Hilary Term
[2014] UKSC 5
On appeal from: [2011] NICA 31

JUDGMENT

R *v* Mackle (Appellant) (Northern Ireland)

R *v* Mackle No 2 (Appellant) (Northern Ireland)

R *v* Mackle No 3 (Appellant) (Northern Ireland)

R *v* McLaughlin (Appellant) (Northern Ireland)

before

Lord Neuberger, President
Lord Mance
Lord Kerr
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

29 January 2014

Heard on 11 December 2013

Appellant (Plunkett Jude Mackle)
Ronan Lavery QC
Michael Duffy BL
(Instructed by Rafferty & Donaghy Solicitors)

Respondent
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David McDowell BL
(Instructed by Public Prosecution Service of Northern Ireland)

Appellant (Benedict Mackle)
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LORD KERR (with whom Lord Neuberger, Lord Mance, Lord Hughes and Lord Toulson agree)

1. On 22 November 2007, three brothers, Patrick Mackle, Plunkett Jude Mackle (commonly known as 'Jude') and Benedict Mackle, all pleaded guilty to the offence of being knowingly concerned in the fraudulent evasion of duty on goods contrary to Section 170(2)(a) of the Customs & Excise Management Act 1979. In a separate trial, on 18 November 2008, Henry McLaughlin pleaded guilty to a similar offence. He was also convicted of a second offence, on his plea of guilty, but that is not relevant to this appeal.

2. On 13 December 2007 Deeny J sentenced Patrick Mackle to three years' imprisonment, suspended for a period of five years. Jude Mackle and Benedict Mackle were sentenced to two and a half years' imprisonment. Again that sentence was suspended for five years. At a later hearing, on 29 October 2008, confiscation orders were made in respect of each of the defendants as follows: Patrick Mackle - £518,387.00; Jude Mackle and Benedict Mackle - £259,193.00 each. The aggregate sum produced by these three amounts was equal to the amount of duty and Value Added Tax which had been evaded. The confiscation orders were made with the consent of each of the Mackle brothers.

3. Henry McLaughlin was sentenced by Weatherup J on 19 November 2008 to one year's imprisonment suspended for two years. The judge also imposed a serious crime prevention order for a period of five years. A confiscation order for £100,000 was made against Mr McLaughlin on the same date. This sum, taken together with other confiscation orders made against co-defendants, represented the total amount of duty and VAT said to have been evaded. The confiscation order against Mr McLaughlin was also made with his consent.

The facts (the Mackles)

4. On 16 January 2003 a cargo ship, MV Hyundai Fortune, arrived in Southampton from Malaysia. Customs officers carried out routine screening of a container on board the ship. It was found to contain cigarettes. (Subsequently, it transpired that the cigarettes had been manufactured in the United Kingdom. They had been exported without duty having being paid on them.) The container was not intercepted at this stage. It was allowed to proceed to its destination. It was taken first from Southampton to Belfast docks on the MV Celtic King on 25 January 2003. It was then collected at Belfast by a haulier on 27 January 2003 and taken to premises at Ballynakilly Road, Coalisland, County Tyrone.

5. On the same date, police and customs officers went to the premises to which the container had been delivered. There they found Jude Mackle and his brother Benedict unloading boxes from the container. They were being assisted by two other men. It was discovered that the boxes which were being unloaded contained cigarettes. These had been concealed under wooden flooring in the container. All four men were interviewed by police officers. They were subsequently charged with revenue offences.

6. Patrick Mackle was the owner of the premises where the cigarettes were being unloaded. He was not present when the police were at the premises on 27 January 2003 but he later presented himself to police and on 25 April 2003 he voluntarily attended Musgrave Street Police Station in Belfast for interview. On that date he was released on bail. He returned on 3 July 2003 for further interview. Following this interview he was also charged with revenue offences.

The facts (Mr McLaughlin)

7. On 16 November 2005 police officers went to premises at 194 Battleford Road, Armagh. There they discovered 10,434,620 cigarettes stored in two sheds. They also found 4,999,920 cigarettes loaded on a lorry, hidden amongst a consignment of peat moss. They arrested three persons who were at the premises. These persons were subsequently charged with revenue offences in relation to the cigarettes. Henry McLaughlin was not present when the police were at Battleford Road. He had no known connection to the premises there.

8. On 20 July 2006, however, Mr McLaughlin's home was searched by police officers. Large amounts of cash in different currencies were found. The total value of the cash amounted to something in the order of £65,000. Various documents including documentation relating to the sale and distribution of cigarettes were found. Mr McLaughlin was subsequently interviewed and charged in relation to the items that had been found in his house and in relation to the cigarette seizure on 16 November 2005. It is accepted that the lorry which had been found at Battleford Road loaded with the cigarettes had stopped at the Mr McLaughlin's premises earlier on 16 November 2005. It is also accepted, however, that he was not present at that time.

The proceedings against the Mackles

(i) The Rooney hearing

9. Each of the Mackle brothers was prosecuted on a single count to which he pleaded guilty, as described in para 1 above. That plea was entered after evidence had been given over the course of a number of days. It also followed what is known as a *Rooney* hearing (*Attorney General's Reference No 1 of 2005; In re Rooney (Bernard Philip Mary) and others* [2005] NICA 44; [2006] NI 218). The purpose of a *Rooney* hearing is to obtain from the trial judge an indication of the possible sentence in the event that a plea of guilty is entered.

