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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **30/06/11**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

-v-

AIDAN GREW and HILARY PATRICK McLAUGHLIN

AND

REGINA

-v-

PATRICK MACKLE, PLUNKETT MACKLE and BENEDICT MACKLE

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Before: Morgan LCJ, Girvan LJ and Coghlin LJ

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GIRVAN LJ (giving the judgment of the court)

[1] There are before the court two separate sets of appeals arising out of two trials. In each case the appellants were convicted of fraudulent evasion of duty contrary to section 170(2) of the Customs and Excise Management Act 1979 ("the 1979 Act"). In each set of proceedings the appellants played varying roles in relation to two unrelated cigarette smuggling operations. In each set of proceedings the trial judge made confiscation orders against the appellants on their consent. The appeals raise the question whether the trial judges erred in imposing the confiscation orders. The central contention of the appellants is that the courts in imposing the confiscation orders failed to properly recognise the effect of the Tobacco Regulations 2001 and fell into the error identified in R v. Chambers [2008] EWCA Crim 2467 ("Chambers").

[2] In our judgment we shall deal at the outset with the factual background to the appeals in the two sets of proceedings, firstly, in relation to the case involving Aidan Grew and Henry Patrick McLaughlin and, secondly, in relation to the cases of Patrick, Plunkett and Benedict Mackle. We shall then consider the key submissions made by the appellants, each set of appeals

raising similar issues. We shall then consider the Crown's case in the light of the appellant's case. Finally we will set out the conclusions which we have reached on the issues raised by in the appeals.

R v. Grew and McLaughlin

[3] Grew and McLaughlin each pleaded guilty on 18 November 2008 before Weatherup J to one count of being concerned in the fraudulent evasion of duty under the 1979 Act in respect of some 5 million cigarettes seized from a lorry at premises at Battleford Road, County Armagh. McLaughlin also pleaded guilty to possession of criminal property, namely 19 separate amounts of cash. Another party Abernethy was involved in the enterprise but was not a party to the appeal.

[4] Weatherup J in his sentencing remarks stated that:

> "The defendants Grew and Abernethy were present at the time of the recovery of the items. The matter is put forward on the basis that neither was an importer or organiser in respect of the matter but were present at the time the contraband was recovered. McLaughlin on the other hand was not present. It is the case that is (sic), that the lorry which carried the contraband had stopped at his premises earlier in the day. He was not present when the lorry called at his premises but then connections were made between the contraband and McLaughlin and eventually that led to searches which led to the recovery of other items which it is agreed were the proceeds of criminal, were in fact criminal property."

[5] Grew was sentenced to 3 years imprisonment suspended for 2 years. McLaughlin was sentenced to 2 years suspended for 2 years. The judge in so sentencing took account of the sentencing guideline given by the Court of Appeal in R v. Czyzewski [2004] 1 Crim. App. R (S) 49. He concluded that none of the aggravating factors discussed in that case applied. He accepted that the pleas, being a response to modified counts against the defendants were offered at the first opportunity. There was no record of previous relevant offending against the defendants. He took account of the limited role of the defendants as put forward in their plea. He concluded that while a custodial sentence was appropriate in respect of both the appellants, because of the exceptional circumstances and in the light of the Crown's pragmatic approach in the management of the charges he should suspend the sentence.

[6] The appellants having been convicted, the prosecution asked the court to make confiscation orders. Weatherup J proceeded to consider whether he

should do so. In this case he had to decide whether the appellants had benefited from their particular criminal conduct. The recoverable amount would be the defendants' benefit arising from the conduct concerned. If the defendants showed that the available amount was less than the benefit the recoverable amount was the available amount. It was contended by the Crown and not contested by the defendant Grew that the benefit accruing to him was some £500,000 and the available amount was that sum. The court made a confiscation order against Grew in the sum of £500,000. In respect of McLaughlin the benefit was stated by the Crown and agreed by McLaughlin to be £100,000 and the available amount was agreed at £100,000. A confiscation order was made against McLaughlin in that sum.

