law he owns it, whether alone or jointly . . ." Lord Bingham then states the legal consequences that come with ownership of property, viz "a power of disposition or control . . ." But the converse is plainly not the case. Just because a person has a power of disposition or control over property, it does not mean that he owns it.

50. Both *Jennings* and *Seager* have been considered by different constitutions of this court since the decision of the Supreme Court in *Prest.* As we shall explain below, there has been a degree of consolidation and retreat from the more expansive interpretations of those authorities in the light of the principles enunciated by Lord Sumption JSC.

51. In *Sale*, supra, the appellant had been the managing director, founder and sole shareholder of a company which became a supplier used by Network Rail. The appellant and/or the company made corrupt gifts, whose value was just under £7,000, to a Network Rail employee, as a result of which the employee arranged for a number of high value contracts to be awarded to the company. The company was in other respects entirely legitimate, carrying on a substantial business. Three sums had been calculated, namely (a) £125,000 representing the value of the appellant's personal benefit taking into account the apportioned salary and dividends attributable to the Network Rail contracts as a proportion of the total trading of the company; (b) £197,683 as the gross value of the profit earned by the company after deducting costs of production, it being common ground that the contracts had been carried out properly; and (c) a little over £1.9million being the total sum paid to the company by Network

Rail. The Crown's case was that £1.9 million was the appropriate figure for the appellant's POCA benefit. The Crown Court judge held that the corporate veil should be lifted, referring to *Jennings* and *Seager*, on the basis that the appellant had done acts in the name of the company which constituted two separate criminal offences, to which he had pleaded guilty, so that it was right and just to lift the corporate veil.

52. At [41], the Court endorsed the approach set out at [76] of Seager; but it said:

> "It may be that the three situations identified by the Court in *R v Seager* might be prefaced as if the preceding sentence read as follows:
>
> > "In the context of criminal cases the courts have identified at least three situations when *a benefit obtained by a company is also treated in law by POCA as a benefit obtained by the individual criminal*.""

53. Amongst the submissions made by the appellant was that the sum of £1.9 million was disproportionate because it took the entire turnover resulting from the corruptly obtained contracts and attributed it to the appellant: a proportionate amount to take as the appellant's benefit would be the gross profit from the corruptly obtained contracts. The Crown submitted that the evasion principle applied or, failing that, that the appellant was a joint actor with the company and so the concealment principle applied, on which basis the question of piercing the corporate veil did not arise.

54. The Court of Appeal rejected the submission that the evasion principle applied, because there was no legal obligation or liability on the part of the appellant that was evaded or frustrated by the interposition of the company. It, however, held at [40]-[41] that the case came within the concealment principle:

> "40. … In the circumstances of this case, where the defendant was the sole controller of the company, and where there was a very close inter-relationship between the corrupt actions of the defendant and steps taken by the company in advancing those corrupt acts and intentions, the reality is that the activities of both the defendant and the company are so interlinked as to be indivisible. Both entities are acting together in the corruption.
>
> 41. Accordingly, in so far as the company was involved, what it did served to hide what the defendant was doing. …"

55. The Court held that section 76(4) of the 2002 Act was apt to capture the whole of the invoices paid as benefit obtained as a result of or in connection with the admitted criminal conduct. It also held that pecuniary advantage had also been derived in that the corrupt conduct will have improperly enhanced the company's place in the market. The Court then turned to consider a submission that treating all of the turnover as the appellant's benefit would be disproportionate. Following *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 the Court said:

> "56 Applying those observations to this case and having regard to *R v Waya*…, and in particular para 34, had this been an offence

> whose only criminal effect was upon Network Rail which had been provided with value for money achieved by the performance of a contract which required the company to expend moneys in the ordinary course of business, it would have seemed to us proportionate to limit the confiscation order to the profit made, and to treat the full value given under the contract as analogous to full restoration to the loser."

56. Having held that the confiscation order in the sum of £1.9 million was disproportionate, the Court allowed the appeal.

57. In *Boyle* the Court conducted an extensive review of the authorities before and since *Prest* including all of the authorities to which we have referred. A family haulage business was originally operated by "the Old Company". At all material times, the sole directors were Patrick and Mark Boyle, who were father and son ("the applicants"). Between them they had a 50.1% shareholding in the Old Company, which enabled them, if they acted together, to pass or defeat ordinary resolutions of the company. The remaining shareholders were the wife of Patrick Boyle and their other two sons, who did not hold their shares as nominees or bare trustees for the applicants. The applicants were found to be the "operating minds" of the Old Company. The Old Company had a substantial business. Tachograph tampering happened on a large scale and the applicants were charged with conspiring to make false instruments, to which in due course they pleaded guilty. Before that, a restraint order had been made against them. The tachograph tampering was described by the sentencing judge as being done for the applicant's benefit "in that by illegal means you were enabled to run a profitable business and make monies for yourselves and your families."

58. In POCA proceedings, the Crown asserted that the benefit obtained by the applicants corresponded to 91% of the adjusted turnover of the Old Company, nearly £18 million. The applicant's expert did not challenge the overall methodology adopted by the Crown but suggested that a higher proportion of journeys could have been conducted in compliance with the tachograph regulations, thereby arriving at a benefit figure of £10,016,810. At the confiscation hearing that figure was agreed as the figure for benefit.

59. Shortly after the sentencing of the applicants, a New Company was incorporated. The applicants were not directors; the shareholders were not known to the court. The entire fleet of vehicles and trailers was then transferred from the Old Company to the New Company. The details of the transfer do not matter for present purposes. The New Company continued to trade, albeit at lower profit margins than had the Old Company while the tachographs were being falsified. It was the Crown's case that the transfer of the business from the Old Company to the New was a mere device; and the Judge so found.

