Case No: 2016/04868 B1

Neutral Citation Number: [2018] EWCA Crim 682

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SOUTHWARK CROWN COURT
THE HONOURABLE MR JUSTICE COOKE
T20137308

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2018

Before:

LORD JUSTICE DAVIS
MR JUSTICE EDIS
and
HIS HONOUR JUDGE PATRICK FIELD QC (SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

- -

Between:

	R	**Respondent**
	- and -	
	HAYES	**Appellant**

- -
- -

Michael Parroy QC and James Byrne for the **Respondent**
James Fletcher for the **Appellant**

Hearing date: March 15 2018

- -

Judgment

Lord Justice Davis:

Introduction

1. This appeal involves an issue of some importance for confiscation proceedings. It arises in the context of the tainted gifts provisions of the Proceeds of Crime Act 2002 ("the 2002 Act") in general and in the context of the application and effect of s. 77 and s. 78 of that Act in particular. The issue can perhaps be, formulated in this abbreviated way. To what extent can the family services (if we may use that short-hand phrase) which an individual provides as wife and mother constitute valuable consideration for the

purposes of s. 78 (1) of the 2002 Act?

Factual background

2.The factual background, in summary, is this.

3.The appellant, Tom Hayes, was convicted on 3 August 2015, after a lengthy trial at Southwark Crown Court, of a number of counts of conspiracy to defraud. For present purposes, the details of those conspiracies are not important. Suffice it to say that the appellant, with others, between 2006 and 2010 agreed to manipulate the Yen LIBOR in order to advance the trading interests and profits of the banks for which he worked and thereby also to advance his status as a successful trader and, in consequence, his bonuses. In the relevant period the appellant was working first with UBS Japan and latterly with Citigroup Japan. His employment with Citigroup Japan was terminated on 7 September 2010.

4.The facts and issues relating to his conviction are set out in the decisions of constitutions of this court, whereby his appeal against conviction was dismissed and his appeal against sentence allowed: reported at [2018] 1 Cr. App. R 134 and [2016] 1 CAR (S) 449. We gather that an application to the Criminal Cases Review Commission is currently being pursued.

5.By reason of the conviction, confiscation proceedings were initiated. Those were, in the result, the subject of a lengthy written decision by the trial judge, Cooke J, delivered on 23 March 2016. Following some subsequent amendments by the judge, benefit was assessed at £852,560.94. The available amount was assessed at £1,757,919.68. The judge made a confiscation order in the sum of £852,560.94 accordingly. A term of 3 years was set in the event of default in payment.

6.Included in the available amount was the value of a property known as The Old Rectory, Woldingham, Surrey. It is the judge's treatment of that asset for the purposes of the confiscation order which has generated this appeal.

The Old Rectory

7.The circumstances in which that property came to be acquired are as follows.

8.The appellant started working for UBS Japan on 9 August 2006, based in Tokyo. During 2007 he met the woman who was to become his wife, Sarah Tighe. She was (and is) a qualified solicitor, at that time working in the London office of an eminent law firm. She was visiting Tokyo in 2007 albeit she thereafter returned to London. By December 2007 she and the appellant were discussing getting married; and ultimately she joined the

Tokyo office of another eminent law firm, starting work there in June 2008. By this time she was living with the appellant in Japan; and they became engaged in December 2008. It is to be gathered from her witness statement made in the confiscation proceedings that they split their living expenses on a broadly 50/50 basis.

9. In June 2010 Ms Tighe gave notice of resignation from her law firm in Tokyo. She was intending then to study Japanese for one year; but in the event the appellant's employment with Citigroup (which he had joined in 2009) was terminated on 6 September 2010, shortly before they were due to be married in England. The wedding was on 18 September 2010: it seems both contributed to the costs of the wedding. Thereafter they made arrangements to relocate from Japan to England.

10. In December 2010 the two purchased a property in Shoreditch, London known as 40 Sugar House. The price was £995,000, which the appellant paid out of his own resources, from sterling bank accounts in his name. That property was placed in joint names.

11. Shortly thereafter Ms Tighe became pregnant. They decided to buy a house out of London. They acquired The Old Rectory, the Transfer being dated 21 December 2011. The property was transferred into their joint names; and the form of Transfer also included a declaration of trust stating that they held the property on trust for themselves as beneficial joint tenants.