10. In the course of the *Rooney* hearing, counsel on behalf of Patrick Mackle asserted that he had not been the organiser of "this matter". Counsel for the Crown submitted that Patrick Mackle had played "... a role in the organisation of this operation". He suggested that conclusions about the extent of the organisational role would depend on the inferences which the court might ultimately draw and "on the extent to which primary facts are established." Understandably, since he did not, in the event, hear all the evidence, the judge did not express a conclusion on the precise role that Patrick Mackle had played. He did say, however, that he was satisfied that he had played some part in the organisation of the evasion of the duty on the cigarettes. In giving an indication of the possible sentence to be imposed the judge said that he would propose to sentence Patrick Mackle on the basis that "he is not a ringleader but has some limited organising role in the matter."

11. In relation to Jude and Benedict Mackle, their counsel urged on the judge during the *Rooney* hearing that they had been merely labourers in the unloading of the cigarettes. In response to those submissions, counsel for the Crown said this:

> "… the prosecution position is that there is no evidence which suggests anything contrary to the submissions made by counsel on their behalf in this application. So for the purpose of this application I have no contrary submissions."

12. On the hearing of the appeal before this court, Mr McCollum QC, for the respondent, drew our attention to the fact that in his submissions to the trial judge he had emphasised that the statement that the prosecution had no evidence to counter the claims made by counsel for Jude and Benedict Mackle had been made for the purpose of the *Rooney* application. This did not amount to a concession, he said, concerning the value of any benefit which they had received for the purpose of the subsequent confiscation proceedings. This aspect of the case will be considered in greater detail below.

13. In giving his indication of sentence in relation to Jude and Benedict Mackle, Deeny J said that he considered there were no aggravating features in their cases.

Since playing a part in the organisation of this type of criminal activity is well recognised as an aggravating feature, it is to be presumed that the judge had accepted that neither of these appellants had performed such a role.

(ii) The sentencing hearing

14. In opening the case to the trial judge for the purpose of sentencing, Crown counsel said that if all the prosecution evidence had been given, "certainly at its height it would have suggested an organisational role by Mr Patrick Mackle". Counsel who then appeared for Patrick Mackle submitted that there was "no suggestion on the evidence of the accused having had any hand, act or part in the financing, funding, importation or other organisational contribution". The judge concluded that since Patrick Mackle had asked his brothers to carry out the unloading of the cigarettes and since this had taken place at Patrick Mackle's yard, he had a limited organising role. He noted that the prosecution had accepted the appellant's plea of guilty on the basis that he was not the ringleader in the enterprise. He (the judge) considered that it was appropriate to sentence Patrick Mackle on that basis.

15. In relation to Jude and Benedict Mackle, counsel for the Crown told the judge that the prosecution had no evidence to suggest that they were involved in any capacity other than as assisting in the unloading of the container. Unsurprisingly, this statement was highlighted by counsel for the two appellants in their pleas in mitigation and appears to have been accepted by the judge in choosing the sentence that should be imposed on them for he distinguished the role that they had played from the more serious part that their brother, Patrick, had had in the enterprise.

(iii) The confiscation proceedings

16. A prosecutor's statement in respect of each of the Mackle brothers was prepared by Roisin McMullan, an officer of HM Revenue and Customs. In each of the statements Ms McMullan asserted that the benefit obtained by each of the Mackle brothers was the full amount of the duty which had been evaded. At the confiscation hearing on 29 October 2008 the only evidence as to benefit presented to the court was a witness statement prepared by Ms McMullan dated 14 November 2006. This was appended to the prosecutor's statements. The witness statement also referred to the total excise duty as constituting the benefit which had been obtained.

17. At the outset of the confiscation hearing, prosecuting counsel announced that the parties had reached agreement as to the amount of benefit that each defendant had received and that each would consent to a confiscation order for that amount. In these circumstances no examination was undertaken of the basis of the apportionment of the total sum to be confiscated. It is quite clear, however, that this was directly related to the duty which Revenue and Customs had calculated to have been evaded.

The proceedings against Mr McLaughlin

18. There was no *Rooney* hearing in Mr McLaughlin's case. The sentencing and confiscation hearings took place at the same time. In his mitigation plea, counsel for Mr McLaughlin suggested that there was no evidence that he had been involved in the actual importation of the cigarettes. Mr McLaughlin had played, counsel said, "what could be described as … a supporting role in what happened."

19. In sentencing Mr McLaughlin, Weatherup J referred to the decision of the Court of Appeal in England and Wales in the case of *R v Czyzewski* [2003] EWCA Crim 2139; [2004] 1 Cr App R (S) 289 in which a number of possible aggravating features in fraudulent evasion of duty cases were considered. The first of these was "playing an organisational role". Weatherup J plainly must have accepted counsel for the appellant's submission on this aspect because he said that neither this nor, indeed, any other aggravating feature was present.

20. The amount of duty evaded in the case of Mr McLaughlin and his two co-defendants was something just short of £730,000. The total recoverable amount (*i.e.* the amount of benefit which the three accused were said to have obtained) was, by agreement, fixed at the same sum. One co-defendant's benefit (and therefore the amount recoverable from him) was said to be £500,000; another's was fixed at £129,968.61 (although in his case since it was agreed that the available amount was nil, the confiscation order was fixed at nil). The confiscation amount ordered to be recovered from Mr McLaughlin was £100,000, fixed so as to make up the balance of the duty evaded. All of this was done by agreement and, again, there was no investigation before the judge of the basis on which the total sum was apportioned or how the respective benefits to each of the defendants was estimated. The only indication of the value of the benefit to the defendants was the amount of the duty evaded.

