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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | **Delivered: 29/6/2012**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

Respondent;

-v-

DAVID EDWIN ALLINGHAM
FREDA ELIZABETH ALLINGHAM

Appellants.

_____

THE QUEEN

Respondent;

-v-

JOHN McKENNA

Appellant.

_____

THE QUEEN

Appellant;

-v-

JOHN McKENNA

Respondent.

_____

Before: Higgins LJ, Coghlin LJ and Treacy J

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THE APPEAL OF DAVID EDWIN ALLINGHAM AND FREDA ELIZABETH ALLINGHAM

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HIGGINS LJ

[1] Following a trial before his Honour Judge Babington and a jury at Omagh Crown Court, David and Freda Elizabeth Allingham were convicted of two counts (Counts 2 and 3 in the indictment) contrary to the Waste and

Contaminated Land (Northern Ireland) Order 1997 (the Order). Count 1 was not proceeded with. Count 2 contrary to Article 4(1)(c) and (6) of the Order alleged that –

"David Edwin Allingham and Freda Elizabeth Allingham on the 4 day of December 2003 in the County Court Division of Fermanagh and Tyrone kept controlled waste in a manner likely to cause pollution of the environment or harm to human health.

Count 3 contrary to Article 4(1)(c) and (6) of the Order alleged that –

David Edwin Allingham and Freda Elizabeth Allingham between 8th day of December 2003 and 28th day of July 2004 in the County Court Division of Fermanagh and Tyrone kept controlled waste in or on land otherwise than under or in accordance with a Waste Management Licence."

[2] David Edwin Allingham was sentenced to 9 months imprisonment on counts 2 and 3 concurrently. Freda Elizabeth Allingham was sentenced to 4 months imprisonment on Counts 2 and 3 concurrently and both sentences were suspended for a period of two years. At a later hearing Judge Babington made a Confiscation Order against Mr Allingham in the amount of £48,520.80 and imposed a further period of 16 months imprisonment in default of payment by a due date. He also made a Confiscation Order against Mrs Allingham in the amount of £32,347.20 and imposed a period of 14 months imprisonment in default.

[3] Mr and Mrs Allingham reside at Garrison in County Fermanagh where they run a farm. Both are partners in the farming operation but in addition Mrs Allingham is a senior staff nurse at the Shiel Hospital in County Donegal. Following allegations regard the dumping of waste on their lands an investigation was carried out by Fermanagh District Council. A visit to the lands revealed evidence of excavations having been carried out beside the farm house. On 17 July 2003 a notice was issued to the Allinghams informing them that the District Council would be entering the lands on 27 August 2003 for the purposes of a survey. On that date access to the lands was denied to the District Council by farm vehicles blocking the entrance to the farmyard. Mr Allingham was present. The purpose of the survey was explained to him but he continued to deny access to the lands. Subsequently on 5 November 2003 a court order was obtained by the Council and served on Mr Allingham. On foot of that order a survey of the lands was carried out on 4 December 2003 at which officers of the Environment and Heritage Service (EHS) were present. Excavations at the site revealed substantial quantities of decomposing controlled waste which had been deposited close to the

farmhouse and within view of it. There was a strong smell of decomposing waste and gas was escaping from puddles of water on the ground. Mr and Mrs Allingham were invited for interview but did not respond to the invitations and neither has ever said anything by way of explanation relating to the charges preferred against them and of which they were convicted or given evidence either at their trial or at the confiscation hearing. It appears the waste originated in the Republic of Ireland and agencies in that jurisdiction are responsible for the removal of the waste and the reinstatement of the lands. Following the conviction of the Allinghams a Confiscation Order under section 156 of the Proceeds of Crime Act 2002 (the Act) was sought against both of them in the sum of £80,868.00. This sum was made up of three amounts. The first amount was £20,000 which represented the sum received by them in respect of permitting the waste to be left in their lands. It was agreed between the prosecution and the defence that the Allinghams were paid £5 for each of the 4000 tonnes of waste which had been deposited on the lands. The second amount was £52,000 which represented the amount the Allinghams did not pay as Landfill Tax on the waste, which at the relevant time was £13 per tonne. The third amount was £8,867.57 which represented, over time, the upward change in the value of the sums agreed in respect of the first and second amount above (inflation).