12. The purchase price was £1,218,682. The evidence was, and the judge found, that the purchase funds were provided entirely by the appellant, without recourse to any mortgage. Ms Tighe made no financial contribution to the purchase price. Thereafter, major renovation works (also funded solely by the appellant, by borrowing) were undertaken at The Old Rectory. They remained at 40 Sugar House in the interim. When those works were completed, the couple, with their son Joshua who had been born on 7 October 2011, in due course moved in at the end of 2012. As for 40 Sugar House, that was sold (at no profit) for £995,000.00 on 19 June 2012, although they continued to occupy it, as tenants, for a time thereafter.

13. From the date of the marriage until May 2013 Ms Tighe was earning no money. She was full time at home looking after Joshua and the home and supporting the appellant. He was endeavouring to make money from trading and spread-betting on his personal account. Ms Tighe, amongst other things, described the financial arrangements as follows in paragraph 23 of her witness statement dated 22 February 2016:

> "From January 2011 I was responsible for running the house/ apartment, doing the food shopping, cooking, cleaning etc. I was a housewife and, when Joshua was born in October 2011, a stay at home mother. In anticipation of the arrival of our baby I was also responsible for buying baby items, clothes, equipment and furniture. I did so largely through the use of my American Express card. Tom would transfer me the money to pay the

> American Express bill. I was also responsible for furnishing and decorating The Old Rectory and I paid for curtains and furniture for the house using my American Express card or by way of payments from my bank account. Again, Tom would transfer me the money for specific items and everyday expenses incurred by me. With the exception of the first two payments, that was the reason for the transfers listed on page 1313 of RS/01. We were newly married and my role had become that of a stay at home wife who was pregnant with our first child. I was supporting Tom and contributing to the marriage in non-financial ways. I produce as my exhibit ST/9 my bank and American Express statements that demonstrate the type of expenditure I was incurring on behalf of both of us that Tom would reimburse me for."

14. It is, however, only right also to allude, albeit briefly, to other aspects of Ms Tighe's evidence. She describes in graphic terms the impact thereafter on the family unit of the criminal charges being levelled against the appellant, in circumstances of great media publicity hostile to him. There was intense domestic pressure and intense financial pressure (by reason of legal costs): in a situation where her husband was on the edge of total mental collapse. Further, Joshua had sleeping and other problems – although we were very pleased to be told that he is now doing extremely well – and she herself had some significant health problems. There was a time when the pressures were such that they lived apart. But as she was to put it in her witness statement, "I stood by him at a time when virtually everybody else in his life had turned their backs on him."

15. In May 2013, at all events, Ms Tighe returned to work in London as a solicitor. On 26 July 2013 the appellant transferred to his wife his entire interest (legal and beneficial) in The Old Rectory, for £250,000. In addition, she then took out a mortgage on the property for £350,000 of which it seems that £250,000 was then paid to the appellant to assist with the large legal bills which he was by then incurring.

16. In the meantime The Old Rectory was being unsuccessfully marketed for sale. It was, we were told, eventually sold on 21 October 2016 for £1,638,500. Out of the sale proceeds £782,301 was paid to the Serious Fraud Office to discharge the then outstanding balance of the Confiscation Order. After discharge of the mortgage of £350,000 (and related costs) the balance was remitted to Ms Tighe.

17. The confiscation hearing before Cooke J in March 2016 took place against that background: albeit he made far fuller and more extensive findings in his review of the evidence than we have thought necessary to include for present purposes. But that brief recital at least serves to identify what became two main issues for decision by Cooke J:

    (1) First, did the acquisition of The Old Rectory in December 2011, whereby a joint

legal and beneficial interest was obtained by Ms Tighe in circumstances where she had made no financial contribution to the purchase, constitute a tainted gift (for the purposes of the 2002 Act) on the part of the appellant?

(2) Second, did the disposal to Ms Tighe by the appellant in July 2013 of his legal and beneficial interest in the property for the sum of £250,000 constitute a tainted gift?

18. The judge found that each such transaction gave rise to a tainted gift. The judge's ruling with regard to the second transaction is not challenged on this appeal. His ruling on the first transaction, however, is.