60. The issue before the Court was "whether the turnover and assets that had ostensibly belonged to the Old Company in truth were to be regarded as the property of the [applicants]. If the turnover of the Old Company did not belong to them as individuals then such turnover could not represent benefit obtained by them. If the assets held in the name of the Old Company did not belong to them as individuals then such assets could not represent part of the available amounts": see [39].

61. In a wide ranging review, the Court started with and emphasised the importance of the doctrine of separate legal personality, observing that the doctrine of separate legal personality "was asserted as much with regard to "one man" companies as to companies with several directors or shareholders": see [47]. The significance of this observation, with its implicit rejection of too easy an elision of the personalities of limited companies and those engaged in their management, direction and ownership, was illustrated by the Court's reference to *R v Grainger* [2008] EWCA Crim 2506, a case involving the fraudulent discounting of false invoice to banks which paid over very substantial sums shortly before the company went into liquidation. At [56] of *Boyle*, Davis LJ, giving the judgment of the Court, summarised the decision:

> "The company (more accurately, a group of companies) was controlled by a man called Prudhoe. The appellant, Grainger, held a 5% shareholding and was the group finance director. As group finance director, he received a salary, expenses and other benefits. The prosecution invited the court to calculate benefit in a pro-rata amount (equally with the other accused) of the total sums dishonestly obtained from the bank. The trial judge acceded to that, finding that the appellant had "joint control", with Prudhoe at the head, and "joint and fully active responsibility". In an ex tempore judgment, again delivered by Toulson LJ, the Court of Appeal rejected that conclusion. It was stated that "it is necessary to examine what in reality the offender obtained". It was held that the "true nature" of the benefit which Grainger obtained was the benefit from his continued employment by a company which otherwise would have gone into liquidation. But the trial judge had never valued the benefit on that basis, and so had erred. In the course of giving the judgment of the court, Toulson LJ also said this:
>
> > "14. The moral is that in such cases it is essential, first, for the prosecution and then for the judge to look to see what real benefit the offender has obtained and to examine the evidence relating to it in order to arrive at a fair valuation. In our judgment, there is no obvious or indeed logical link between the benefit which the judge described and a twelfth share of the sums obtained by the companies.""

62. Turning to the decision in *Prest*, the Court observed that "the basic principle of *Salomon* was most emphatically affirmed in this context": see [62]. The Court then went on to review *Seager*, *Sale* and *McDowell*, highlighting that, in *McDowell* the Court had said, at [40], that "examination of true ownership or control of property is the bread and butter of confiscation proceedings, although it is correct to say that judges frequently speak of lifting or piercing the corporate veil when doing so."

63. The Court in *Boyle* addressed questions of principle under the rubric "Relevant wider considerations" in terms that we respectfully endorse without reservation. It rejected the existence of a test simply based on "justice" as being unprincipled and liable to lead to great uncertainty and inconsistency in decision making; in doing so it relied upon the decision in *Salomon* itself and statements of like principle in *Seager* (at [76]) and in *Prest* itself. Second, relying on "the reality of the matter" does not permit departure

from established principles relating to the separate legal status of a limited company. Third, the Court issued a timely reminder that the confiscation process under the 2002 Act is not aimed at punishment, referring to [13] of *Jennings*, which we have set out at [42] above. Fourth, the principles relating to the doctrine of lifting or piercing the corporate veil in confiscation proceedings are the same as in the civil courts. The Court cautioned against using the phrase "piercing" the corporate veil without focusing precisely on the two concepts of concealment and evasion as now identified in *Prest*. Fifth, regard should be had to the nature and extent of the criminality involved, referring to *R v King (Scott)* [2014] EWCA Crim 621, [2014] 2 Cr. App. R. (S) 54. Sixth, "even where a company mixed up in relevant wrong doing is solely owned and solely controlled by the (criminal) defendant, that does not *of itself* always necessitate a conclusion in a confiscation case that it is an alter ego company, whose turnover and assets are to be equated with being the property of the defendant himself." Seventh, and finally, all such decisions in the context of confiscation proceedings must be geared to the facts and circumstances of the particular case.

64. Turning to the decision of the court below in *Boyle* the Court adopted an orthodox approach to the role of the applicants in that case. At [102] the Court said:

> "It cannot be determinative that Patrick and Mark Boyle ran the company and were the "operating minds". On the contrary, they were the sole, legally appointed, directors. They were, in substance, executive directors, with very wide general powers and duties. As such directors, it was their delegated responsibility to operate the day to day affairs and business of the Old Company (although of course they had no authority to do so unlawfully). Under the companies' legislation and conventional Memoranda and Articles of Association shareholders, generally speaking, have no right, as shareholders, to involve themselves in such matters: their ultimate control rests on their voting powers at company meetings. So to say, in the context of this case, that Patrick and Mark Boyle were the "operating minds" simply does not carry the almost conclusive force which the judge seems to have ascribed to it. "

65. Having identified features evidencing that the Old Company was not a sham or a device and that the role of the applicants as its "operating mind" was not determinative, the Court turned to the reliance of the judge below on the second way identified in [76] of *Seager*, as follows (at [109]-[111]):

> "109. We have reservations about this as an approach. Such a "situation", as there identified, is not to be taken out of context and cannot, in our view, be taken to identify some further free–standing wider legal principle whereby the court will always lift or pierce the corporate veil. That would be inconsistent with established principles of company law which *Seager* itself had been at pains to affirm and inconsistent with the approach taken in *Prest*. … It is, in fact, also revealing in itself that in formulating the second "situation" the court in *Seager* referred to the decision in *Jennings*: just because *Jennings* was a case where the entire company was a sham, existing and operating