[4] Pursuant to an order made by the trial judge under section 168 of the Act Mr Allingham provided information relating to the waste by way of two statements or affidavits. These related to payments received in respect of the waste deposited on the lands, various bank accounts, the amount and value of farm machinery they owned and the value of their various lands. He averred that he received £200 per load of waste and that his total benefit amounted to £14,000 and that all payments were made in cash and in Euros. In relation to the payments he said he kept records of some loads and payments. Various dates in late 2003 and early 2003 were mentioned. He stated he received some 30 loads of waste after 20 May 2003, but received credit for these set off against debts to a named person. He also referred to lodgements made to banks in the Republic of Ireland and Northern Ireland. It appears that most of the lodgements were made by Mrs Allingham.

[5] In his ruling on the confiscation application the respected trial judge stated that at the hearing certain matters were accepted and could be said to be agreed between the parties. He detailed these as -

> "Although the recoverable amount - £80,868.00 could in the view of the prosecution be directed against each defendant they were only seeking a recoverable order of that sum against both the defendants and it would be a matter for the court if that should be apportioned and if so by how much."

[6] It was accepted that the defendants had sufficient realisable assets to meet the recoverable amount and accordingly there would be no need for the court to prepare a schedule under section 159 of the Act.

[7] In accepting that the defendants had sufficient realisable assets it was made clear by defence counsel that liability itself was not accepted.

[8] In the case of Mr Allingham the trial judge determined that the benefit and the recoverable amount were each £48,520.80 and made the Confiscation Order in that amount. In the case of Mrs Allingham he determined that the benefit and the recoverable amount were each £32,347.20 and made the Confiscation Order in that amount.

[9] It was submitted to the trial judge that the Proceeds of Crime Act did not become operative in Northern Ireland until 24 March 2003. Therefore any payments received by the appellants or deposits of waste made prior to that date could not be considered for the purposes of an application for a confiscation order. The money paid was for depositing the waste whereas the convictions were for keeping the waste and in those circumstances no order should be made against either of them. It was further submitted that, as this was not a criminal lifestyle case, the prosecution had to prove that the Allinghams had benefited from their criminal conduct. The prosecution alleged that the benefit to them was the evasion of duty but it was submitted that neither Mr nor Mrs Allingham were ever liable to pay duty and therefore could not have benefited by way of a pecuniary advantage. Even if they had benefited in the manner alleged it was not mandatory that a confiscation order be made where proceedings in respect of loss or injury have been started against them by a victim of their conduct or where a victim intends to start such proceedings against him, in accordance with section 156(5) of the Act. It was submitted that such proceedings by a victim are intended when Part III of the Act comes into force. (There was nothing to indicate that any such proceedings were intended or contemplated either at the time of the Crown Court hearings or the hearing of these appeals). The trial judge rejected each of these submissions and apportioned the order 60% against Mr Allingham and 40% against Mrs Allingham.

[10] An application for leave to appeal against the Confiscation Orders was lodged. Seven grounds of appeal were set out.

> "1. The Defendants having been convicted of 'keeping' waste under Article 4(i)(b) and 4(1)(c) of the Waste and Contaminated Land (NI) Order 1997, rather than of 'depositing' or 'permitting the deposit' of waste under Article 4(1)(a) of the said Order, and any such monies which the Defendants may have received, having been received by them for allowing a person or persons to dump waste on their lands, rather than for 'keeping' such waste, the Learned

Trial Judge was wrong in law in finding that the sum of £20,000.00 was a pecuniary benefit which the Defendants received, as a result of the crimes of which they were convicted, i.e. their 'particular criminal conduct'.

2. The Learned Trial Judge was wrong in law in holding the Defendants liable for the full amount of £20,000.00, agreed as being the total figure received by the Defendants for the deposit of waste on their lands, when the evidence was to the effect that a quantity of such waste was deposited on their lands, prior to 24 March 2007, the date on which the relevant part of the Proceeds of Crime Act 2003 came into force.

3. The Learned Trial Judge, was on the same grounds, wrong in law in holding the Defendants liable for the full amount of any liability for the evasion of landfill tax.