19. We turn, then, to the legislative scheme set out in the 2002 Act.

The Legislative Scheme

20. As is all too familiar in this context, it is the task of the court in confiscation proceedings to determine the benefit; to determine the available amount; and then to determine the recoverable amount accordingly. The proviso to s. 6 (5) of the 2002 Act (as amended) can also then apply to the making of a confiscation order in the recoverable amount. But it is sufficient to say that no issue of proportionality by reference to that proviso has been or could be raised in this particular case.

21. As to available amount, s. 9 (1) of the 2002 Act provides as follows:

> "For the purposes of deciding the recoverable amount, the available amount is the aggregate of -
>
> (a) the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and
>
> (b) the total of the values (at that time) of all tainted gifts."

22. It is also, of course, a general requirement under s. 6 (4) that the court must consider whether or not a defendant had a criminal lifestyle. In the circumstances of the present case, the judge inevitably found that the appellant did. In consequence, the judge applied some (though not all) of the assumptions set out in s.10 for the purpose of calculating the benefit from "general criminal conduct" (as defined). There is no challenge to his decision in these respects. There is also no dispute but that the tainted gifts, in so far as they are indeed properly to be adjudged to be tainted gifts, fall within the available amount in this case.

23. Turning, then, to the provisions concerning tainted gifts, the key provisions for present purposes are those set out in s. 77 and s. 78. They provide as follows:

> "s. 77. Tainted gifts
>
> (1) Subsections (2) and (3) apply if -
>
> (a) no court has made a decision as to whether the defendant has a criminal lifestyle, or
>
> (b) a court has decided that the defendant has a criminal lifestyle.
>
> (2) A gift is tainted if it was made by the defendant at any time after the relevant day.
>
> (3) A gift is also tainted if it was made by the defendant at any time and was of property -
>
> (a) which was obtained by the defendant as a result of or in connection with his general criminal conduct, or
>
> (b) which (in whole or part and whether directly or indirectly) represented in the defendant's hands property obtained by him as a result of or in connection with his general criminal conduct.
>
> (4) Subsection (5) applies if a court has decided that the defendant does not have a criminal lifestyle.
>
> (5) A gift is tainted if it was made by the defendant at any time after -
>
> (a) the date on which the offence concerned was committed, or
>
> (b) if his particular criminal conduct consists of two or more offences and they were committed on different dates, the date of the earliest.
>
> (6) For the purposes of subsection (5) an offence which is a continuing offence is committed on the first occasion when it is committed.
>
> (7) For the purposes of subsection (5) the defendant's particular criminal conduct includes any conduct which constitutes offences which the court has taken into consideration in deciding his sentence for the offence or offences concerned.
>
> (8) A gift may be a tainted gift whether it was made before or after the passing of this Act.
>
> (9) The relevant day is the first day of the period of six years

ending with -

(a) the day when proceedings for the offence concerned were started against the defendant, or

(b) if there are two or more offences and proceedings for them were started on different days, the earliest of those days.

s. 78. Gifts and their recipients

(1) If the defendant transfers property to another person for a consideration whose value is significantly less than the value of the property at the time of the transfer, he is to be treated as making a gift.

(2) If subsection (1) applies the property given is to be treated as such share in the property transferred as is represented by the fraction -

(a) whose numerator is the difference between the two values mentioned in subsection (1), and

(b) whose denominator is the value of the property at the time of the transfer.

(3) References to a recipient of a tainted gift are to a person to whom the defendant has made the gift."

24. Section 81 (read with s.79) makes provision for the valuation of tainted gifts. Section 84 then includes general provisions with regard to "property". This includes a provision, by s. 84 (2)(c), that property is transferred by one person to another if the first one transfers or grants an interest in it to the second one.

25. The wide reach of these tainted gifts provisions, particularly when set in the context of a criminal lifestyle case, has frequently been remarked on. That width is to be explained by Parliament's evident determination that convicted criminals should be required, by all practicable means, to disgorge the proceeds of their criminality. That width is also to be explained by Parliament's desire, in order to achieve that primary purpose, to deter attempts to render confiscation orders ineffectual by gifting away assets. It is thus to be noted, as part of the anti-avoidance techniques adopted, that, for example, s. 77 (2) is capable of applying to gifts both of property which itself was obtained from criminal conduct and also (if made after the relevant day) of property which was not. Various aspects of the general workings of the tainted gifts regime are further discussed in the decisions of constitutions of this court in *Kim Smith* [2013] EWCA Crim 502, [2013] 2 CAR (S) 77 and *Johnson (Beverley)* [2016] EWCA Crim 10, [2016] 2 CAR (S) 403 (albeit cases which were wholly different, on their facts, from the present case): to which reference can be made.