> solely for the purposes of carrying out the advance fee fraud. That indicates what the court had in mind in formulating the second "situation"—in effect, an acknowledgment of the concealment principle.
>
> 110. It follows that the second "situation" there identified is not to be regarded as a self-contained or free-standing further principle and the judge was wrong to treat it as such. Putting it another way, and whilst we would not regard the first and third "situations" identified in [76] of *Seager* as likely to be at all controversial, we think that [76] of that decision, as revised in *Sale*, may be further revised, in the aftermath of *Prest*, by further adjusting the preface as follows:
>
> "In the context of criminal cases the courts have identified at least three situations when a benefit obtained by a company *may, depending on the facts, also* be treated in law by POCA as a benefit obtained by the individual criminal … ."
>
> This may, we accept, seem to be blander than the original formulation. But we think that such further revision reflects the essential need to focus on the whole facts and circumstances of each case.
>
> 111. We should also add that it is noticeable that the actual decision of the Court of Appeal in *Sale* itself was not founded on any purported application of the second "situation" identified in *Seager* as some kind of governing principle. On the contrary, the decision in that case, by reference to its facts, was in terms founded on an application of the concealment principle. As such, it is in accord with the approach indicated in *Prest*."

66. At [113] ff the Court addressed the question of "one man" companies, adding to the sixth general proposition that we have summarised at [63] above. In doing so, it queried how the benefit to be attributed to the appellant in *Sale* was adjudged to equate to (or to part of) the turnover of the company by a process of lifting or piercing the veil. In an important passage, the Court said at [114]-[119]:

> "… Doubtless Mr Sale had benefited. But by an approach corresponding to that taken in cases such as *Grainger* such benefit might be readily assessed by reference to, say, his increased remuneration, dividends and any other benefits or pecuniary advantage resulting to him personally from his company's enhanced profitability and competitive advantage occasioned by his corrupt actions.
>
> 115. The Court of Appeal, nevertheless, plainly was heavily influenced by the fact that Mr Sale was the sole director and the sole shareholder. Obviously that was indeed a highly material fact. But it is rather hard to see why such a fact always would, of itself, be conclusive. To repeat, as *Salomon* makes clear, the fact

that the incorporator is sole shareholder and director of a company does not mean that the company is thereby and for that reason alone to be treated as his alter ego. That criminality is somewhere involved (not the situation in *Salomon*) does not of itself necessarily and conclusively and in all cases change that. The actual decision in *Sale* thus is to be explained as one on its own facts; as the court in that case itself made clear.

116. We do have concerns, however, that the emphasis given in *Sale*, in the circumstances of that particular case, to the fact that the defendant was sole director and shareholder may in future be used to achieve a conclusion which in other cases of confiscation proceedings may not necessarily be merited and which would not be consistent with the approach in *Seager*. The present case may in fact be an illustration of that danger (the judge having in effect decided that this was a "two man" company).

117. We say this in particular in the light of certain comments made in *McDowell*. It having been said in [40] of that case that "examination of true ownership or control of property is the bread and butter of confiscation proceedings", at [55] it was then accepted that Mr McDowell did not "hide his trading behind the cloak of the company". Nor, as was found, did Mr McDowell seek to evade responsibility for his criminal acts by interposing the company between himself and those criminal acts. How, then, could it be found in *McDowell*, as it was, that Mr McDowell was the alter ego of the company? The short answer given was that he was "the company's sole controller … he used [the company] openly in these trading transactions … He was the beneficial owner." The court apparently would have taken the same approach, had the point arisen, with regard to Mr Singh in that same case: for it treated the receipts of the company as the receipts of Mr Singh personally "since he was the sole controller of this trading company" (at [63]). This, however, seems to be close to suggesting that the corporate veil could be disregarded simply because the defendant was sole controller and owner. Further, to say that someone is a beneficial owner of a company is no doubt convenient shorthand. But it can lead to the misleading conflation of two separate concepts: beneficial ownership of the shares in a company and beneficial ownership of the receipts and assets of a company.

118. We think that those observations in [55] and [63] of *McDowell* have to be put in context. In the case of Mr McDowell it had been argued that the underlying weapons and arms trading was lawful but for the absence of a licence. But that was rejected: the underlying trading was unlawful: see [53] of the decision. Thus the entirety of the business at the relevant times had been carried on in knowing and criminal breach of the requirements of the relevant order. Likewise (had there been a finding of

> criminal conduct) in the case of Mr Singh. The importance of each being sole owner and controller of the company in question has, we suggest, to be assessed against that background.
>
> 119. Thus, the decision in *McDowell* on these particular points is to be regarded as made on the facts of that case. It is not to be taken as an invitation to criminal courts in confiscation cases under the 2002 Act to regard sole ownership and control of a company as necessarily and always sufficient of itself to justify treating the company as an alter ego of the defendant. To say that is not to provide an open road and a fast car to crooks seeking to conceal their real activities and true benefits behind a one-man limited company. On the contrary, the application of the concealment principle, if not also the evasion principle, is available on appropriate facts to deal with just such a scenario. The general observations of Toulson LJ in [14] and [15] of *Grainger* continue to be relevant. Overall, to respect the principles of *Salomon* is consistent, not inconsistent, with a principled, proper and sensible application of the 2002 Act: for it is required that the court, in confiscation proceedings, focus on the benefit which the defendant has obtained and on the assets which the defendant holds. In this regard we think, where limited companies are involved in relevant wrongdoing, that words such as "façade" and "sham" will continue, even allowing for the reservations expressed by Lord Sumption as to their "protean" nature, to have a real and practical use in confiscation cases. Ultimately, any conclusion on lifting or piercing the corporate veil will require a careful examination of all the relevant facts before it may be reached."