4. The Learned Trial Judge was wrong in law in finding that the Defendants avoided wrongfully or at all the payment of landfill tax to the amount of £52,000.00, or any amount, and was wrong in law in finding that the Defendants obtained a pecuniary advantage, within the meaning of Section 224(5) of the Proceeds of Crime Act 2002, to such or any amount, by virtue of the rustlers of which they were convicted herein, i.e. their 'particular criminal conduct'.

5. Further or in the alternative, the Learned Trial Judge was wrong in law in failing to give the Defendants credit for the aforesaid £20,000.00, or appropriate proportion thereof, as against the liability for the evasion of landfill tax, having regard to the evidence, and the Learned Trial Judge's acceptance that liability for landfill tax is passed on by the landfill site operator to the users of the landfill site, and is paid out of the receipts for permitting the deposit of the waste.

6. The Learned Trial Judge was, as a consequence of the foregoing, also wrong in law in holding that the increase in the value of the monies, of which the Defendants may be liable to confiscation, amounts to £8,867.57.

7. The Learned Trial Judge was wrong in law in failing to pay regard to the probability that Part 3 of the Waste and Contaminated Land (NI) Order 1997, will come into effect, whereby the relevant Council will then become duty bound to effect remediation of the land affecting by the illegal deposit of waste herein, whereby in turn, the Court as a power rather than a duty to make a Confiscation Order against the Defendants herein."

[11] The single Judge granted leave to appeal on Grounds 2–6 only.

THE APPEAL OF JOHN McKENNA

[12] At Omagh Crown Court, following a trial before his Honour Judge Finnegan QC and a jury, John McKenna was convicted of three offences contrary to the Waste and Contaminated Land (Northern Ireland) Order 1997 (the Order). Count 1 contrary to Article 4(1)(c) and (6) of the Order alleged that –

> John McKenna on the 8th day of December 2003 in the County Court Division of Fermanagh and Tyrone, treated, kept or disposed of controlled waste in manner likely to cause pollution of the environment or harm to human health.

Count 2 contrary to Article 4(1)(c) and (6) of the Order alleged –

> John McKenna on a date unknown between the 8th day of December 2003 and the 20th day of January 2004, in the County Court Division of Fermanagh and Tyrone, treated, kept or disposed of controlled waste in manner likely to cause pollution of the environment or harm to human health

Count 3 contrary to Article 4(1)(b) and (6) of the Order alleged -

> John McKenna on a date unknown between the 8th day of December 2003 and the 20th day of January 2004, in the County Court Division of Fermanagh and Tyrone, treated, kept or disposed of controlled waste or knowingly permitted controlled waste to be treated, kept of disposed or (sic) except under and in accordance with a waste management licence.

[13] John McKenna was sentenced to 12 months imprisonment concurrent on the first two counts and 6 months on the 3rd count concurrent to counts 1 and 2. The prosecution subsequently applied for a Confiscation Order under section 156 of the Proceeds of Crime Act 2002. On 6th November 2007 at Belfast Crown Court Judge Finnegan QC made a Confiscation Order whereby the defendant was ordered to pay £252,252.00 on or before 6th May 2008 and in default to serve 5 years imprisonment, consecutive to the sentences for the substantive offences.

[14] On 20th January 2004 a site owned by Mr McKenna at 22 Corleaghan Road, Clogher, Co Tyrone was found to contain quantities of buried

household and commercial waste. There was evidence that the waste had emanated from the Republic of Ireland. Mr McKenna was interviewed by a scientific officer from the Environment and Heritage Service (EHS) in the presence of his solicitor. In answer to questions, the defendant replied that he did own the land in which the waste had been found, he did not have a licence to dump waste and he did not know how the waste had got there. A survey of the site revealed the quantity of contaminated waste present as well as the emission of gas and the presence of a heavy polluting leachate. Evidence was also given as to the costs of reinstatement and the amount of Landfill Tax which would normally be paid on the amount of waste found.