R v. Patrick Plunkett and Benedict Mackle

[7] The appellants initially pleaded not guilty to being concerned in the fraudulent evasion of duty contrary to section 170(2) of the 1979 Act in respect of 5 million cigarettes seized from premises in County Armagh. During the trial the defendants asked for and were granted a Rooney hearing before the trial judge with a view to ascertaining the likely level of sentence if they pleaded guilty. The trial judge acceded to that application. If a judge sitting alone, as the trial judge was in this instance, is requested to agree to a Rooney hearing and a fortiori if he conducts such a hearing he would, of course, be bound to discharge himself from the trial thereafter if the defendants did not in fact plead guilty as a result. That would necessitate a retrial. For those reasons considerable care needs to be taken by a judge trying a case on his own when considering of the question whether a Rooney hearing is appropriate. As matters turned out the appellants did plead guilty to the counts of offences under section 170(2)(a) of the 1979 Act. Hence no complication arose in fact.

[8] Plunkett and Benedict Mackle entered pleas on the basis that they were labourers engaged to unload the cigarettes from the lorry. The Crown informed the court that it had no evidence to suggest that they were involved in any capacity other than as assisting the unloading of the container. In respect of the appellant, Patrick Mackle, he was the owner of the premises at 114 Ballynakilly Road where the cigarettes were recovered. He relied on a rental agreement between himself and a tenant and it was his case that the tenant asked him to arrange for the unloading of the container. He claimed he did not know the person who leased the property from him. The prosecution asserted that the evidence at its height suggested an organisational role by Patrick Mackle. The Crown in presenting the facts before the pleas said that it would ultimately be a matter for the trial judge to make a judgment about that issue.

[9] The trial judge sentenced each of Benedict Mackle and Plunkett Mackle to 3 years suspended for 5 years. In his sentencing remarks the judge noted that the case involved a sophisticated importation and smuggling of cigarettes

into the United Kingdom, the cigarettes being imported from Malaysia in a container containing wooden flooring which the bill of lading represented to be the entire contents of the container. Customs officers in Southampton detected the presence of the cigarettes with the aid of scientific equipment. A search indicated the presence of the 5 million cigarettes in the container. The Customs allowed the container to proceed to Northern Ireland with the intention of identifying the recipients. The container ended up at 114 Ballynakilly Road. Benedict and Plunkett Mackle and two other men were there to unload it. The four men removed the upper level of wooden flooring thereby exposing the boxes which contained the cigarettes. The role of Patrick Mackle was to request his two brothers to attend his yard to unload the cigarettes. The judge recognised that there were contentious issues regarding the admissibility, relevance and inferences to be drawn from the evidence against Patrick Mackle. The judge concluded that he had some limited organisational role in the matter. The judge stated that the Crown accepted the plea on that basis but not that he could be described as the ring leader or a ring leader of this conspiracy to import the cigarettes which clearly involved other persons not before the court. He proceeded to sentence taking that approach.

[10] In sentencing, the judge mentioned the absence of aggravating features such as were identified in R v. Czyzewski in relation to Benedict and Plunkett Mackle with only one applying in the case of Patrick Mackle. He noted that Rose LJ stated that in the case of economic crimes prison is not necessarily the only appropriate form of punishment, particularly in the case of those who have no record of previous offending. The judge also noted the time the case had taken to reach trial, a factor which under Strasbourg jurisprudence should be taken into account. The appellants argued that that should go in favour of a suspended sentence. He noted the absence of relevant records. He also took account of the fact that the operator related to cigarettes rather than illegal drugs. He noted that there would be a very substantial confiscation in the case and the fact that somebody was to be deprived of a large sum of money was particularly relevant to the sentences in this case.

[11] At a later hearing on 29 October 2008 Crown Counsel informed the court that Patrick Mackle agreed to a confiscation order in the sum of £518,387 to be paid on or before 29 April 2009. In the case of each of Benedict Mackle and Plunkett Mackle counsel informed the court that they consented to a confiscation order in the sum of £259,193. It was agreed that the global benefit was £1,037,775. The judge then made an order finding that the benefit and realisable amount was £518,387. He made a confiscation order against Patrick Mackle in that amount payable by 29 April 2009 with 5 years' imprisonment in default. In respect of each of Benedict Mackle and Plunkett Mackle he made confiscation orders in the sum of £259,193 payable by the same date with 3 years' imprisonment in default.