67. We respectfully agree with and endorse this analysis. It was a justified retrenchment based upon a proper analysis of the principle of separate legal personality developed in and since *Salomon* and in the light of the decisions to which we have referred, of which the most important is the decision in *Prest*.

68. A different constitution of the Court of Appeal adopted a similarly rigorous approach in the case of *R v Powell*, supra. There the respondents had been significant shareholders in and directors of Wormtech Ltd, a company that had be licenced to recycle co-mingled food and green waste into compost. One of them, Mrs Powell, was said by the Crown to be the directing mind of the company with control of its finances and having day-to-day responsibility. The other, Mr Westwood, had been active in the management of the operations at the site. The company collapsed, and failed to dispose of the waste left on site on its collapse, or to incur the costs of clearing up the site for which it was responsible. By abandoning the site, the company avoided those clear-up costs, which amounted to a pecuniary advantage to the company. Mrs Powell was convicted of two counts of consenting or conniving as a director in the failure of Wormtech to comply with the condition of its environmental permit, and one count of consenting or conniving as a director of a company in the commission of an offence by the company, namely treating, keeping or disposing of controlled waste in a manner likely to cause pollution. Mr Westwood pleaded guilty to essentially equivalent

offences. In the resulting POCA proceedings the Crown contended that the company's pecuniary benefit in avoiding the clear-up costs should be attributed to the defendants. The judge in the Crown Court rejected that contention. The Crown appealed.

69. The Court of Appeal rejected the Crown's contentions and rejected its appeal, albeit on different grounds from those adopted by the Judge. In the course of so doing, the Court of Appeal reviewed the leading authorities, including *Seager*, *Prest* and *Boyle*. In making its case the Crown accepted, as here, that it must bring itself within the second *Seager* test. This, the Court held, it was unable to do. At [24] the Court (Treacy LJ) said:

> "It seems to us important to go back to the second test propounded at [76] of *Seager & Blatch*. As the decision in Boyle Transport makes clear, it is necessary to understand the context in which the *Seager & Blatch* test was put forward. The reference to the case of *Jennings* at that point is to a case in which Jennings, who was neither a shareholder nor a director, was heavily involved in a company used as a vehicle for fraud and whose corporate structure was effectively a sham. It is clear to us that the words of the second *Seager & Blatch* test should not be read literally and without regard to their context. As was observed in *Boyle Transport*, regard should be had to the nature and extent of the criminality involved."

70. Having pointed to the fact that the company's purpose was the legitimate disposal of food waste, that it had all the necessary permits to do so, and that it had incurred significant expenditure to comply with the regulations and its permits, the Court also referred to the significant commitment that Mrs Powell had made to the project. The Court then (a) had close regard to the nature of the criminality alleged against the respondents and (b) analysed the position of the Respondents adopting the principles to be derived from *Prest* and (c) concluded that the Crown fell well short of establishing the necessary conditions for fixing the respondents with liability for the clear up costs. At [32] the Court re-emphasised the point made in *Boyle* that decisions of the sort being undertaken in the context of confiscation proceedings must be geared to the facts and circumstances of the particular case.

71. Taken together, the decisions in *Boyle* and *Powell* represent a considered reassertion of the orthodox principles governing separate legal personality and when a benefit obtained by a limited company may properly be attributed to those who direct or control the company. They elucidate the "second *Seager* test" by referring back to and explaining dictum of Lord Bingham in *Jennings* (to which we add our own contribution at [44] above). Above all, they remind us that control of a company is not of itself sufficient justification for attributing a benefit accruing to a company to those who control it and that consideration of "benefit" in the context of POCA proceedings will involve a fact sensitive enquiry taking into account all relevant features, of which control is likely to be significant but by no means necessarily a determinative one.

The effect of a confiscation order made by consent

72. The circumstances in which a person who has consented to a confiscation order may be allowed to resile from their agreement is the subject of established and binding

authority. In *Hirani* [2008] EWCA Crim 1463 the appellant, who had consented to an order on the basis that he had assets of £110,000 sought to appeal on the basis that he had in fact had no assets and that he had only agreed to the order on the basis of erroneous legal advice. Giving the judgment of the court, Burnett J (as he then was) rejected the suggestion that the appellant's agreement to the confiscation order amounted to a representation that he had assets of £110,000. Rather, "[he] was prepared to agree that figure as a matter of compromise to avoid additional potential liability. Similarly, the prosecution were not representing by this agreement that the appellant had no more than £110,000. This was in effect a consent order in which the appellant had bought off risk, both as to the amount of the confiscation order and the period he would be allowed to meet it."

73. At [35] the Court said:

> "In other jurisdictions, those who have entered into consent orders may set them aside on very narrow grounds. We do not exclude the possibility in the arena of confiscation orders that such circumstances might conceivably arise. But we do not consider that they arise where the essence of the complaint is that, in seeking to secure the best deal available, erroneous advice was given to one of those who was party to the agreement, save in the most exceptional circumstances. We would not wish to identify exhaustively what those circumstances might be but, in our judgment, there would need to be a well-founded submission that the whole process was unfair."

74. The principled need for an appellant seeking to set aside a confiscation order made by consent to show "the most exceptional circumstances" and that "the whole process was unfair" has been applied in numerous authorities since *Hirani*. A number of the authorities were considered in ***R v Morfitt*** [2017] EWCA Crim 669, where the appellant Class A drug dealer had consented to a confiscation order which recorded the value of his benefit based on general criminal conduct as being £250,000. He had previously asserted that his benefit was £12,300, that being the value of the high-purity cocaine hydrochloride found on him when he was arrested. The prosecution had extrapolated that value to cover the six-year period covered by the section 10 assumptions and then adopted a percentage of the extrapolated figure as his benefit. He was advised that the prosecution's approach could not be challenged. Giving the judgment of the Court of Appeal, Lindblom LJ at [28] characterised the appellant's real complaint as being that, if the hearing had been contested the prosecution may not have succeeded in proving the figures for which they contended. But the Court held that it was

> "implicit in that consent was his acceptance that the prosecution would have been able to prove – or might well have been able to prove – to that extent and to the requisite standard, the matters it would have needed to prove under the statutory scheme. He had the opportunity, at the confiscation hearing, to oblige the prosecution to prove what it would have needed to, including the existence of the property in question. He chose not to do so."