[15] The prosecution applied for a confiscation order and at a subsequent hearing the learned trial judge heard evidence from officers of the Environment and Heritage Service and the Assets Recovery Agency and Mr McKenna's solicitor and also had the benefit of an affidavit made by Mr McKenna and a report from an Environmental Consultant retained on his behalf. The trial judge accepted the evidence which he heard. He concluded Mr McKenna had benefited from his criminal conduct and that he should put a monetary value on the pecuniary advantage and treat it as property for the purposes of the application for a confiscation order. He was satisfied that Mr McKenna's benefit from his criminal conduct was £264,252. This comprised the amount received by Mr McKenna for the deposit of the waste, namely £88,080 (11,744 tonnes at £7.50 per tonne), £152,672 being the amount of Landfill tax not paid (at £13 per tonne) and £23,500 identified by the Assets Recovery Agency as the increase in the value of these monies over time (inflation). The amount recoverable for the purposes of section 156 of the Act is an amount equal to the benefit, in the case of Mr McKenna the sum of £264,252. The judge held that the onus lies on a defendant, on the balance of probabilities, to persuade the court that the available amount is less than the benefit and found that Mr McKenna had failed to discharge that burden. The judge identified the assets available to Mr McKenna and was further satisfied that he had other hidden assets. Mr McKenna's solicitor stated that an outlay of £12,500 would be required to realise the assets held by Mr McKenna in order to meet the confiscation order made. The trial judge deducted this from the benefit figure which he had arrived at and therefore made a confiscation order in the sum of £252,252. The deduction of this outlay is the subject of an appeal by the prosecution which I shall consider later and separately in this judgment.

[16] Mr McKenna lodged an appeal against the confiscation order. Five grounds were relied on –

"1. The Learned Trial Judge's finding that the 'Defendant received £7.50 a tonne for his keeping of the said waste' was not in keeping with the evidence or the weight of the evidence, all of which evidence was to the effect that any such monies that the

Defendant received were for 'depositing' or 'permitting the deposit' of waste, rather than for 'keeping' such waste.

2. The Defendant having been convicted of 'keeping' waste, under Article 4(1)(b) and 4(1)(c) of the Waste and Contaminated Land (NI) Order 1997, rather than 'depositing' or 'permitting the deposit' of waste, under Article 4(1)(a) of the said Order, and any such monies which he may have received as aforesaid having been received by him for 'depositing' or 'permitting the deposit' of the said waste, the Learned Trial Judge was wrong in law in finding that the sum of £88,080.00 was a pecuniary benefit which the Defendant received as a result of the crimes of which he was convicted, i.e. 'his particular criminal conduct'.

3. The Learned Trial Judge was wrong in law in finding that the Defendant avoided, wrongfully or at all, the payment of Land Fill Tax to the amount of £152,672.00 or any amount, and was wrong in law in finding that the Defendant obtained a pecuniary advantage, within the meaning of Section 224(5) of the Proceeds of Crime Act 2002, to such or any amount, by virtue of the matters of which he was convicted herein, i.e. 'his particulars criminal conduct'.

4. The Learned Trial Judge was, as a consequence of the foregoing also wrong in law in holding that the increase in the value of the monies, of which the Defendant may be liable to confiscation, amounts to £23,500.00.

5. The Learned Trial Judge was wrong in law in imposing a sentence of five years imprisonment in default of payment by the Defendant of £252,252.00, when five years is the maximum payment of a sum exceeding £250,000.00 but not exceeding £1m, and three years is the maximum which can be imposed in default of payment of a sum up to, but not exceeding £250,000.00."

[17] The single judge granted leave in respect of Grounds 3–5 only.

[18] At the hearing in this Court leave was granted to add two further grounds of appeal (identified as Ground 3A and 6). These are similar to Grounds advanced on behalf of Mr and Mrs Allingham. These were –

> "3A Further or in the alternative, the Learned Trial Judge was wrong in law in failing to give the Appellant credit for the aforesaid £88,080 as against any liability for the evasion of Land Fill Tax, given that such tax is paid by a land fill

operator out of the monies received by him for permitting the deposit of waste on his land fill site.

6. The Learned Trial Judge was wrong in law in failing to pay due regard to:

(a) the probability that Part 3 of the Waste and Contaminated Land (Northern Ireland) Order 1997 will come into effect, whereby the relevant District Council will then become duty bound to effect remediation of the land affected by the illegal deposit of waste herein, whereby in turn the Court has a power rather than a duty to make a Confiscation Order against the defendants herein, and

(b) the fact that the defendant is present subject to a Notice under Article 27 of the Waste and Contaminated Land (Northern Ireland) Order 1997 which give rise to the same consequence."