The appellants' case

[12] The appellants' case is that the confiscation orders were wrongly made. Counsel argued that the proper question which the sentencing courts should have considered was whether the appellants were personally liable for the duty evaded and, hence, whether they could be said to have "benefited" from their conduct so as to make them liable to a confiscation order. This should have been determined by reference to the 2001 Regulations which replaced the earlier Excise Goods (Holding, Movement and Warehousing and REDS) Regulations 1992 ("the 1992 Regulations"). Under the correct application of Regulation 13 of the 2001 Regulations none of the appellants would properly have been considered to be persons who benefited from the conduct in question in that they had not evaded a liability for which they were personally liable. Under Regulation 12(1) of the 2001 Regulations it is provided that the excise duty point for tobacco products is the time when the tobacco products are charged with duty. By virtue of section 5(2)(a) of the 1979 Act the time of importation and, consequently, the excise duty point was to be deemed to be "where the goods are brought by sea, the time when the ship carrying them comes within the limits of a port." In the case of the Mackles the point of importation was Southampton and in the case of McLaughlin and Grew the excise point was unknown. Counsel for the appellants relied on R v. Chambers [2008] EWCA Crim 2467. In that case it was discovered that Customs prosecution officers had been proceeding for a number of years relying on the 1992 Regulations overlooking the fact that the 2001 Regulations had changed the law. Under the 1992 Regulations any person acting on behalf of an importer could be held liable with the importer for the duty evaded. It was argued that as from 1 June 2001 when the 2001 Regulations came into effect any determination as to whether a person can be considered to have obtained a benefit by way of pecuniary advantage through evasion of personal liability to pay duty is by reference to an application of those Regulations. Under Regulation 13 any person liable to pay the duty is the person holding the tobacco products at the excise point. Under Regulation 13 any person who is specified in paragraph (3) is jointly and severally liable to pay the duty. The only category of person relevant in the present case had to fall within (e) "any person who caused the tobacco products to reach an excise duty point".

[13] Counsel argued that in the light of the authorities post-Chambers, such as R v. Khan [2009] EWCA Crim 588, in a smuggling case it will generally be the case that the person liable to pay the duty will be the person holding the products at the excise duty point and any person who caused the tobacco products to reach an excise point being the port of entry to the United Kingdom. In R v. Khan et al the defendants had a modest organisational role in the collection and distribution of the smuggled goods. They were held not to be responsible for the importation and were not liable for the duty and were

held not to have obtained the benefit such as to render them liable to confiscation orders.

[14] Counsel argued that Chambers makes clear that where the Crown agrees a basis of plea that basis is binding as to the Crown and the court considering confiscation. If the basis is not agreed the judge will be required to hear evidence and reach his own conclusion as to the part played by the defendant.

[15] Counsel contended that the confiscation orders were made in the mistaken belief common to all the parties that the provisions of the 1992 Regulations were extant or had been imported into the 2001 Regulations. The orders were not sustainable in law and thus consent to the making of the orders was irrelevant. In R v. Mitchell [2009] EWCA Crim 214 the trial judge did not accept a concession by the appellant that he was liable for duty and embarked on an enquiry to determine if the defendant was liable in law. The Court of Appeal commended the trial judge for taking that course for by doing so he had avoided a miscarriage of justice.

Chambers and the later authorities

[16] Toulson LJ in Chambers stated at paragraph [52]:

> "On the hearing of the appeal [counsel] 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 to evade the payment of duty payable by that other person, with 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, e.g. 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 and of the relevant Regulations."

In paragraph [60] he stated that it was a matter of considerable concern that the Recorder was not taken to the relevant Regulations.

[17] In R v. White [2010] EWCA Crim 978 Hooper LJ stated at paragraphs [3], [4], [5], [7] and [8]:

> "3. Under both the Criminal Justice Act 1988 and its successor the Proceeds of Crime Act 2002 if a person obtains a pecuniary advantage as a result of or in connection with an offence (the 1998 Act) or with conduct (the 2002 Act) he is treated, for confiscation purposes, as having received a sum of money equal to the pecuniary advantage (see section 71(5) of the 1988 Act and section 76(5) of the 2002 Act). Thus his benefit will be deemed to include a sum of money equal to the pecuniary advantage.
>
> 4. However, 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. This was established by the House of Lords in May [2008] UKHL 28 and Jennings [2008] UKHL 29 and applied in Chambers (2008) EWCA 2467 and Mitchell [2009] EWCA Crim. 214.
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> 5. In May the House of Lords said in paragraph 48 that the defendant "ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject" (underlining added). The House pointed out that more than one person could be personally liable.
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> 8. The relevant regulations will determine whether a defendant personally owes a duty or VAT, subject to the compatibility of those Regulations with the primary domestic legislation and the relevant EC Directive. However before the law was clarified by the House of Lords in May and Jennings, the Regulations were generally unimportant in confiscation hearings since whether the defendant personally owed the duty or VAT did not matter because he would normally have contributed to the evasion to the duty or VAT by another."

The Crown's argument

[18] Mr McCollum QC contended that on a charge under section 170(2) the prosecution must prove that there had been a fraudulent evasion or attempt at evasion of duty in relation to any goods in respect of goods chargeable with the duty and that the accused was knowingly concerned therein. That necessitated some act of participation in the venture. Anyone who is knowingly concerned in the evasion of the duty has obtained the benefit of the duty. Evasion continues until the duty is paid on the goods or until they are exported (per Ormrod LJ in R v. Green [1976] QB 985). Although importation occurs at a precise time at the excise point a person concerned in the importation may play his part before or after that moment. A person dealing with the cigarettes after the excise point is still concerned in the evasion of the duty and has responsibility for it. He has obtained the benefit of the evasion of the duty in connection with the offence. In all the cases relied on by the appellants the defendants were convicted of offences contrary to section 170(1)(b) which did not necessarily require participation in the evasion of duty on the cigarettes or their guilt of being knowingly concerned in the evasion of duty. Counsel contended that what matters was whether someone had obtained property or money or a pecuniary advantage, not whether he retained it. It is open to the judge to infer that a defendant has a beneficial interest in cigarettes in the absence of contradictory evidence. In this case the appellants consented to the orders thereby recognising that they had obtained property, money or a pecuniary advantage. The court should rely on the statutory wording and what Lord Bingham stated not only in R v. May but also in Jennings v. CPS:

> "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."

In these appeals the consent to the orders indicates an acceptance by the appellants that they had, indeed, obtained property or derived a pecuniary advantage. No judicial inquiry was necessary by reason of the appellants' consent to the making of the orders.

[19] Counsel contended that whether a defendant is personally liable in a civil sense to pay an excise duty is not the test of whether he has criminally benefited from the offence. Indeed in so far as R v. Chambers, R v. Khan and R v. White suggest that that is the test, they were wrongly decided. The benefit in cigarette smuggling cases is the value of the duty evaded, not the liability for the duty. A person with no personal liability to pay the duty can still obtain the value of the goods on which duty is evaded. The appellants were jointly and severally liable in a criminal joint enterprise. Aiders and abettors have joint responsibility with the principal.

[20] Mr McCollum argued that the 1992 Regulations had no relevance since they related to importation from other Member States of the EU. No argument was addressed to the trial judges on the impact of the 2001 Regulations because all the appellants and their advisors must have recognised that by pleading guilty they accepted the level of benefit which they agreed that they had obtained.

[21] The confiscation orders had the status of the contract between the parties (Weston v Dayton [2006] EWCA Civ. 1165). In R v Hirani [2008] EWCA the court made clear that consent orders would only be set aside in exceptional circumstances. There would have to be a well founded submission that the whole process was unfair. In these cases the parties consented to confiscation orders after the decision in chambers. They were fully represented. In the case of Grew and McLaughlin the prosecution agreed not to proceed in relation to the evasion of duty on some 10 million further cigarettes. The parties insisted on negotiating an agreed amount rather than being assessed by the judge. In the case of Grew and McLaughlin the appellants insisted that the orders be made on consent for agreed amounts as pre-requisite of their pleas of guilty. The prosecution could have proceeded against all the appellants with the full amount of the duty and the value of the cigarettes in the absent of consent and compromise. In the case of Patrick Mackle the Crown had ample material to establish that he was an organiser and importer. In the Mackle case the trial judge (albeit incorrectly) took into account the making of confiscation orders against the appellants leading to a significantly lenient sentence.