The judge's ruling

26. Cooke J went through the evidence very thoroughly and in great detail. In effect, putting it broadly, he found that 95% of the appellant's actual employment income was to be regarded as legitimately acquired, as was 65% of the relevant bonuses in the relevant period. For the criminal lifestyle provisions, the relevant day was determined to be 19 June 2007.

27. The judge then dealt fully with the facts relating to the purchase of 40 Sugar House and The Old Rectory, as summarised above. His key conclusions were set out in paragraph 97 as follows:

> "i) The defendant on the original purchase of The Old Rectory made a gift to his wife of a half share in that property. She made no financial contribution to the purchase in December 2012 and was not in any position to do so as she had earned nothing in the relevant preceding period since the autumn of 2010. He was paying all the bills following her resignation from employment and the birth of their child. As a matter of property law, he made her a gift of a half share in The Old Rectory. It matters not how a family court might see issues arising from contributions to the marriage in the context of a divorce. He paid for the house. There was no mortgage and no sharing of relevant expenditure in the household at all. She was his dependant. The gift was clearly therefore a tainted gift for the purpose of POCA, falling within s. 77 (2).
>
> ii) In July 2013 the defendant sold his half share to Miss Tighe at a considerable undervalue. They both knew of potential confiscation proceedings as a result of the SOCPA agreement which he had concluded which made express reference to them. He referred, in an email to his lawyers in April 2013, to contesting such proceedings in the context of questioning whether he could make a transfer of a half share in the house to his wife. The value of The Old Rectory was on any view, at the time of the transfer of the half share, around £1.7 million. He transferred a half share for £250,000. As joint tenants in law and equity, the property was held on trust for sale and was realisable for it's full value. His half share was therefore worth 50% of that figure, namely around £850,000. He sold it to her for an undervalue of £600,000. By this time Miss Tighe had still made no financial contributions towards the house and he had continued to pay all household expenditure. She had presumably made financial contributions since May in order to support herself and her son whilst living with her parents in Hampshire."

28. It is the finding in paragraph 97 (i) which is now challenged.

Submissions

29. On behalf of the appellant, Mr Fletcher (who had not appeared below) advanced two grounds of appeal in the course of his excellent arguments.

30. The first ground was a technical one. He submitted that, for the purposes of the tainted gifts regime, there has to be a transfer of property. He then went on to submit that at the time The Old Rectory was transferred into the joint names of the appellant and Ms Tighe the appellant did not hold any interest in it (Mr Fletcher, we add, focused solely on the time of transfer at completion rather than on the time of exchange of contracts): the vendors did. Consequently, at that time the appellant had no interest to transfer to Ms Tighe. He only acquired such an interest at exactly the same time as Ms Tighe: that being their shared intent. Accordingly there was no relevant gift for the purposes of s. 77 and s. 78.

31. The second ground was to the effect that the judge had been wrong to focus solely on the financial contributions of the appellant and Ms Tighe at the time of purchase. Mr Fletcher said that was much too narrow an approach for the purposes of s. 78 (1). He submitted that there was no reason why consideration, for the purposes of s. 78 (1), should be limited to direct financial contributions. True it was that the entire purchase price had been paid out of the appellant's own cash resources and true it was that Ms Tighe had not made any financial contribution, as such, herself. But that, he argued, did not in the circumstances here make this a gift. He said that Ms Tighe's contributions, as a wife and mother, should have been brought into account as consideration for this purpose and valued. He asserted that such value was to be equated with one-half of the property. On that basis, his ultimate calculation was that the available amount should have been assessed at £707,031.