[19] In view of the similarities in the grounds of appeal relied on the two appeals were listed to be heard together. Mr Ferriss QC appeared on behalf of the Allinghams with Mr McHugh and on behalf of Mr McKenna with Mr K Mallon. Mr Mateer QC appeared on behalf of the Crown with Mr Lowry.

[20] Mr Ferriss QC informed the Court that he did not rely on Ground 7 in respect of the Allinghams (Ground 6 in respect of Mr McKenna) and that he would not be making any submissions in respect of Ground 6 in respect of the Allinghams (Ground 4 in respect of Mr McKenna).

[21] Thus the submissions advanced on behalf of all three appellants may be summarised as follows.

[22] Each of the appellants was convicted of the offence of keeping controlled waste on land either without a waste management licence or in a manner likely to cause pollution. This is a separate and distinct offence from that of depositing waste on land which is an offence contrary to Article 4(1)(a) of the Order. The evidence was that the appellants were paid for permitting waste to be deposited on land not for keeping it on the land. In those circumstances they received no benefit for keeping it (the particular criminal conduct of which they were convicted) which could be the subject of a confiscation order under the Proceeds of Crime Act 2002. Therefore the trial judge was wrong to make a confiscation order in respect of the amounts received by each appellant. Furthermore as the relevant parts of Article 4 did not come into force until 8 December 2003 a confiscation order could not be made in respect of any monies received by the appellants prior to that date.

[23] By not paying landfill tax the appellants did not obtain a pecuniary advantage within the meaning of section 224(5) of the Proceeds of Crime Act 2002. It was submitted that the appellants had not avoided or evaded the payment of landfill tax. Such tax is paid by the operator of a landfill site. The appellants were never the operators of a landfill site and were never liable to pay landfill tax. Consequently in not paying it they had not obtained any pecuniary advantage from their particular criminal conduct. They have never been charged with evasion of landfill tax which is a statutory offence contrary to section 15(1)(a) of and Schedule 5 to, the Finance Act 1996. The circumstances in these two appeals were distinguishable from those in the authorities relied upon by the prosecution. The appellants were never in the same position as those charged with the evasion of duty on cigarettes or alcohol brought into the jurisdiction on which duty is immediately due.

[24] It was further submitted that if the appellants have obtained a pecuniary advantage through the non-payment of landfill site tax, any sum due in respect of it should not be additional to confiscation of the money received for the depositing of the waste. The operator of a legal landfill site charges the depositor of waste a sum which includes the appropriate landfill tax which the operator then pays to the Revenue. Thus what he receives in payment includes the landfill tax. In assessing the landfill tax due the Court should recognise that the money received by the appellants included an element for tax. Therefore it would be unjust to confiscate the money received and then impose a further sum by way of landfill tax. This would amount to double payment of landfill tax. Alternatively if a figure for landfill tax alone is due then allowance should be made against that figure in respect of the sum received for the deposit of the waste.

[25] In the case of Mr McKenna it was submitted that the period of imprisonment (five years) imposed in default of discharge of the confiscation order (£252,252) was excessive. Five years is the maximum period permitted for failing to discharge a fine of a sum between £250,000 and £1 million. Failing to discharge a fine between £150,000 and £250,000 attracts a maximum of three years. Therefore the period in default should lie somewhere between three and five years' imprisonment, though at the lower end of that range.

[26] The Waste and Contaminated Land (Northern Ireland) Order 1997 re-enacted with significant amendments the provisions of Part II of the Pollution Control and Local Government (Northern Ireland) Order 1978. In addition to re-enacting the prohibition on depositing controlled waste it created several new offences relating to the disposal of waste on land in the absence of a waste management licence. Provision was made for the grant of a waste management licence to a person who is determined to be a fit and proper person to hold such a licence. It is evident that the strict control of the disposal of waste as laid down in Part II is for the purposes of preventing

pollution of the environment, harm to human health and serious detriment to local amenities.

[27] The relevant part of Article 4 provides –

"Prohibition on unauthorised or harmful deposit, treatment or disposal, etc., of waste

4. - (1) Subject to paragraphs (2) and (3) a person shall not-

(a) deposit controlled waste, or knowingly cause or knowingly permit controlled waste to be deposited in or on any land unless a waste management licence authorising the deposit is in force and the deposit is in accordance with the licence;

(b) treat, keep or dispose of controlled waste, or knowingly cause or knowingly permit controlled waste to be treated, kept or disposed of-

(i) in or on any land, or

(ii) by means of any mobile plant,

except under and in accordance with a waste management licence;

(c) treat, keep or dispose of controlled waste in a manner likely to cause pollution of the environment or harm to human health.