Discussion

[22] Where a person imports dutiable cigarettes into the country he becomes liable to the duty at the excise point which in the case of importation by sea means arrival at the limits of the port of entry. Regulation 13 of the 2001 Regulations makes the person holding the tobacco products at the excise duty point liable to pay the duty. That liability is extended by Regulation 13(3)(e) to any person who caused the tobacco products to reach the excise duty point.

[23] In Chambers counsel for the Crown accepted that the appellant would only have obtained a benefit by way of pecuniary advantage in the form of evasion of excise duty if he himself was under a liability for the payment of that duty which he dishonestly evaded. The defendant in that case was found in a car containing keys which opened a padlocked area securing a storage container containing tobacco packages. He pleaded guilty to an offence under section 170(1)(b) of the 1979 Act of being knowingly concerned in keeping, concealing or dealing with goods which were chargeable to duty which had not been paid with intent to defraud the Crown of the duty chargeable on the goods. The trial judge held that he had received a pecuniary advantage equal to the value of unpaid duty concluding that he provided an important link in the chain between the importers and the ultimate sale up to which point no profit could actually be realised. The Court of Appeal approached the question thus:

> "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."

It concluded that he was not.

[24] In the present cases the appellants were charged with and pleaded guilty to offences under section 170(2):

> "Without prejudice to any other provision of the Customs and Excise Management Act 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempted evasion –
>
> (a) of any duty chargeable on the goods;
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> (b) of any prohibition or restriction of the time being in force with respect to the goods under or by virtue of any enactment; or
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> (c) of any provision of the Customs and Excise Act 1979 applicable to the goods,
>
> he shall be guilty of an offence under this section and may be detained."

[25] Under section 25(1) of the Finance Act 2003 where a person engages in any conduct for the purpose of evading any relevant tax or duty and his conduct involves dishonesty (whether or not such as to give rise to criminal liability) that person is liable to a penalty of an amount equal to the amount of the tax or duty evaded or sought to be evaded. When a person is convicted of an offence by reason of such conduct section 25(6) provides that such conduct does not give rise to a liability to a penalty under the section in respect of that tax or duty.

[26] If the appellants were involved in the importation of the cigarettes then liability for duty would have arisen under Regulation 13 of the 2001 Regulations. If they were not they would not be so liable. If, as they admitted, they were knowingly concerned in the evasion of duty they would appear to have been liable to a penalty equal to the amount of the duty evaded under section 25(1) of the 2003 Act but since they were convicted of the offence, they are not liable to the penalty because of section 25(6). In the light of Chambers, if they were not participants in the actual importation, they would not be liable for the duty as such and thus could not be said to have obtained a pecuniary advantage for the purposes of the 2001 Regulations.

[27] That conclusion is not, however, the end of the matter. 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. This can be illustrated by a simple example. X smuggles cigarettes into the United Kingdom evading the payment of duty at the point of entry. The cigarettes illegally freed from the duty payable on them represent a valuable asset to X enhanced by the absence of the duty. If X passes the cigarettes on to Y who has knowledge of the evasion of the duty Y gains the economic advantage of having effectively duty free cigarettes which he can sell at a considerably greater profit. The goods can be sold on at prices discounted compared to the legitimate trade market cost of cigarettes which reflects the imposition of duty. Those acting in the joint enterprise with Y are participating in a venture designed to enable those involved to profit from the criminal evasion of the duty. The evasion of duty is an ongoing offence and continues until the goods are no longer tainted by the evasion of the duty (cf. Ormrod LJ in R v Green [1976] 1 QB 985).

[28] Section 156 of the Proceeds of Crime Act 2002 so far as material provides as follows:

"(1) The Crown Court must proceed under this section if the following two conditions are satisfied.

(2) The first condition is that a defendant falls within either of the following paragraph –

(a) he is convicted of an offence or offences in proceedings before the Crown Court;
(b) …….

(3) The second condition is that –

(a) the prosecutor or the Director asked the court to proceed under this section; or

(b) the court believes it is appropriate for it to do so.

(4) The court must proceed as follows –

(a) …….

(b) ……

(c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.

(5) If the court decides under sub-section 4(b) or (c) that the defendant has benefited from the conduct referred to it must –

(a) decide the recoverable amount; and

(b) make an order (a confiscation order) requiring him to pay that amount.

….