The Court of Appeal's judgment

21. Appeals by the Mackle brothers and by Mr McLaughlin and one of his co-accused, Aidan Grew, against the confiscation orders made in their cases were heard together by the Court of Appeal (Morgan LCJ, Girvan and Coghlin LJJ). Delivering the judgment of the court, Girvan LJ identified the two principal issues as (i) whether the appellants had consented to the making of the consent orders on an incorrect legal basis (and that therefore the trial judges had likewise wrongly made the orders); and (ii) whether the orders having been made on consent, the appellants were in any event bound by them.

22. On the first of those issues, Girvan LJ considered the effect of the decision of the Court of Appeal in *R v Chambers* [2008] EWCA Crim 2467. He held that, in light of that decision, if the appellants were not participants in the actual importation of the cigarettes, they would not be liable for the duty on them and thus could not be said to have obtained a pecuniary advantage for the purposes of the Tobacco Products Regulations 2001 (para 26). This was not an end of the matter in Girvan LJ's estimation, however, for at para 27 he said this:

> "Where, a defendant is knowingly involved in the evasion of duty on smuggled cigarettes after importation and comes into possession of the smuggled cigarettes with knowledge of the evasion and as part of a joint enterprise to take advantage of the economic advantages flowing from the evasion of the duty at the point of importation he may gain a financial advantage flowing from his participation in the ongoing enterprise."

23. Girvan LJ observed in para 29 of the judgment that it was not in dispute that the appellants had engaged in criminal conduct. The critical issue was, therefore, whether they had benefited from that conduct. He acknowledged that this depended on whether they had obtained property as a result and in connection with the offences. Drawing on an example that he had earlier given of the pecuniary advantage that could be obtained by a person to whom goods had been passed by the actual importer of the goods, he concluded that the profitability in the criminal enterprise in both cases arose from the evasion of the duty. He then said (at para 35):

> "This criminal enterprise involved a number of participants acting together playing different roles in the furtherance of the joint enterprise. The pleas of guilty by the appellants make clear their acceptance of the fact that they played a role in the enterprise, thus evidencing participation in that joint enterprise. A proper inference that could have been drawn from the pleas is that in playing their different roles the appellants and each of them were involved in the handling and processing of the cigarettes to advance the purposes of

> the joint enterprise. To so handle and process them they had to obtain them at different stages of the process. As *R v Green* shows receipt of goods by one on behalf of several defendants can be regarded as receipt for all. The joint actions of the appellants, at least arguably, involved possession and control of the cigarettes by those involved in the participation and the enterprise."

24. On the basis of this analysis Girvan LJ held that it would have been open to a court to conclude that each of the appellants had obtained property in connection with their admitted criminal conduct or obtained a pecuniary advantage as a result of that conduct. He considered, however, that it was not only unnecessary for the trial judges in these cases to consider whether the appellants had obtained property or a pecuniary advantage in this way (which was, of course, a different basis from that which the prosecution had proffered), it would have been inappropriate for them to do so. This was because the appellants had consented to the making of the orders, having received legal advice. Having reviewed commentary on the effect of consent orders in confiscation proceedings in *Millington and Sutherland Williams on the Proceeds of Crime*, 3rd ed (2010), at para 11.21 and considered decisions of the Court of Appeal in *R v Bailey* [2007] EWCA Crim 2873 and *R v Hirani* [2008] EWCA Crim 1463, Girvan LJ stated that the court had concluded that, even if the appellants were incorrectly advised to consent to the confiscation orders, they were bound by the orders made on consent. He went on to say, however, that it had not been shown that the sentencing judges made the consent orders on an incorrect legal or factual basis because "the factual basis on which the orders were made arose from the admissions made by the appellants that, on the facts, they had received a benefit from their criminal conduct." The appellants having made those admissions, there was no reason for the judges to go behind them.

25. The appellants applied for permission to appeal to this court against the decision of the Court of Appeal. That application was refused but the Court of Appeal certified that the following points of law of general public importance arose from its judgment:

> "1. Is a defendant who pleaded guilty to being knowingly concerned in the fraudulent evasion of duty and who consents, with the benefit of legal advice, to the making of a confiscation order in an agreed amount in circumstances which make clear that he does not require the Crown to prove that he obtained property or a pecuniary advantage in connection with the charged criminal conduct bound by the terms of the confiscation order?

> 2. Does a defendant who knowingly comes into physical possession of dutiable goods in respect of which he knows the duty has been evaded and plays an active role in the handling of those goods so as to assist in the commercial realisation of the goods benefit from his criminal activity by obtaining those goods for the purposes of section 158 of the Proceeds of Crime Act 2002?"

26. On 30 October 2012 this court gave permission to the appellants to appeal.

The statutory framework

27. Section 170(2) of the Customs and Excise Management Act 1979 provides:

> "Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion—
>
> > (a) of any duty chargeable on the goods;
> >
> > …
>
> he shall be guilty of an offence under this section and may be detained."

28. Excise duty on tobacco is payable by virtue of section 2(1) of the Tobacco Products Duty Act 1979 (as amended by Finance Act 1981, Sch 19, Pt III) which provides that tobacco products imported into or manufactured in the United Kingdom are subject to a duty of excise at the rates shown in a table in Schedule 1 to the Act. Such duty becomes payable at an "excise duty point". Section 1(1) of the Finance (No 2) Act 1992 provides that:

> "… the Commissioners may by regulations make provision, in relation to any duties of excise on goods, for fixing the time when the requirement to pay any duty with which goods become chargeable is to take effect ('the excise duty point')."