(6) A person who contravenes paragraph (1) or any condition of a waste management licence shall be guilty of an offence."

[28] Article 4(1) (c) came into force in 1st March 2001. Article 4(1)(a) and (b) were brought into effect on 27th November 2003 by the Waste and Contaminated Land (Northern Ireland) Order (Commencement No 7) Order (Northern Ireland) 2003. At a pre-trial hearing and following submissions made by counsel on behalf of the Allinghams, His Honour Judge Babington ruled that the Allinghams could not have known that Article 4(1)(b) had been brought into effect as the Commencement Order SR 2003/489 bringing it into effect had not been issued until 8 December 2003 (see letter from Cabinet Office dated 24 October 2005). In consequence of that ruling the trial judge ordered that Count 1 in the indictment against both Allinghams be stayed. Count 1 alleged an offence of treating, keeping or disposing of controlled waster in or on land otherwise than in accordance with a waste management licence between 27 November 2003 and 4th December 2003. The correctness or otherwise of that ruling was not an issue before this Court.

[29] Article 4(1) creates a number of separate and distinct offences. Article 4(1)(a) makes it an offence, in the absence of a valid waste management licence, to deposit controlled waste in or on any land, or to knowingly cause or permit controlled waste to be so deposited. The waste management licence must authorise the deposit of waste and the deposit must be in accordance with the terms of the licence. Article 4(1)(b) makes it an offence to treat, keep or dispose of controlled waste in or on any land except under and in accordance with a waste management licence. Article 4(1)(c) makes it an offence to treat, keep or dispose of controlled waste in a manner likely to cause pollution of the environment or harm to human health. Waste is defined in Article 2 as any substance or object in the categories set out in Schedule I which the holder discards or intends or is required to discard and for the purpose of this definition 'holder' means the producer of the waste or the person who is in possession of it. Controlled waste means household, industrial or commercial waste. Article 4(7) provides a defence to a charge under Article 4 if the accused proves that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence or where the acts were done in an emergency to avoid danger to human health. Article 8 makes provision for the grant of a waste management licence which is defined in Article 6(1) as a licence authorising the treatment, keeping or disposal of specified controlled waster in or on specified land. The licence, which is non-transferable, is granted by the Department.

[30] Specified lands where waste is kept or disposed of are known as land fill sites. The Finance Act 1996 introduced from 1 October 1996 a landfill tax. Sections 39, 40 and 41 provide -

"39. Landfill tax.

(1) A tax, to be known as landfill tax, shall be charged in accordance with this Part.

(2) The tax shall be under the care and management of the Commissioners of Customs and Excise.

40. Charge to tax

(1) Tax shall be charged on a taxable disposal.

(2) A disposal is a taxable disposal if—

(a) it is a disposal of material as waste,
(b) it is made by way of landfill,
(c) it is made at a landfill site, and
(d) it is made on or after 1st October 1996.

(3) For this purpose a disposal is made at a landfill site if the land constitutes or falls within land which is a landfill site at the time of the disposal.

41. Liability to pay tax

(1) The person liable to pay tax charged on a taxable disposal is the landfill site operator.

(2) The reference here to the landfill site operator is to the person who is at the time of the disposal the operator of the landfill site which constitutes or contains the land on or under which the disposal is made."

[31] Section 66 provides that land is a landfill site if at a given time there is in force in relation to the land a site licence (in Northern Ireland a waste management licence) authorising disposals in or on the land. By section 67 the operator of a landfill site at a given time is the holder of the licence. Thus a disposal of waste at a landfill site attracts a payment of tax and the person liable to pay the tax is the landfill site operator at the time of the disposal.

[32] Part 4 of the Proceeds of Crime Act 2002 empowers Crown Courts in Northern Ireland to make confiscation orders. I set out the relevant sections for the purposes of these appeals.

"156. Making of order

(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 paragraphs—

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

(b) he is committed to the Crown Court in respect of an offence or offences under section 218 below (committal with a view to a confiscation order being considered).