(7) The court must decide any question arising under sub-section (4) or (5) on a balance of probabilities."

Under section 158 it provides:

"(1) If the court is proceeding under section 156 this section applies for the purpose of –

(a) deciding whether the defendant has benefited from conduct; and

(b) deciding his benefit from the conduct.

(2) The court must –

(a) take account of conduct occurring up to the time it makes it decision .."

Under section 224 dealing with conduct and benefit is provided:

"(1) Criminal conduct is conduct which –

(a) constitutes an offence in Northern Ireland …

(3) Particular criminal conduct of the defendant is all his criminal conduct which falls within the following paragraphs -

(a) conduct which constitutes the offence or offences concerned;

(b) conduct which constitutes offences of which he was convicted in the same proceedings as those in which he was convicted of the offence or offences concerned;

(c) conduct which constitutes offences which the court will be taking into consideration in deciding his sentence for the offence or offences concerned.

(4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.

(5) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.

> (6) References to property or a pecuniary advantage obtained in connection with conduct includes references to property or a pecuniary advantage obtained both in that connection and some other.
>
> (7) If a person benefits from conduct his benefit is the value of the property obtained."

[29] In the present cases it was not in issue that the appellants had committed criminal conduct, as their pleas make clear. For the purposes of the making of confiscation orders the issue was whether they had *benefited* from the criminal conduct. This, in turn, depends on whether they had *obtained* property as a result and in connection with the offences. This is a separate question from whether they obtained a pecuniary advantage as a result of evading duty at the point of importation. Furthermore, as the example of X and Y set out in paragraph [27] demonstrates Y may gain a separate pecuniary advantage flowing from the fact that X has evaded the duty at the point of entry on importation. That pecuniary advantage, as the example demonstrates, arises from the financial advantage flowing from the fact the dutiable goods have escaped the duty properly due on them.

[30] In R v Smith [2001] UKHL 68 the question before the House of Lords was whether an importer of uncustomed goods who intended not to pay duty on them derived a benefit under section 74 of the Criminal Justice Act 1988, the predecessor of the 2002 Act, through not paying the required duty at the point of importation where the goods were forfeited following importation before their value could be realised by the importer. In the course of his speech Lord Rodger stated:

> "… when considering the measure of the benefit obtained by an offender in terms of section 71(4), the court is concerned simply with the value of the property to him at the time when he obtained it or, if greater, at the material time. In particular, where the offender has property representing in his hands the property which he obtained, the value to be considered is the value of the substitute property … Except, therefore, where the actual property obtained by the offender has subsequently increased in value, the court is simply concerned with its value to the offender "when he obtained it". It therefore makes no difference if, after he obtains it, the property is destroyed or damaged in a fire or is seized by customs officers: for confiscation order purposes the

> relevant value is still the value the property to the offender when he obtained it."

Nothing was said in the cases of R v May [2008] UKHL, Jennings v CPS [2008] UKHL 29 and R v Green [2008] UKHL 30 to call into question the correctness of Lord Rodger's statement of the governing principles in that context.

[31] In R v Wilks [2003] EWCA Crim 848 the appellant was convicted on one count of aggravated burglary. He was arrested while the burglary was in progress and all the stolen goods were recovered. The Court of Appeal concluded the appellant had obtained the property. It was irrelevant that he was unable to realise the property because of police intervention. The Court of Appeal concluded that the matter was put beyond argument by the House of Lords decision in R v Smith.

[32] In May the House of Lords stated that the 2002 Act is intended to deprive defendants within the limits of their available means of the benefits gained from relevant criminal conduct whether or not they have retained such benefit. The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators. The House pointed out that there are three questions to be addressed. Firstly, has the defendant benefited from the relevant criminal conduct? Secondly, if so, what is the value of benefits so obtained? Thirdly, what sum is recoverable from D? D ordinarily obtains property if in law he owns it whether on loan or jointly. This will ordinarily confer a power of disposition or control. In May the House of Lords did not address the question decided previously in R v Smith and nothing in that case questioned its correctness. The House of Lords make clear in its decisions that guidance should ordinarily be sought in the statutory language itself rather than in the proliferating case law. The language of the statute is not arcane or obscure and any judicial gloss or exegesis should be viewed with caution. In reading the references to benefit in May one must bear in mind the statutory definition of benefit. Under the statute a benefit arises if the defendant obtains property by virtue of the criminal conduct.