32. For his part, Mr Parroy QC, leading Mr Byrne, submitted on behalf of the respondent that the first argument was untenable and contrary to the whole underlying purpose of the statutory regime. As to the second argument, he submitted that, having regard to the plain wording of s. 78 (1) as applied to the facts of this case, the judge was entirely correct to rule as he did. Ms Tighe had provided no consideration of value, measurable in money terms, in obtaining an equal and joint share in The Old Rectory in 2011; and the appellant was accordingly correctly adjudged to have made a gift of a half share to her, for the purpose of the tainted gifts provisions.

Discussion

33. We consider that Mr Parroy's arguments are correct. The judge reached an entirely

proper conclusion, given the facts of this case.

34. The 2002 Act provides no definition, as such, of the word "gift" or the word "consideration". But what at least is plain from s. 78 (1) is, first, that the value of the property is to be assessed at the time of transfer; second, that the consideration must have value and must have value in the sense of being capable of being assessed in money terms in a way which can then, as necessary, be utilised in accordance with the mathematical approach stipulated in s. 78 (2); and, third, that while at common law the adequacy of any consideration provided under an agreement is rarely to be investigated by the courts, such a matter is precisely the subject of focus for the purpose of s. 78 (1). If the consideration is of a value significantly less than the value of the property transferred then s. 78 (1) deems there to have been a "gift".

(1) First ground of appeal

35. We can dispose of the first ground of appeal shortly. It is untenable; and in fairness to Mr Fletcher, he ultimately, after some debate before the court, withdrew his argument on this ground. However, in order to forestall any attempts hereafter in other cases to raise such an argument we will briefly explain why, in our judgment, it is untenable.

36. The first point to note is that, were the argument right, it would entirely undermine the whole statutory purpose underpinning the tainted gifts regime. If it were right, the sophisticated criminal would be astute to apply the proceeds of his criminality – or, indeed, other assets - into the purchase of matrimonial (or other) property in joint names. Indeed, the logic of this argument would even seem to mean that had, in the present case, The Old Rectory been placed in the sole name of Ms Tighe (albeit that the appellant had provided the entirety of the purchase price) still there would have been no transfer of property and hence no "gift." Such considerations of themselves demonstrate that these statutory provisions are not to be read in so narrow and technical a way.

37. We do not, in any event, think that the argument could work even at such a level of technicality. The money needed for the purchase of The Old Rectory came entirely from the applicant himself. When, however, the money was transferred from his own bank accounts to the bank account of the solicitors acting in the purchase for onward remission to the vendors' solicitors it (or, strictly, the chose in action representing it) would have been held in the solicitors' account on behalf of the appellant and Ms Tighe as the joint purchasers. She thereby had an interest in it. Thus at that stage, and before any title in The Old Rectory itself was transferred, there had been a transfer by the appellant of a half - interest in those monies (or, strictly, the chose in action representing those monies) for the purpose of enabling the transfer of The Old Rectory then to be completed.

38. Finally, the argument advanced replicates precisely one of the arguments unsuccessfully advanced in the case of *Thompson* [2015] EWCA Crim 1820. That case also, as here,

had involved a property acquired and held by way of legal and beneficial joint ownerships and the husband, as here, had himself paid the entire purchase price (in fact, in that particular case, entirely out of the proceeds of crime). As Macur LJ, giving the judgment of the court, concisely put it in rejecting that particular argument:

> "The wife's legal and beneficial ownership was conveyed to her but was dependent upon an endowment made by virtue of the monies held in the account of the husband, which he effectively gifted to her by his consent to the conveyance drawn."

A similar approach (albeit in the context of the Drug Trafficking Act 1994) had, we note, also been adopted in the case of *Buckman* [1997] 1 CAR (S) 325. We agree. So here. There is no proper basis for this court departing from the decision of the court in *Thompson* on that point. On the contrary, we endorse the decision in *Thompson* on that point.

39. Accordingly this ground fails. We are in no doubt that Mr Fletcher was right ultimately to abandon it.

(2) <u>Second ground of appeal</u>

40. That, then, leads to the principal ground of appeal advanced.

41. Two points need to be cleared out of the way. First, it was emphasised by Mr Fletcher that Ms Tighe had absolutely no knowledge of any criminal conduct (as the jury has decided it to be) on the part of the appellant. Of course we accept that. But it is irrelevant for present purposes. The tainted gifts regime does not depend on a guilty state of mind on the part of the recipient (even though, no doubt, there may be cases where there will be such a state of mind). Second, it was emphasised by Mr Fletcher that the judge made no express finding that any part of the purchase price of £1,218,682, provided by the appellant out of his own resources, itself represented the proceeds of his own criminality or was the product of his particular criminal conduct. But, as we have explained above, the provisions of the tainted gifts regime do not require that to be the position in a case of this kind and where the transaction occurs after the relevant day.