75. At [36] ff the Court reviewed previous authorities including *Hirani* and endorsed the *Hirani* principles that we have set out above. The Court rejected the appellant's

reliance on *Mackle* [2014] UKSC 5, [2014] AC 678, summarising the effect of *Mackle* for these purposes at [43] as being that:

> "none of the categories of person liable to pay excise duty under regulation 13 of the Tobacco Products Regulations 2001 fitted the circumstances of the appellants (paragraph 32 of his judgment), that "the only basis on which the appellants were said to have obtained a benefit was that they had evaded the duty and VAT payable", that "[an] acceptance that they had obtained a benefit on that account inevitably involved a mistake of law", and that "[no] evidence was needed to establish that proposition" (paragraph 45). It was "clear", he said, "that the basis on which both judges accepted that the appellants had benefited by their criminal conduct was that they had evaded duty on the cigarettes", and, as was now apparent, "because their liability to pay duty could not be established, this was not a correct legal basis on which to find that the appellants had obtained a benefit" (paragraph 47)."

76. It was in this context that Lord Kerr had said at [50] of *Mackle*:

> "50. It is to be remembered that under POCA the court must itself decide whether the convicted person has benefited from his particular criminal conduct. The power to make a confiscation order arises only where the court has made that determination. A defendant's consent cannot confer jurisdiction to make a confiscation order. This is particularly so where the facts on which such a consent is based cannot as a matter of law support the conclusion that the defendant has benefited. On the other hand, if it is clear from the terms on which a defendant consents to a confiscation order, that he has accepted facts which would justify the making of an order, a judge, provided he is satisfied that there has been an unambiguous acceptance of those facts from which the defendant should not be permitted to resile, will be entitled to rely on the consent. This is so not because the defendant has consented to the order. It is because his acceptance of facts itself constitutes evidence on which the judge is entitled to rely. Provided the acceptance of the facts is unequivocal, and particularly where it is given after legal advice which proves to be sound, the judge need not mount a further investigation. It should be emphasised, however, that this is because the judge can in those circumstances himself be satisfied on the evidence that the basis for making a confiscation order has been made out."

77. The starting point, therefore, is that an appellant's consent cannot confer jurisdiction upon a Crown Court to make a confiscation order if, on examination, the facts on which the consent is based cannot as a matter of law support the conclusion that the defendant has benefitted. Where, however, the judge is satisfied that there has been unequivocal acceptance of facts which would justify the making of an order and from which the defendant should not be permitted to resile, the judge is entitled to rely upon the consent

because the defendant's unequivocal acceptance of the facts itself constituted evidence upon which the judge may rely without mounting a further investigation: see *Mackle*.

78. This does not mean that the defendant must have accepted that the prosecution's case is well-founded. Provided the prosecution's case discloses facts upon which, if they were proved, the judge would be entitled to make a confiscation order, a consensual settlement which serves the purpose of buying off the risk of an adverse finding in the proceedings can provide the evidence upon which the judge may rely without mounting a further investigation: see *Hirani* and *Morfitt.* In such a case, an appellant will have to show "the most exceptional circumstances" in order to set aside the confiscation order that has been made by consent.

79. In our judgment, two further points remain where the position is not entirely clear cut. The first is whether, in addition to showing "the most exceptional circumstances" an appellant must *also* show (as a separate requirement) that "the whole process was unfair" and, if so, what is meant by "the whole process". It is to be noted that the statement of principle in [35] of *Hirani* was expressly *not* a comprehensive statement of the circumstances in which an appellant could succeed; and, on our understanding, the court was not saying that every aspect of the process had to be unfair before an appeal could succeed. Conversely, if it were to be held that no unfairness resulted from the process, it seems clear that an appellant would have no legitimate cause for complaint.

80. Second, what is the impact of incorrect legal advice? In *Mackle* the first certified question for the Supreme Court was re-formulated and answered by Lord Kerr at [54] as follows:

> "Is a defendant precluded from appealing against a confiscation order made by consent on the ground that the consent was based on a mistake of law, as a result of wrong legal advice?" and I would answer that question, "No".

It does not follow from this answer that an appeal based upon an asserted mistake of law will always be well-founded, or that wrong legal advice will always give rise to a mistake of law on the part of a defendant. Further enquiry is therefore necessary.

81. We start from the position that there is a strong public interest in holding defendants to orders made by consent, particularly where it can be seen that the effect of the agreement and order is to buy off the risk of an adverse outcome if the issues were to be litigated to judgment. We also recognise the force of the observation of the Court presided over by the Lord Chief Justice in *R v Kirman* [2010] EWCA Crim 614 at [15]

> "There may be good reasons from his view for a defendant to enter into a consent order even if he may for the purposes of sentencing have put forward an inconsistent basis of plea. Thus the court will not save in exceptional circumstances go behind the consent even if it is subsequently asserted that it was based on erroneous advice. There may be other remedies available to the defendant if he can show that there was negligence."