[33] In Green the House of Lords cited with approval the judgment of David Clarke J in the Court of Appeal in that case. He stated:

> "For the reasons given earlier, however, we consider that where money or property is received by one defendant on behalf of several defendants jointly, each defendant is to be regarded as having received the whole of it for the purposes of section 2(2) of the Act. It does not matter that the proceeds of sale may have been received by one conspirator who retains his

> share before passing on the remainder; what matters is the capacity in which he received them."

[34] In this jurisdiction this court in R v Leslie [2009] NI 93 reviewed the authorities. In that case the applicants and three other accused persons were convicted of the theft of eleven quad bikes. They pleaded guilty to the theft. The sentencing judge made each of the applicant's subject to a confiscation order in the sum £32,000 under the Proceeds of Crime Act representing the value of quad bikes. He rejected the applicant's argument that because the bikes had been recovered by the police while they were being transported away from the scene of the crime the applicants had obtained no benefit. This court stated at paragraph 18:

> "From the authorities we are driven to the conclusion that the applicants must be held to have benefited from the property criminally obtained from the true owner of the quad bikes. They obtained possession and control of those items as thieves which gave them a possessory title pending their return to the true owner. The subsequent seizure of the items by the police did not negate their obtaining of the items which gave rise to the statutory benefit. Green makes clear that each of the thieves who are joint conspirators in the theft obtained the goods and thereby each of them benefited from them. May makes clear that where assets are held jointly there is nothing wrong in principle in making a confiscation order for the whole of the benefit as against each of the defendants severally. …."

[35] In the two separate cigarette smuggling operations cigarettes were smuggled into the country without the payment of duty with the evident intention of turning those smuggled cigarettes to account in this country, the profitability in the exercise flowing from the evasion of the duty. 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 enterprise.

[36] Viewed in that way a conclusion that each of the appellants had *obtained* property in connection with the criminal conduct for the purposes of section 224(4) or obtained a pecuniary advantage as described in paragraph [29] was one that could be reached by a court exercising powers under the 2002 Act depending on its final view of all the relevant evidence.

[37] It is not necessary to establish that the sentencing judges were bound to reach such a conclusion before imposing the confiscation orders on the appellants. It was unnecessary and inappropriate for the courts to go on to hear further evidence or make findings of fact on such evidence. The appellants on advice consented to the making of such orders. As pointed out in Millington and Sutherland Williams on the Proceeds of Crime (3rd Edition) at paragraph 11.21:

> "Defendants and third parties should take great care when agreeing consent orders with the prosecutor to check the terms proposed and ensure they are content to be bound by them. Once a consent order has been agreed, it has the status of a contract between the parties and will be interpreted as such."

[38] In R v Bailie [2007] EWCA Crim. 2873 the appellant sought to reopen a confiscation order made on consent. MacKay J giving the judgment of the court said at paragraph [11] and [13]:

> "[11] When asked what this court's basis of intervention should be [counsel] who now appears for the appellant answered that the confiscation order was manifestly excessive or wrong in principle. He argues that the position equates to that where a guilty plea is entered on erroneous legal advice and the defendant seeks to vacate that plea in appeal against his conviction. In our view a better analogy would be where a defendant pleaded guilty on the basis of erroneous legal advice: for example, that he would not receive a custodial sentence. We cannot see this court readily acceding to an argument in those circumstances that the resultant sentence was for that reason manifestly excessive or wrong in principle.
>
> [13] This is an appeal against sentence … . Therefore the traditional grounds for entertaining and allowing such an appeal are limited to those which [counsel] today argues, or to where the sentence was unlawful (and that is not arguably the case here) or

> where it was passed on a wrong factual basis (that is not the case; there was agreement between the parties), or where matters were improperly taken into account or where fresh matters should be taken into account."

The court went on to dismiss the appeal against the confiscation order which "was made with the consent of the appellants albeit in reliance on legal advice which may or may not have been incorrect."