29. By section 1(3) of the 1992 Act, regulations made under the section may provide for the excise duty point for any goods to be at such times as may be prescribed. Under section 1(4) where regulations prescribe an excise duty point for any goods, they may also make provision (a) specifying the person or persons on whom the liability to pay duty on the goods is to fall at the excise duty point and (b) where more than one person is to be liable to pay the duty, specifying whether the liability is to be both joint and several.

30. Regulation 12(1) of the Tobacco Products Regulations 2001 (SI 2001/1712) provides that the excise duty point for tobacco products is the time when the tobacco products are charged with duty. In relation to imported tobacco, therefore, the excise duty point arises at the point of importation into the United Kingdom because, by virtue of section 2(1) of the Tobacco Products Duty Act 1979, that is the point when duty becomes chargeable. In the case of the Mackles the excise duty point arose when the ship carrying the cigarettes entered the limits of the port at Southampton Docks – see section 5(2)(a) of the Customs and Excise Management Act 1979 which provides that, where the goods are brought by sea, the time of their importation shall be deemed to be the time when the ship carrying them comes within the limits of a port; *R v White* [2010] EWCA Crim 978, [2010] STC 1965 at para 57 and *R v Bajwa (Naripdeep)* [2011] EWCA Crim 1093, [2012] 1 WLR 601, para 32. The excise duty point in respect of the cigarettes involved in Mr McLaughlin's case is unknown.

31. By virtue of regulation 13(1) of the 2001 Regulations the person liable to pay the duty is the person holding the tobacco products at the excise duty point. But regulation 13(2) provides that the persons described in regulation 13(3) are jointly and severally liable to pay the duty with the person holding the tobacco products at the excise duty point (ie, the person specified in regulation 13(1)). Included in this group are the occupier of the registered premises in which the tobacco products were last situated before the excise duty point (regulation 13(3)(a)); any registered excise dealer (RED) to whom the tobacco products were consigned (regulation 13(3) (b)); and any person who caused the tobacco products to reach an excise duty point (regulation 13(3) (e)).

32. None of the categories of person described in regulation 13(3) fits the circumstances of the Mackle brothers or Mr McLaughlin. There is no evidence that they held the tobacco products at the excise duty point. Nor is there evidence that they caused the tobacco products to reach the excise duty point. In this connection it should be noted that the Court of Appeal in *White* held (correctly in my view) that regulation 13(3) (e) must be interpreted in conformity with section 1(4) of the Finance (No. 2) Act 1992, so that a person who has caused the tobacco products to reach an excise duty point is not liable for the duty unless he has retained a connection with the goods at the excise duty point. As Aikens LJ said at para 39 of *Bajwa* the "upshot" of the relevant decisions on regulation 13 is that a

person cannot be liable to pay duty on tobacco imported by sea in a ship unless one of two conditions is satisfied. Either he must be "holding" the tobacco at the excise duty point, or he must both have "caused" the tobacco products to reach the excise duty point and he must also have retained a connection with the goods at that point.

33. The 2001 Regulations provide a sharp and (for the purposes of this case) pertinent contrast with their predecessor, the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992 (SI 1992/3135). The 1992 Regulations provided that a significantly wider number of categories of person were liable for import duty than are liable under the 2001 Regulations. Firstly, by virtue of regulation 5(1) of the 1992 Regulations, the person liable to pay the duty in the case of an importation of excise goods from another member state was the importer of the excise goods. More relevantly for this case, however, was the provision in regulation 5(3) of the 1992 Regulations that among the categories of person who would be jointly and severally liable with the importer of the goods for the duty was any consignee of the excise goods. For a discussion of the constricting of the classes of individual liable for duty on tobacco products which the 2001 Regulations introduced, see *R v Khan* [2009] EWCA Crim 588, para 2.

34. Despite the fact that the 1992 Regulations were disapplied in relation to tobacco products by regulation 28 of the 2001 Regulations, the significant narrowing of the categories of person liable for excise duty on imported tobacco which was brought about by the 2001 Regulations was not immediately appreciated by the revenue authorities. Indeed it was not until a sharp-eyed lawyer in the Asset Forfeiture Division of the Revenue and Customs Prosecutions Office, reviewing a draft judgment in the case of *R v Chambers* [2008] EWCA Crim 2467, noticed that the Crown in that case had relied on the 1992 Regulations which, as she knew, had been superseded by the 2001 Regulations (so far as tobacco products were concerned) that the true picture began to emerge.

35. A trilogy of decisions of the House of Lords in *R v May* [2008] UKHL 28, [2008] AC 1028, *R v Green* [2008] UKHL 30, [2008] AC 1053 and *Jennings v Crown Prosecution Service* [2008] UKHL 29, [2008] AC 1046, had established that the evasion by a smuggler of duty or VAT constitutes, for the purposes of confiscation proceedings, the obtaining of a pecuniary advantage only if he personally owes that duty or VAT. Giving effect to those decisions, the Court of Appeal in *Chambers* held that a day labourer who had merely assisted in unloading contraband tobacco did not obtain a benefit by way of a pecuniary advantage in the form of the evasion of excise duty since he was not himself under a liability for the payment of that duty. Toulson LJ, delivering the judgment of the court, said at para 52:

> "On the hearing of the appeal Mr Cammerman accepted, in our judgment correctly, that the appellant would only have obtained a benefit by way of a pecuniary advantage in the form of the evasion of excise duty if he was himself under a liability for the payment of that duty which he dishonestly evaded. To help somebody else to evade the payment of duty payable by that other person, within intent to defraud, is no less criminal, but in confiscation proceedings the focus is on the benefit obtained by the relevant offender. An offender may derive other benefits from helping a person who is under a liability for the payment of duty to avoid that liability, eg by way of payment for the accessory's services, but that is another matter. In order to decide whether the offender has obtained a benefit in the form of the evasion of a liability, it is necessary to determine whether the offender had a liability which he avoided. In the present case that turns on whether the appellant was liable for the payment of excise duty on the relevant goods under the relevant Regulations."