82. The public policy underpinning this observation is clear, but it is predicated upon the defendant having good reasons from his view to enter into a consent order. Where his perception and understanding are based upon incorrect advice, it seems to us that there may be wholly exceptional cases where it may be unfair to hold him to his consent and the consequential order. We note that unfairness formed an integral part of the reasoning of the Supreme Court in *Mackle*: see [53]. We do not ignore the last sentence of the *Kirman* observation, and there may be many cases where leaving a defendant to the uncertain prospect of an action over against his legal advisers may be considered to be sufficient and satisfactory. However, given that incorrect advice in POCA proceedings may affect not only a defendant's financial position but, in default of payment, his liberty, we would accept that there may be cases where the existence of a right over against a negligent adviser is insufficient to cure a perceived unfairness resulting from that advice.

83. Fortunately, allegations of incorrect legal advice in the context of POCA proceedings are numerically exceptional. Where, however, the spotlight falls on legal advice, there is a complete range of conclusions that may be appropriate, irrespective of any question of negligence. At one extreme would be a case where the facts alleged by the prosecution are incapable of justifying the making of a confiscation order but the legal advisers fail to recognise this and advise the defendant to consent to an order, as in *Mackle*. At the other extreme may be a case where jurisdiction is not in doubt and where the legal advisers, confronted by multiple factors that go to the risk of an adverse finding, are alleged to have misjudged the seriousness of the risk so that the defendant buys off the risk at a price which they later regret: *Hirani* and *Morfitt* may be examples of such a case. In the first of these two cases, the public interest in holding defendants to their unequivocal agreement gives way for want of underlying jurisdiction. In the second, (and in the absence of other, most exceptional, circumstances) the public interest will prevail. But, in our judgment it is sufficient to identify just one other hypothetical where the outcome may not be so obvious: consider a case where the Crown's case, if proved, is capable of founding jurisdiction but there exists a defence (either cast-iron or possibly less than copper-bottomed) of which the defendant is quite unaware when giving his consent because their legal advisers have not identified it or have wrongly advised that it is not available.

84. In assessing the impact of the public interest in holding a defendant to their agreement to the making of a confiscation order, a further feature that may be relevant is the role and responsibilities of counsel. The relationship between counsel and their client was considered in detail in *R v Farooqi* [2014] 1 Cr. App. R. 8 at [107]-[108]. Put simply, the conduct of the case is the responsibility of the trial advocate. Conversely, as the Court said at [107], "the client's instructions which bind the advocate and which form the basis for the defence case at trial, are his account of the relevant facts: in short, the instructions are what the client says happened and what he asserts the truth to be. These bind the advocate: he does not invent or suggest a different account of the facts which may provide the client with a better defence."

85. At [108] the Court continued:

> "Something of a myth about the meaning of the client's "instructions" has developed. As we have said, the client does not conduct the case. The advocate is not the client's mouthpiece, obliged to conduct the case in accordance with whatever the

> client, or when the advocate is a barrister, the solicitor, "instructs" him. In short, the advocate is bound to advance the defendant's case on the basis that what his client tells him is the truth, but, save for well-established principles, like the personal responsibility of the defendant to enter his own plea, and to make his own decision whether to give evidence, and perhaps whether a witness who appears to be able to give relevant admissible evidence favourable to the defendant should or should not be called, the advocate, and the advocate alone, remains responsible for the forensic decisions and strategy. That is the foundation for the right to appear as an advocate, with the privileges and responsibilities of advocates, and as an advocate, burdened with twin responsibilities, both to the client and to the court."

86. A barrister's core duty is to "act with honesty, and with integrity." This has two implications. First, a barrister is prohibited from arguing any contention which they do not consider to be properly arguable. Second, a barrister's obligations to their client includes the duty to "promote fearlessly and by all proper and lawful means the client's best interests." On behalf of Mr Miller, and relying upon a dictum of Lord Denning MR in *Abraham v Jutson* [1963] 1 WLR 658, 663, it is submitted that this obligation includes "a duty to take any point which he believed to be fairly arguable on behalf of his client". As was made clear in *McFarlane v Wilkinson* [1997] PCLR 578, 603 (a civil case) the obligation to take points that are fairly arguable is not absolute and is tempered by the need to act in the client's best interests, which commonly involves an exercise of judgment on the part of the advocate. Accordingly, if taking an arguable point would not be in the best interests of the client, there is no obligation to take it.

87. The decision whether to take a point is the responsibility of the advocate. Ultimately, if a client dislikes the way in which his case is being conducted, the remedy (however unpalatable) may have to be dispensing with the representative whose conduct of the case they find objectionable. Assuming that their reasons for disagreeing with their counsel are at least rational, the position of a defendant who receives firm advice (including but not limited to a refusal by counsel to take a point because of counsel's view of the law) may be complex and vulnerable, particularly where the advice is given hard up against or during an important hearing.

88. The prosecution takes an additional point in relation to the respective responsibilities of Mr Miller and his counsel, namely that the absence of a witness statement from Mr Miller explaining the rationale behind his instructions to agree the confiscation order is fatal to his appeal. The prosecution relies upon [126] of *Farooqi* where the Court said:

> "Most surprisingly there is no witness statement of any sort provided by Farooqi himself. When an appellant wishes to assert that he has not been given appropriate advice in a particular respect, or has not been able to make an informed decision about a matter of materiality in the trial, he must provide the court with a statement setting out the relevant history. There is no such material from Farooqi."

89. While the absence of an explanation from an appellant may in many cases prove to be fatal to their submission that they were not able to make an informed decision and that

an agreed order should be set aside, this is not an absolute rule. In *Farooqi* itself, the Court went on to consider whether there was evidence from other sources (including Mr Farooqui's junior counsel and solicitors) that would elucidate the basis upon which critical decisions were taken: see [127]-[130] and [141]-[143]. Here, as set out above, there is material from Mr Matthew Miller, counsel and Mr Miller's then solicitor, all of which goes to the basis upon which Mr Miller came to consent to the Order. We consider the implications of that information later in this judgment.