[39] In R v Hirani [2008] EWCA Crim. 1463, which again dealt with an appeal against a confiscation made on consent Burnett J noted that the judge made the confiscation order on consent on the basis he was invited to do by the appellant. He did not proceed on a wrong factual basis as for example may happen if a judge sentences on a factual basis not available on the material before him. At paragraphs [35] and [40] he said:

> "[35] In other jurisdictions, those who have entered into consent orders may set them aside on very narrow grounds. We do not exclude the possibility in the arena of confiscation orders that such circumstances might conceivably arise. But we do not consider that they arise where the essence of the complaint is that, in seeking to secure the best deal available, erroneous advice was given to one of those who was party to the agreement, save in the most exceptional circumstances. We would not wish to identify exhaustively what those circumstances might be but, in our judgment, there would need to be a well-founded submission that the whole process was unfair. We do not consider that the circumstances of this case come close to that.
>
> [36] We see no warrant for reading over generally the approach that has developed in appeals against conviction based upon erroneous advice into confiscation proceedings. There is a fundamental difference between sentence and conviction. On an appeal against conviction, where it is suggested that erroneous legal advice resulted in a guilty plea, the court may allow the appeal and then a trial will take place. The defendant will be either acquitted or convicted and, if convicted, he will be given an appropriate sentence. On a successful appeal against sentence, the matter is not sent back to the

> court with the issue, as it were, at large. ……. So if [counsel] were correct, an appellant in Mr. Hirani's position could appeal to this court, having agreed the confiscation order on a false basis, and seek to set it aside, but in doing so he would deny the prosecution the possibility of contending for a higher figure. In other words, the prosecution would in effect be bound by the agreement from which the appellant, on this hypothesis, had been released. That would, in our judgment, be an undesirable - not to say extremely odd - result."

[40] From these authorities we conclude that even if the appellants were incorrectly advised to consent to the confiscation orders they are bound by the orders made on consent. In fact it has not been shown that the sentencing judges made the consent orders on an incorrect legal or factual basis. 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 those admissions. The legal arguments as set out in paragraphs [35] and [36] were at least arguable. 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. They would moreover have been aware that in confiscation proceedings the Crown may prove its case on a balance of probabilities whereas, when dealing with the factual basis on which a defendant has pleaded guilty, it must prove that factual basis beyond reasonable doubt. The appellants 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. In the circumstances the appellants have shown no reason for reopening the admissions which they made on advice. The confiscation orders must, accordingly, stand.

The Crown's challenge to the sentences

[41] Mr McCollum argued that the sentencing judges were unduly lenient in suspending the sentences in these cases which, he argued, justified actual custodial sentences. He argued that in this jurisdiction it is open to the Court of Appeal to increase a sentence where a defendant appeals although such a power is not available to the Court of Appeal in England and Wales. His argument was presented in the context of the appellants' appeals against the confiscation orders which, if set aside, would have resulted in his submission in the actual sentences failing to meet the justice of the case in which, on their own clear admission, the appellants benefited from their criminal activity.

[42] Deeny J was in fact, in error, in treating the fact that he was likely to make a confiscation order as a reason to justify the suspension of the sentences. The 2002 Act makes clear that the fact that a confiscation order is made is not a relevant factor to the sentencing judge who has to fix the appropriate sentence for the offence. It may well be that if the sentencing judge had appreciated that fact he would not have taken the lenient course which he did.

[43] While this court can undoubtedly increase the sentence on appeal by a defendant it is a course which should only be taken in exceptional circumstances. Were it otherwise the power could inhibit appellants who may have arguable or meritorious appeals and it could thus inhibit the right of access to the court for redress. While the course taken by the sentencing judges in the present appeal resulted in lenient sentences, having regard to the whole course of the proceedings we consider it would be unfair in the circumstances to intervene by way of increase of the sentences at this point.

[44] However, having regard to the quantity of the smuggled goods, the degree of organisation involved in the enterprise and the amount of duty evaded we consider that a lengthy custodial sentence should be the norm. We are not convinced that the circumstances of these cases were sufficiently exceptional to justify the leniency shown by the sentencing judges in suspending the sentences. This type of smuggling activity represents a heavy drain on the public exchequer, involves complex and expensive investigation, and results in criminals making substantial profits at the expense of the public and legitimate trade. Accordingly, we consider that it should normally attract a substantial deterrent custodial sentence.

Disposal of the appeal

[45] In the result we dismiss the appeals.