36. As observed in para 22 above, the Court of Appeal in the present cases accepted that if the appellants were not participants in the actual importation of the cigarettes, they would not be liable for the duty on them and could not therefore be said to have obtained a pecuniary advantage. Although this was expressed conditionally, it is clear that the Court of Appeal must have proceeded on the basis that the appellants could not have been liable for payment of excise duty under regulation 13 of the 2001 Regulations. No evidence had ever been presented of the appellants' having held the cigarettes at the excise duty point or of their having caused them to reach that point, while retaining a connection with them.

37. Liability for payment of Value Added Tax is, for present purposes, coterminous with liability to pay customs duty on imported goods from outside the European Union. Section 1(1) of the Value Added Tax Act 1994 provides that VAT shall be charged (inter alia) on the importation of goods from places outside the member states. Section 1(4) provides that VAT on the importation of goods from places outside the member states shall be charged and payable as if it were a duty of customs. Thus, whoever has liability for the payment of customs duty on goods imported from outside the EU also has a liability to pay the VAT arising on their import.

Provisions relating to confiscation in Northern Ireland

38. The offence to which the Mackles pleaded guilty occurred before 24 March 2003. The relevant confiscation legislation in their case, therefore, was the Proceeds of Crime (Northern Ireland) Order 1996 (SI 1996/1299). Article 2(6) of this Order provided that a person who obtains property, or derives a pecuniary

advantage, as a result of or in connection with the commission of an offence has benefited from the offence. Article 2(7) provided that any property obtained and any pecuniary advantage derived by a person as a result of or in connection with the commission of an offence was his benefit from the offence. Article 2(7)(c) stated that the value of the benefit was the value of the property or a sum of money equal to the value of the pecuniary advantage or the aggregate of the values of the property and money.

39. Mr McLaughlin's offence took place after the coming into force of the Proceeds of Crime Act 2002 (POCA). Section 156(4)(a) and (c) provides that if a defendant has been convicted of an offence before the Crown Court, it must be determined whether he has a criminal lifestyle. If it is not concluded that he has such a lifestyle (and that was the position in relation to all the appellants in this appeal) the court must decide whether the convicted person has benefited from his particular criminal conduct. If it is determined that he has so benefited, the court must decide on the recoverable amount, and make an order (a confiscation order) requiring him to pay that amount.

40. The recoverable amount for the purposes of section 156 is an amount equal to the defendant's benefit from the conduct concerned: section 157(1). But by section 157(2), if the defendant shows that the available amount (as defined in section 159) is less than the recoverable benefit, the recoverable amount is the available amount, or a nominal amount, if the available amount is nil. This is the provision by which one of Mr McLaughlin's co-accused had the recoverable amount in his case fixed at nil.

41. Section 224(4) and (5) of POCA are in similar terms to article 2(6) and (7) of the 1996 Order.

The basis on which the appellants were said to have benefited from their offences

42. The prosecution statements prepared by Ms McMullan in respect of the Mackle brothers were identical in all material respects. And the basis on which the appellants were said to have benefited from their criminal conduct was likewise identical. It was also unequivocal. In respect of each appellant, she asserted that the benefit was £1,036,775.77, a figure made up of evaded tobacco product duty of £845,596.37 and evaded VAT of £191,179.40. It is clear from Ms McMullan's calculations that confiscation was sought against each appellant on the basis that they had derived a pecuniary advantage in the total amount of duty/VAT evaded. This renders academic Mr McCollum's argument (referred to in para 12 above) that he had not made any concession about the value of the benefit to the Mackles so far as concerned the confiscation proceedings. The plain and inescapable fact is

that the case made by the prosecution was that the appellants had obtained a benefit in the form of evasion of the duty. No other form of benefit was advanced or even mooted.

43. The same holds true for the case made against Mr McLaughlin. No suggestion was made that he had derived a benefit from his criminal conduct other than by the evasion of the excise duty and VAT. Indeed, on the evidence presented, it is difficult to see how any other case could have been made. Nothing in the prosecution case suggested a physical connection between Mr McLaughlin and the cigarettes. And, as in the case of the Mackles, the total amount of the benefit that Mr McLaughlin and his co-accused were said to have obtained was calculated solely by reference to the amount of the evaded duty.

44. The respondent in its printed case has asserted that there was no evidence before the Court of Appeal that the appellants had been wrongly advised as to the effect of the 2001 Regulations. It has also been stated that the respondent has not accepted that incorrect advice was given. It is claimed that it was incumbent on the appellants to make an application to adduce fresh evidence before the Court of Appeal, or for that court to inquire of trial counsel as to the nature of the advice that was given before any conclusion could be reached about the basis on which the appellants consented to the confiscation orders.

45. This argument misses the essential point in my view. This is 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. No other possible basis of benefit was canvassed. An acceptance that they had obtained a benefit on that account inevitably involved a mistake of law. No evidence is needed to establish that proposition.

46. On the hearing of the appeal Mr McCollum suggested that the benefit which the appellants had obtained was the equivalent of the evaded duty. The cigarettes had a saleable value which was enhanced, he claimed, by the duty that had been evaded. Even if it could be established that the saleable value of the cigarettes had been increased by precisely the amount of the evaded duty (and that seems, at best, highly questionable), the important point is that this is not the basis on which the case against the appellants was presented on the confiscation proceedings. Moreover, the saleable value of the contraband tobacco (as distinct from the alleged pecuniary advantage from evasion of a legal liability, which was the basis of the prosecution's claim in the proceedings) would be a benefit to the appellants only if they obtained the property as a result of or in connection with the commission of the crime. I return to this point at para 59. If they did not obtain the property, its value, whether enhanced or not, would not be a benefit to them.