Discussion:

90. We are acutely conscious of the fact that, because the Order was made by consent, there are no findings of fact from the Court below to provide a foundation for conclusive determinations. One consequence of this is that we are not able to form a reliable view whether remitting the question of benefit to the Crown Court for reconsideration will or may prove to be advantageous for Mr Miller. The Crown was permitted to adduce evidence on this appeal of how it might have put its case on benefit if the sum alleged as benefit by the Crown had not been agreed, but that evidence was admitted solely to support the submission that Mr Miller bought off a risk of more severely adverse findings if he had not agreed the benefit figure as he did. That evidence points to potential application of the Section 10 assumptions as well as to the payments made by the companies to Mr Miller, which we have earlier referred to as "depredations." Although, as we have indicated, the scale and nature of those payments suggest the obtaining of indirect benefits by the frauds providing funds to the companies that were then able to be siphoned off by Mr Miller, it would be wrong for us to attempt to reach conclusions, and we do not do so.

91. The first main issue to be addressed is whether counsel's advice to Mr Miller was wrong. On the information that is available to us, it was. First, his advice was predicated on the assumption that the fact of the convictions on Counts 1 to 4 demonstrated conclusively that the benefit from Mr Miller's particular criminal conduct, which he specified as being "from the offences of which Mr Miller was convicted", amounted to £5,952,417 and could not be challenged. In our judgment, counsel wrongly elided the concept of "criminality" with the statutory requirements of "benefit" under the 2002 Act. He was right that the indictment sums were properly to be taken into account in assessing Mr Miller's "criminality" for the purposes of determining what sentence of imprisonment should be imposed; but, for the reasons we have outlined at [8] above, this was not a case such as *Jennings* where the fact of the conviction demonstrated conclusively that the proceeds of the frauds were POCA benefit for Mr Miller.

92. On the information that is available to us, it was certainly arguable that the sums paid to, or withheld by, the companies as a consequence of the frauds were not a proper measure of the benefit to Mr Miller. A final determination requires consideration of all the facts of the case which, for the reasons we have explained, we do not have. However, there were features of the case which, on a proper understanding of the applicable principles, could contribute to the argument on behalf of Mr Miller. First, the proceeds of the frauds were paid to, or retained by, the companies and not to Mr Miller. Second, the companies could not be described as a "sham" or merely a device to facilitate the frauds. They had real business; and they had real employees, as is demonstrated by the fact that the PAYE and NI deducted over the relevant period amounted to nearly £5,000,000. While it is true that the companies collapsed after the

balloon went up, that does not derogate from the main point that the companies were "real" concerns carrying on legitimate business while also defrauding the Revenue. Third, although Mr Miller was the director of the companies with control of and responsibility for their financial affairs, that alone does not subvert the principle of separate legal personality, as properly understood. Fourth, although SLM might be described as a one-man company, since Mr Miller was its sole shareholder and director, the other three companies were not, because Mr Miller and Mr Moody both held 50% of the shareholdings in each company. This fact on its own draws attention to the warning at [117] of *Boyle* against the risk of a "misleading conflation of two separate concepts: beneficial ownership of the shares in a company and beneficial ownership of the receipts and assets of a company." Fifth, it is not obvious that the facts of the case fall within either the evasion principle or the concealment principle as explained in *Prest*. That may explain why the Crown in submissions to us concentrated on the *Seager* "second way".

93. The *Seager* "second way" now needs to be seen in the light of the clarification of orthodox principles in *Boyle* and *Powell*. It is now once more clear that the mere fact that a company is implicated in a defendant's criminality does not either necessarily or probably lead to the conclusion that benefit accruing to the company should be attributed to the defendant. If it is accepted that, as it seems to us on present information, the nature of Mr Miller's criminality does not justify a conclusion such as that in *Jennings* that the benefit to Mr Miller is determined by the fact of his conviction, it is necessary to look at all relevant features of the case, including (a) the degree of Mr Miller's control, (b) whether or not the companies were conducting a legitimate business or were merely vehicles for Mr Miller's fraudulent activity, (c) what happened to the monies reclaimed or withheld, and (d) whether it is more appropriate to view the benefit to Mr Miller as being indirect (as in *Grainger*) or direct as the Crown alleges.

94. Although we are clear in our view that Counsel was wrong to advise that the issue of separate legal personality was unarguable and to refuse to argue the point, we reiterate that, as a court of review which does not have the benefit of findings of fact from the court below, we are not in a position to determine what the outcome should or would have been had the point been taken. Our difficulty goes further because, even assuming that the point had been taken and had succeeded in principle, we are not in a position to determine whether it would have led to a reduction in the sum assessed as Mr Miller's benefit. The question therefore arises whether the appeal should be allowed and the case remitted for further determination, that being the third main issue arising in this appeal.

95. Before addressing the third issue, however, it is necessary to consider whether the Judge was right to accept the figure that was presented to him. In our judgment he was. He was presented with an agreed sum in a case where Mr Miller was represented by experienced counsel and solicitors, as he had been throughout. From the perspective of the Judge, the acceptance of the benefit figure by Mr Miller could have had two possible explanations, neither of which the Judge could reasonably discount. The first was the straightforward possibility that Mr Miller accepted and conceded that he had directly benefited in the amount alleged, as often happens in such circumstances. The second was that, while not accepting that the figure was "right", he was prepared to agree to it in order to buy off the risk of a more disadvantageous ultimate order if he contested matters. The Judge was not to know which of these formed the basis of the

agreement to the consent order; but there was nothing to suggest to the Judge that it was a case such as *Mackle* so as to call his jurisdiction to make a confiscation order into question. Counsel's "few sentences" explaining the position would only have served to confirm for the Judge that Mr Miller's agreement to the Order being made constituted evidence upon which he could rely without mounting any further investigation.