42. That being so, we revert to the essential question arising: what was the consideration, at a value not being significantly less than the value of the property at the time of transfer, provided in this case?

43. With all respect to Mr Fletcher we found the arguments advanced at times somewhat elusive. The emphasis throughout was on the contributions of Ms Tighe (albeit not of a directly financial kind) as a wife and as a mother. In human terms, it is impossible not to identify with that. But the tainted gift provisions are not drafted in such terms. Rather,

they are drafted in terms of requiring investigation as to whether the consideration is of a value significantly less than the value of the property at the time of transfer. In short, they are drafted in terms of money or money's worth, to be objectively assessed.

44. That, then, leads one to ask just how the "consideration" said to be provided by Ms Tighe is to be valued, for the purpose of this particular statutory regime. Mr Fletcher in fact accepted that his argument would, potentially, extend not only to cases of husband and wife but also to partners and co-habitees. Does it make a difference - and if so, to what extent - if there are, or are not, children of the relationship? Does it make a difference as to how many children there are? To what extent is the brevity or length of the relationship, at the time of the relevant transfer, to be taken into account? To what extent is the Crown Court, in evaluating such an issue of tainted gifts, required to examine and assess the "quality" of the relationship and the "quality" of the support and assistance and familial contribution provided by the spouse or partner concerned?

45. In this context, therefore, we asked Mr Fletcher how it was that he asserted that the "consideration" of "value" in this case was to be assessed, as he said it should be, at 50%. With respect, he had no real answer. It was simply an assertion. To say, as he also said, that this marriage was a "partnership of equals" also takes it no further for the purposes of s. 78. Certainly the matter cannot be the subject of the parties' self-assessment, as it were. The test is objective. Indeed, the consequence of this assertion, if correct, would seem to be that (for the purposes of the tainted gifts regime) the resulting position in this case would be just the same as if Ms Tighe had herself, in financial terms, provided one-half of the purchase price out of her own money. It is impossible to credit that the statutory provisions had contemplated such an outcome.

46. We think that there was great force in Mr Parroy's blunt submission that in reality the very fact of marriage was of itself being advanced in this case as being consideration of a value which matched half the value of the property at the time of transfer. However, if that could be right then again that would strike against the underpinning statutory purpose of the tainted gifts regime and again would be an incentive, in other cases, for avoidance of the confiscation process by similar means.

47. In this regard, it also has to be said that aspects of the argument advanced before us on behalf of the appellant as to "value" seemed at stages to reflect arguments of a kind that might perhaps be raised in the Family Court. But what has to be decided in the Family Court, in the context of matrimonial proceedings, has no part to play in what has to be decided by the Crown Court in confiscation proceedings under the 2002 Act by reference to tainted gifts. We think that Cooke J was entirely right on this. The underpinning statutory context and statutory purpose are wholly different. In family proceedings, the Family Court is not concerned with "consideration". The Family Court is concerned to decide as to what is the fair and just division of assets, having regard to the respective contributions (financial and non-financial) of the parties, the respective means of the parties, the respective needs of the parties, the needs of any children and so on. That, most emphatically, is *not* the function of the Crown Court in making its

assessment under s. 77 and s. 78 of the 2002 Act in confiscation proceedings.

48. Nor, given the facts of this case, do we think that any great assistance for present purposes is derived from cases cited to us relating to proprietary or equitable interests such as *Stack* v *Dowden* [2007] UKHL 17, [2007] AC 432 and *Jones* v *Kernott* [2011] UKSC 53, [2012] 1 AC 776. The position considered in those cases was different from the present case. In the present case, the court is not concerned to ascertain from the parties' conduct what the shared intention was with regard to ownership of The Old Rectory at the time of transfer. That is because it is known in this case. It is known because the parties have in the Transfer expressly declared their shared intention and agreement: that is, of joint legal and beneficial entitlement. As between themselves, therefore, that is decisive. Since no one could allege, or has alleged, that the acquisition of The Old Rectory involved a sham, it follows that the appellant and Ms Tighe were, legally and beneficially, joint owners. On any sale, they would together have been entitled to the net proceeds. It is irrelevant for *that* purpose that Ms Tighe had made no financial contribution to the original acquisition. It is irrelevant, as a matter of property law, just because that is what the two of them had intended and agreed: as evidenced by the written declaration of trust.