47. The prosecution had firmly espoused the case that the benefit obtained by the appellants took the form of a pecuniary advantage derived from evasion of the duty on the cigarettes. This basis of benefit was accepted uncritically by the sentencing judges. It is not altogether surprising that they should have done so. The confiscation orders were not only made on consent; they were the product of discussions between the parties. Unlike the position in *Revenue and Customs Prosecutions Office v Mitchell* [2009] EWCA Crim 214; [2009] 2 Cr App R (S) 463, (to which reference will be made at para 51 below) the appellants had not indicated disagreement with the amount which the revenue authorities claimed was the benefit that they had obtained. As the *Mitchell* case demonstrates, however, sentencing judges should be astute to ensure that they are satisfied that agreements on the amount to be recovered by way of confiscation orders are soundly based. In any event, it is clear 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. As is 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.

Is a consent to a confiscation order made under a mistake of law binding?

48. As noted at para 24 above the Court of Appeal held that, even if the appellants were incorrectly advised to consent to the confiscation orders, they were bound by the orders made on consent. Unfortunately, it appears that the court was not referred to the decisions of the House of Lords in *R v Emmett* [1998] AC 773 and the Court of Appeal in *R v Bell* [2011] EWCA Crim 6 on this question. In *Emmett* a confiscation order had been made by consent under the Drug Trafficking Offences Act 1986 following the appellant's plea of guilty to being knowingly concerned in the importation of a controlled drug contrary to section 170(2) of the Customs and Excise Management Act 1979. The Court of Appeal certified the question whether it was open to the defendant to appeal against the order on the ground that his acceptance of the prosecution's case as to his liability was based on either a mistake of law or a mistake of fact. Section 3 of the 1986 Act provided:

> "Where—(a) there is tendered to the Crown Court by the prosecutor a statement as to any matters relevant to the determination whether the defendant has benefited from drug trafficking or to the assessment of the value of his proceeds of drug trafficking; and (b) the defendant accepts to any extent any allegation in the statement, the court may, for the purposes of that determination and assessment, treat his acceptance as conclusive of the matters to which it relates."

49. It had been argued by the prosecution in *Emmett* that the effect of this section was that an appeal such as the appellant sought to advance was implicitly

excluded. That argument was rejected by Lord Steyn (with whom the other members of the Appellate Committee agreed). At pp 782-783 he said:

> "Earlier in this century it may not have been possible to put forward as a ground of appeal that the plea of guilty arose from a mistake of law or fact of the defendant: *R v Forde* [1923] 2 KB 400, 403, per Avory J. Nowadays it is clear that as a matter of jurisdiction the Court of Appeal has power in such a case to consider an argument that the plea of guilty was induced by a fundamental mistake of law or fact: see *R v Boal* [1992] QB 591 (a mistake of law); *R v Lee (Bruce)* [1984] 1 WLR 578, 583E (a mistake of fact) and *Blackstone's Criminal Practice,* 7th ed. (1997), pp. 1512-1514, para. D22.12. Given that the powers of the Court of Appeal extend to cases when a plea was entered on a mistaken view of the law or fact, it is difficult to see what rational basis there could be to exclude such a right of appeal under section 3(1). Even drug traffickers have rights and they, too, are entitled to justice."

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.

51. The proper discharge by a judge of his statutory duty to satisfy himself that a defendant has benefited by his criminal conduct is well illustrated by the case of *Mitchell* (referred to above at para 47). In that case the respondent had pleaded guilty to an offence under section 170(2) of the 1979 Act. The goods involved were tobacco products. In subsequent confiscation proceedings the prosecution claimed that the respondent had benefited in respect of the tobacco and had obtained a pecuniary advantage by evading the excise duty payable. The

respondent contended that the only benefit he had received from the offence was £100 paid to him in cash for helping to load the tobacco. The lawyers acting on behalf of the respondent accepted that, whatever his real benefit might have been as a matter of fact, under the terms of POCA, he obtained the benefit alleged by the prosecution. Troubled about the correctness of this concession, the sentencing judge, Recorder Males QC, declined to act on it. After considering the position and hearing argument, he made a confiscation order against the respondent for £100, the amount that he had claimed to have received for his services as a loader. The Court of Appeal not only endorsed this approach, it paid tribute to the way in which the Recorder had dealt with the case.

52. In *Bell*, confiscation orders were made in respect of evaded duty on tobacco products smuggled into the United Kingdom for resale. The prosecution had wrongly claimed benefit in the sum of the evaded duty as a pecuniary advantage although (it transpired) the defendants could not in law be liable for it. The defendants had consented to confiscation orders in those sums. On their appeal against the confiscation orders the prosecution argued that because the defendants had consented to the orders, they were bound by them. It was submitted that it was for the defendants to spot the error and having not done so, leave to appeal should be refused. This submission was forthrightly rejected by Hooper LJ, who delivered the judgment of the court. Stating that the arguments were neither convincing nor attractive, Hooper LJ said at para 14:

> "In our view it would be a grave injustice not to grant leave in cases such as the present cases … on the basis that there has been a previous misconception as to the state of the law, there would be a substantial injustice if we did not grant leave."