96. We therefore see no reason to criticise the Judge for accepting what, to all outward appearances, was a relatively conventional agreed Order.

97. This leads to the third main issue which, in our judgment, is the most difficult and finely balanced. We recognise the public interest in holding defendants to Orders to which they have given their agreement: see [72]ff above. We also recognise the Crown's concerns that (a) viewed overall, the order to which Mr Miller agreed involved negotiation and compromise in relation to the question of his available assets and so, to that extent it may be said that his agreement bought off the risk of a worse result; and (b) allowing an appeal in circumstances such as these is a one-way street since the Crown Court on a remitted hearing may reduce but may not increase the amount required to be paid under the Order. We also bear in mind the clear and binding authority, to which we have referred in detail above, that an appeal should not be allowed except in "the most exceptional circumstances" and where "the whole process is unfair".

98. Despite the absence of a witness statement from Mr Miller, the information provided as a result of the waiver of privilege is entirely consistent with what counsel told the Judge. The only reason why the point was not taken was that counsel refused to take it. On our view of the law, as set out above Mr Miller's consent to the order was based on a mistake of law, namely that it was unarguable that the indictment sums were not the correct measure of Mr Miller's benefit. Furthermore, the information that is available to us shows a state of affairs that we would characterise as "the most exceptional": the mistake of law arose because counsel, as he was right to do if he thought the point to be unarguable, refused to argue it – and this despite concerted opposition from Mr Matthew Miller who set out in some detail why he considered counsel to be wrong.

99. Three points may be suggested. First, it may be said that Mr Miller's remedy was in his own hands and he could have sacked his counsel if he disagreed with his advice and proposed course of conduct of the case. It is true that he could have done so; but a full appreciation of the circumstances leads to a ready understanding why he would not do so. Mr Miller was hard up against the date of the hearing in proceedings where his (either ex- or soon-to-be-ex-) wife was taking an active part, represented by leading counsel. The position taken by Mr Miller's counsel was supported by his solicitor. Even if Mr Miller had taken the decision to sack his existing team, what then? It cannot be guaranteed (and could not be guaranteed at the time), that he would have been permitted to engage a new team of lawyers, and equally uncertain whether he would have been permitted an adjournment. We also recognise as a possibility that a court confronted with a convicted fraudster attempting to change the basis of calculation that had been in place ever since the Crown's section 16 statement may not have been permitted to do so at such a late stage, though it is at least equally possible that a Judge who was persuaded that the point was arguable would have been prepared to admit it, if only to avoid any suggestion that the result was unfair.

100. The second point that may be suggested is that it is an abuse of the process for Mr Miller to have agreed to the order in the knowledge that he (or at least his son) thought it was based on a misunderstanding of the law. We would not agree. Once again, we think it is necessary to recognise the difficulty of his position; and, if he was not to sack his team, the solution they proposed had the great advantage of transparency. We make it clear that, although we consider counsel's underlying analysis to be wrong, we applaud his decision to explain what had happened and his responsibility for it to the Judge. This is not to encourage others to try to adopt a similar approach to agreeing orders in the future: it is simply a recognition of suitable transparency between bar and bench in the exceptional circumstances that prevailed in this case.

101. The third point is that this court is unable to conclude that taking the point would have been beneficial for Mr Miller. We have seen and considered the evidence about how the Crown would wish to put its case on benefit if the central point were to be raised. We accept that there is a risk that a Court would conclude that the correct figure for his benefit would have been *higher* if the Crown had put its case on an alternative basis. But we cannot be sure that is so and it would not be right to disallow this appeal on the basis that there is a risk that it will not ultimately benefit Mr Miller.

102. What then of the requirement that the whole process be unfair? The procedure adopted by the Court below was not unfair in any respect. The normal exchange of the parties' positions took place. The Judge was presented with an agreed Order that he was entitled to accept, and he did so. However, we have come to the conclusion that what happened can and should be characterised as unfair because Mr Miller, facing a very substantial potential confiscation order, was deprived of the ability to advance a point which we regard as reasonably arguable by the refusal of his counsel to argue it. While accepting that the point was raised very late by Mr Matthew Miller, we consider that a Court's first instinct should always be to hear and rule on the real issues arising in a case once they have been identified. It has been no part of the Crown's case on this appeal to suggest that it is academic because the Court below either should or would have refused to let it be raised. While nothing can be completely certain, we consider that to be a measured and correct stance for the Crown to take.

103. We have considered whether it would be fair to hold Mr Miller to his agreement of benefit because it enabled the overall agreement of the Order and thereby bought off risk. We are not persuaded that it would be. First, there was no negotiation in relation to benefit, since Mr Miller simply accepted the Crown's figures (subject to his reservation about double-counting, which fell away). Put another way, the point now at issue was not ever used as a bargaining chip in relation to the benefits. Second, such negotiation as did take place was all in relation to available assets and, specifically, Ms Nicholson's interest. Apart from the general assertion that there was a *risk* of a worse outcome if agreement had not been reached, which we accept, there is no information that persuades us that the Crown's concessions were not justified and just. To our minds, there is no reason to interfere with the negotiations about available assets by remitting it for further consideration.

Conclusion

104. For these reasons, we conclude that this is a case where the most exceptional circumstances exist such that it would be unfair not to allow Mr Miller's appeal. That said, the issues raised on this appeal go solely to the calculation of Mr Miller's benefit

and we see no good reason to interfere with the negotiated outcome, including the involvement of Ms Nicholson, of the sum agreed as available assets.

105. We therefore allow the appeal and remit the question of Mr Miller's benefit to the Crown Court. For the avoidance of doubt, we do not remit the question of Mr Miller's available assets.