49. So far as the subsequent transaction in 2013 is concerned- albeit made at a significant undervalue, as the judge found - that of itself then had the consequence that Ms Tighe thereupon became the sole legal and beneficial owner of The Old Rectory: cf. the observations of Toulson LJ in *Richards* [2008] EWCA Crim 1841, in particular at paragraph 19 of his judgment.

50. The point, however, remains as to what is the impact of s. 78 of the 2002 Act, for the purpose of these confiscation proceedings.

51. Mr Fletcher placed reliance on the decision of the Court of Appeal in *Gibson* v *Revenue Customs and Prosecution Office* [2008] EWCA Civ 645, [2009] QB 348. In that case (decided by reference to the Drug Trafficking Act 1994), a property - the matrimonial home - was acquired in joint names in 1990. No proceeds of criminality were used at that time. From 1993 the husband derived large sums from the proceeds of his crimes: this postdating the purchase of the property. Further, the purchase itself had antedated the 6 year period applicable to tainted gifts (see paragraph 10 of the judgment). Between 1993 and 1998 mortgage payments, due under a mortgage for which each of the husband and wife had joint legal liability in respect of the property, were paid by the husband out of tainted money (his wife having no knowledge of that). It was held by the trial judge in enforcement proceedings that the relevant payments were not gifts "because Mrs Gibson had provided consideration by bringing up the children and looking after the home". The prosecution had on appeal then accepted that finding "for the purposes of this appeal" (paragraph 10 of the judgment).

52. Although Mr Fletcher placed considerable reliance on the authority of *Gibson*, we agree

with Mr Parroy that it is readily distinguishable from the present case.

53. For one thing, *Gibson* was a decision by reference to a different (even if in many respects analogous) statute and made in the context of enforcement proceedings. For another, the actual purchase of the matrimonial home in that case had occurred prior to the relevant day, in contrast to the present case. Yet further, in that case the decision focused on subsequent mortgage repayments: whereas the present case involves an outright purchase for cash, provided by the appellant, with no joint mortgage involved at all. Yet further again, the finding of the trial judge in *Gibson* about consideration was not challenged by the prosecution on the appeal. Although that concession was described as right in the subsequent case of *Usoro* [2015] EWCA Crim 1958, it was in terms only approved as being right "in that case": see paragraph 18 of the judgment of Beatson LJ.

54. As for the decision in *Usoro*, on which Mr Fletcher also sought to place some reliance and which was a case under the 2002 Act, that too is distinguishable from the present case. In that case, the defendant had made regular payments to two women who were the mothers of his children. The payments had been conceded by the prosecution to be for the children's maintenance and support. The court held, "on the particular facts of this case", that the payments had been made for consideration of value for the purposes of s. 78 (1) of the 2002 Act. This was because, as it was held, they had discharged the defendant's legal obligations to the mothers, since he would have been required to make such payments in any event via the Child Support Agency. Beatson LJ also expressly stated that such cases are "intensely fact specific".

55. Given the very tight wording and approach evident from the provisions of s. 77 and s. 78 one can, overall, see that there is potential for an argument as to whether "consideration" asserted to arise solely in the form of bringing up children or looking after the family home can *ever* suffice to constitute valuable consideration for the purposes of s. 78 (1). The points made above as to just how such asserted consideration is to be valued in monetary terms also can come into play here. At all events, it is clear from the statutory wording that such valuation has to be made objectively and in monetary terms, on an evidenced basis.

56. In such circumstances, we asked Mr Parroy if he was submitting that "family services", not involving any direct financial contributions as such, could *never* be valuable consideration for the purposes of s. 78 (1). Mindful no doubt of the approach adopted and observations made in cases such as *Usoro* (cited above) and, for example, in the civil case of *Serious Organised Crime Agency* v *Lundon* [2010] EWHC 353 QB (see at paragraph 65 of the judgment of Blake J) he said that he was not. He said that each case was "fact sensitive".