53. On the same basis it would be manifestly unfair to require the appellants in this case to be bound by their consent to the confiscation orders when, as pointed out in para 45 above, the only possible explanation for the consent was that it was given under a mistake of law. The Court of Appeal in para 40 of its judgment had suggested that the appellants "were, on advice, prepared to consent to confiscation orders by way of a compromise of the legal issues that arose as between them and the Crown in respect of the confiscation applications" and that they "knew perfectly well what their respective roles were in the joint enterprises and what was likely to emerge if they contested the applications for the confiscation orders". This suggests that the court had concluded that there were tactical reasons for consenting to the orders which were not associated with the erroneous belief that the appellants were legally liable to pay the duty and VAT. But there was no evidence to support such a conclusion. On the contrary, the court had been told by the legal representatives of the appellants that the lawyers who had appeared for them on the confiscation proceedings had wrongly advised them that they were liable for the duty and VAT. No challenge to that claim was made by the Crown

nor was it contended that evidence was required to show that wrong advice had in fact been given. Since the only basis on which it had been claimed against the appellants that they had benefited was that they were liable for the duty and VAT, the obvious, indeed the only, inference to be drawn was that they had agreed to the consent orders because they believed that they were indeed liable on that basis. The prosecution had firmly committed itself to that unique case. If the appellants had contested the sole basis on which the prosecution claimed that they had benefited *viz* that they had evaded duty for which they were liable, there is no reason to suppose that this would have exposed them to the risk of disadvantageous evidence which was entirely unconnected with the case that the prosecution had advanced. A finding that there were reasons for the appellants consenting to the confiscation orders other than that they had been advised that they were liable to pay the duty which had been evaded inevitably involves a measure of speculation.

54. I would therefore re-formulate the first certified question so as to properly reflect the particular circumstances of this case; in its amended form the question reads, "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".

The second certified question

55. By way of preamble to consideration of the second certified question, it should be noted that the reason the Court of Appeal dismissed the appeals was that, in its estimation, an alternative basis from that advanced by the Crown existed whereby the appellants could be found to have benefited from their admitted criminal conduct. This circumstance, taken together with the consent to the confiscation orders, was deemed sufficient to refuse to allow the appeals. Where the original basis on which a confiscation order was made is no longer viable, a decision to confirm the order on different grounds must be made with great care and only when it is clear that the person against whom it is to be made has had ample opportunity to address the altered grounds on which it is proposed to make the order.

56. Of course, it may be clear on the established or admitted facts that those who were made subject to a confiscation order on the erroneous basis that they were liable to pay the excise duty under regulation 13(1), are in fact liable under regulation 13(2) because they caused the goods to reach the excise duty point or because they had obtained the value of the goods themselves: see, in this context, *R v Khan* [2009] EWCA Crim 588 at para 8. In such circumstances it would be wrong to quash the confiscation order if it is plain that the order would have been made if the proper basis of liability had been correctly identified.

57. It is apparent that the Court of Appeal in the present case did not regard the appellants as having obtained a benefit on either of the two bases considered in *Khan*. There was no evidence that they had caused the tobacco to reach the excise duty point and no basis on which it could be said that they had received the benefit of the cigarettes themselves. The court followed a different route. It said, firstly, (at para 27) that those who come into possession of goods knowing that duty on them has been evaded and, as part of a joint enterprise, take advantage of the economic advantages flowing from the evasion of the duty *may* gain a financial advantage flowing from their participation in the ongoing enterprise. Secondly, the Court of Appeal found that "the joint actions of the appellants, *at least arguably*, involved possession and control of the cigarettes by those involved in the participation and the enterprise." (para 35 - emphasis added).

58. It is to be noted that the Court of Appeal concluded that these were possible alternative bases on which it *might* be concluded that the appellants had obtained a benefit. It decided that it was unnecessary and inappropriate for the sentencing judges to examine these alternative bases of liability because of the appellants' consent to the making of confiscation orders. For the reasons given above, I do not consider that the trial judges could in these cases be relieved of their duty to be satisfied that the appellants had *in fact* obtained a benefit. It follows that I consider that, if these alternative bases of liability were viable, they would have had to be considered by the judges making the confiscation orders and that it would have been necessary that the appellants have a proper opportunity to address the different foundation on which the confiscation orders might be made against them. On that account, I do not consider that the Court of Appeal's affirmation of the orders made can be upheld.

59. The second certified question is based on the premise that a defendant has had physical possession of the goods and played an active role in the handling of them. What is meant by possession of goods for the purpose of confiscation proceedings and the significance of a finding as to the degree of possession involved has exercised the courts in England and Wales on a number of occasions. It again appears that not all of those cases can have been cited to the Court of Appeal since some of them have not been referred to in the judgment.

60. In *May*, dealing with the requirement under the 1986 Drug Trafficking Offences Act that a defendant be shown to have benefited from his criminal conduct, at para 15 Lord Bingham said:

> "…under the 1986 Act the first question was always whether, on the facts (and allowing permissible inferences) the defendant had benefited by receipt of any payment or other reward, which a mere intermediary might possibly not. It does not necessarily follow from

> the mere possession of drugs that a person is not a mere minder or custodian: see *R v J* [2001] 1 Cr App R (S) 273; *R v Johannes* [2002] 2 Cr App R (S) 109."

61. In other words, it is not to be assumed that because someone has handled contraband, even if that is in the course of a joint criminal enterprise, he has, on that account alone, benefited from that possession. This reasoning applies to the concept of obtaining benefit in both the 1996 Order and POCA. At para 48 of *May* Lord Bingham set out a number of principles to be followed by courts dealing with applications for confiscation orders. The first of these was that the relevant legislation "is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of fine". Later, in the same para, Lord Bingham observed that mere "couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property".

62. The House of Lords returned rather more explicitly to this theme in *Jennings*. In that case (as in *May*) the relevant provision was section 71(4) of the Criminal Justice Act 1988 which, among other things provided that "a person benefits from an offence if he obtains property as a result of or in connection with its commission". At para 13 Lord Bingham said:

> "In its opinion in *R v May* the committee endeavoured to explore the meaning of section 71(4). … The focus must be and remain on the language of the subsection. The committee regards the meaning of the subsection as in substance the same as the equivalent provisions of the drug trafficking legislation. There is a real danger in judicial exegesis of an expression with a plain English meaning, since the exegesis may be substituted for the language of the legislation. 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." (emphasis added)

63. At para 14 Lord Bingham dealt with the question of whether a person who contributes to property being obtained by another might be said to have obtained benefit from it. He said that a person's acts "may contribute significantly to property … being obtained without his obtaining it. … a person benefits from an offence if he obtains property as a result of or in connection with its commission, and his benefit is the value of the property so obtained, which must be read as meaning 'obtained by him'".

64. The focus must be, as Lord Bingham has said, on what benefit the defendant has actually gained. Simply because someone has embarked on a joint criminal enterprise, it does not follow that they have obtained an actual benefit. Being engaged in a conspiracy does not, of itself, establish that each conspirator has obtained the property which is the product of the conspiracy. Thus in *R v Sivaraman* [2008] EWCA Crim 1736, [2009] 1 Cr App R (S) 469, at para 12 (6) the Court of Appeal said:

> "Where two or more defendants obtain property jointly, each is to be regarded as obtaining the whole of it. Where property is received by one conspirator, what matters is the capacity in which he receives it, that is, whether for his own personal benefit, or on behalf of others, or jointly on behalf of himself and others. This has to be decided on the evidence: *Green,* para 15. By parity of reasoning, two or more defendants may or may not obtain a joint pecuniary advantage; it depends on the facts."

65. In the subsequent case of *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58, an argument that the judgment in *Sivaraman* on this point was wrong was firmly rejected: see para 30. In delivering the judgment of the Court of Appeal (the Vice President, Hughes LJ, Toulson LJ, Rafferty J and Maddison J) Toulson LJ dealt with two misconceptions that had also featured in *Sivaraman.* At para 31 he said this:

> "In *Sivaraman* the court also addressed two misconceptions which subsequent cases suggest may still be common. One was that in assessing benefit in a conspiracy case each conspirator is to be taken as having jointly obtained the whole benefit obtained by 'the conspiracy'. A conspiracy is not a legal entity but an agreement or arrangement which people may join or leave at different times. In confiscation proceedings the court is concerned not with the aggregate benefit obtained by all parties to the conspiracy but with the benefit obtained, whether singly or jointly, by the individual conspirator before the court. The second misconception is a variant of the first. It is that anybody who has taken part in a conspiracy in

> more than a minor way is to be taken as having a joint share in all benefits obtained from the conspiracy. This is to confuse criminal liability and resulting benefit. The more heavily involved a defendant is in a conspiracy, the more severe the penalty which may be merited, but in confiscation proceedings the focus of the inquiry is on the benefit gained by the relevant defendant. In the nature of things there may well be a lack of reliable evidence about the exact benefit obtained by any particular conspirator, and in drawing common sense inferences the role of a particular conspirator may be relevant as a matter of fact, but that is a purely evidential matter."

66. Two assumptions must be guarded against, therefore. Firstly, it is not to be assumed that because one has handled contraband one has had possession of it in the manner necessary to meet the requirements of the relevant legislation. Secondly, participation in a criminal conspiracy does not establish that one has obtained a benefit – as Toulson LJ said, this is to confuse criminal liability with resulting benefit.

67. The Court of Appeal in the present case did not examine the evidence with a view to ascertaining whether the appellants could be shown to have had possession of the cigarettes in such a way as is contemplated by the legislation. Before a confiscation order could be made in any of the appellants' cases, such an examination must take place. In its absence the Court of Appeal's decision cannot be upheld. Furthermore, the court's conclusion that the appellants could be considered to have obtained a benefit simply because they admitted participation in a joint criminal enterprise cannot, in the light particularly of the decisions in *Sivaraman* and *Allpress*, be accepted.

68. I would therefore answer the second certified question, "Not necessarily. Playing an active part in the handling of goods so as to assist in their commercial realisation does not alone establish that a person has benefited from his criminal activity. In order to obtain the goods for the purposes of section 156 of POCA 2002 or article 8 of the Proceeds of Crime (Northern Ireland) Order 1996, it must be established by the evidence or reasonable inferences drawn therefrom that such a person has actually obtained a benefit."

69. On an appeal against sentence the Court of Appeal has power under section 10(3) of the Criminal Appeal (Northern Ireland) Act 1980 to quash the sentence passed by the Crown Court and pass such other sentence as is authorised by law. Section 10(3A) of the 1980 Act (as inserted by the Coroners and Justice Act 2009, section 141(2)) provides that where the Court of Appeal exercises its power under subsection (3) to quash a confiscation order, the court may, instead of passing a sentence in substitution for that order, direct the Crown Court to proceed afresh

under the relevant enactment. Section 33(3) (as substituted by the Constitutional Reform Act 2005, section 40, Schedule 9, para 33(4)(b)) provides that, for the purpose of disposing of an appeal under this Part of the Act, the Supreme Court may exercise any powers of the Court of Appeal. I would therefore quash the confiscation orders and remit the cases to the trial courts to proceed afresh in light of this judgment.