57. We think that this is right. What "family services" (itself a rather open-ended phrase) actually involve can vary between cases. In this context, it would be wrong to commit to

a wholly inflexible purported statement of principle. In any event, *Gibson* is one illustration, albeit on its own facts, at least tending against any such inflexible principle. *Usoro* is another. Moreover, we note that in the case of *Thompson* (cited above) the trial judge had apparently made an allowance of 10% "in respect of family life" (not further defined or explained in the judgment). That was a finding which, albeit not debated in the Court of Appeal, attracted no adverse comment from the court. It is, however, to be noted that it was held in *Thompson,* on the facts, that disappointment in not having children and the giving up of employment by the wife did not constitute valuable consideration for the purposes of s. 78 (1).

58. However, in the hope of providing some assistance to Crown Courts in this difficult area of the operation of the tainted gifts regime under s. 78 of the 2002 Act we suggest (without intending in any way to be either exhaustive or prescriptive) that the following may be a convenient general approach to follow. In making a tainted gifts appraisal the court will of course in each case have first assessed whether the instant case is a criminal lifestyle case and, if it is, will have determined the relevant day and the assumptions under s. 10 which are to be applied or disapplied.

(1) The approach required under s. 78 (1) involves the following steps:

(i) first, place a value upon the property transferred, at the time of transfer;

(ii) second, assess whether consideration has been provided by the recipient of the property and (if it has) assess the value of the consideration provided;

(iii) third, assess whether the value (if any) of that consideration (if any) is significantly less than the value of the property transferred, at the time of transfer;

(iv) fourth, if there is found to be a significant difference apply the calculation

prescribed in s. 78 (2); thereafter also applying the provisions of s. 81 as appropriate.

(2) Each of steps (i), (ii) and (iii) above must always be undertaken objectively and on an evidence based approach. There is no room, in this context, for "plucking a figure out of the air" or anything like that.

(3) Where the consideration which is asserted to have been provided by the recipient of the property is not in the form of a direct financial contribution or contributions, then it is necessary to examine the evidence rigorously and closely to see if the asserted consideration (whether by way of "services" or otherwise) is capable of being assessed as consideration of value and (if it is) to what extent.

(4) Any consideration which is asserted to have been provided must be atributable to the transfer of property in question.

(5) Any consideration which is asserted to have been provided must, for the purposes of s. 78 (1), be capable of being ascribed a value in monetary terms.

(6) Each case, ultimately, will depend on its own facts and circumstances.

Disposition

59. In the present case, the appropriate outcome is clear. Ms Tighe made no financial contributions at all, directly or indirectly, towards the purchase: the appellant paid the entire purchase price. Their marriage for around a year, and Joshua's birth in October 2011, cannot of itself involve "consideration" of "value" which could to any extent - let alone the asserted 50% - come within s. 78 (1). Indeed, as Mr Parroy pointed out, at the time The Old Rectory was purchased the family continued to live at 40 Sugar House: a property jointly owned. Furthermore, everything that Ms Tighe did as wife and mother at that time is also to be put into the context of the appellant paying all the household expenses and other outgoings: and so what she did, as the judge found, can properly be attributed to, and set against, that in any event. We note in this regard that the Crown, very fairly, has in the circumstances of this case never sought to argue that payment by the appellant of all the household expenses and other "regular" outgoings constituted a tainted gift within the ambit of s. 78 (1).

60. In such circumstances, the judge's conclusion was, in our judgment, wholly justified.

61. In many ways, any initial attraction towards the arguments of Mr Fletcher perhaps can be explained by an initial disinclination to style the disposition in December 2011, as between husband and wife, as a "gift". As between husband and wife, that is unappealing nomenclature. This was a joint, mutually agreed decision made in good faith: one which many, probably most, spouses and partners make in property acquisitions. But the word "gift" has to be placed, for present purposes, in the context of the whole statutory scheme (against a background of criminal conduct) relating to tainted gifts, as contained in the 2002 Act. Accordingly, we consider that the correct outcome in the present case, on the facts, is clear. It is the outcome reached by the judge.

Conclusion

62. The appeal has to be dismissed.