(3) The second condition is that—

(a) the prosecutor [...] [1] asks 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) it must decide whether the defendant has a criminal lifestyle;

(b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;

(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 subsection (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.

(6) But the court must treat the duty in subsection (5) as a power if it believes that any victim of the conduct has at any time started or intends to start proceedings against the defendant in respect of loss, injury or damage sustained in connection with the conduct.

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

(8) The first condition is not satisfied if the defendant absconds (but section 177 may apply).

(9) References in this Part to the offence (or offences) concerned are to the offence (or offences) mentioned in subsection (2).

157. Recoverable amount

(1) The recoverable amount for the purposes of section 156 is an amount equal to the defendant's benefit from the conduct concerned.
(2) But if the defendant shows that the available amount is less than that benefit the recoverable amount is—

(a) the available amount, or

(b) a nominal amount, if the available amount is nil.

(3) But if section 156(6) applies the recoverable amount is such amount as—

(a) the court believes is just, but

(b) does not exceed the amount found under subsection (1) or (2) (as the case may be).

(4) In calculating the defendant's benefit from the conduct concerned for the purposes of subsection (1), any property in respect of which—

(a) a recovery order is in force under section 266, or

(b) a forfeiture order is in force under section 298(2), must be ignored.

(5) If the court decides the available amount, it must include in the confiscation order a statement of its findings as to the matters relevant for deciding that amount.

158. Defendant's benefit

(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 its decision;
(b) take account of property obtained up to that time.

(3) Subsection (4) applies if—

(a) the conduct concerned is general criminal conduct;

(b) a confiscation order mentioned in subsection (5) has at an earlier time been made against the defendant, and

(c) his benefit for the purposes of that order was benefit from his general criminal conduct.

(4) His benefit found at the time the last confiscation order mentioned in subsection (3)(c) was made against him must be taken for the purposes of this section to be his benefit from his general criminal conduct at that time.

(5) If the conduct concerned is general criminal conduct the court must deduct the aggregate of the following amounts—

(a) the amount ordered to be paid under each confiscation order previously made against the defendant;

(b) the amount ordered to be paid under each confiscation order previously made against him under any of the provisions listed in subsection (7).

(6) But subsection (5) does not apply to an amount which has been taken into account for the purposes of a deduction under that subsection on any earlier occasion.

(7) These are the provisions—

(a) the Drug Trafficking Offences Act 1986 (c. 32);

(b) Part 1 of the Criminal Justice (Scotland) Act 1987 (c. 41);

(c) Part 6 of the Criminal Justice Act 1988 (c. 33);

(d) the Criminal Justice (Confiscation) (Northern Ireland) Order 1990 (S.I. 1990/2588 (N.I. 17));

(e) Part 1 of the Drug Trafficking Act 1994 (c. 37);

(f) Part 1 of the Proceeds of Crime (Scotland) Act 1995 (c. 43);

(g) the Proceeds of Crime (Northern Ireland) Order 1996 (S.I. 1996/1299 (N.I. 9));

(h) Part 2 or 3 of this Act.

(8) The reference to general criminal conduct in the case of a confiscation order made under any of the provisions listed in subsection (7) is a reference to conduct in respect of which a court is required or entitled to make one or more assumptions for the purpose of assessing a person's benefit from the conduct.

159. Available amount

(1) For the purposes of deciding the recoverable amount, the available amount is the aggregate of—

(a) the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and

(b) the total of the values (at that time) of all tainted gifts.

(2) An obligation has priority if it is an obligation of the defendant—

(a) to pay an amount due in respect of a fine or other order of a court which was imposed or made on conviction of an offence and at any time before the time the confiscation order is made, or
(b) to pay a sum which would be included among the preferential debts if the defendant's bankruptcy had commenced on the date of the confiscation order or his winding up had been ordered on that date.

(3) "Preferential debts" has the meaning given by Article 346 of the Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405 (N.I. 19)).

Conduct and benefit are defined in Section 224.

224. Conduct and benefit

(1) Criminal conduct is conduct which—

(a) constitutes an offence in Northern Ireland, or

(b) would constitute such an offence if it occurred in Northern Ireland.

(2) General criminal conduct of the defendant is all his criminal conduct, and it is immaterial—

(a) whether conduct occurred before or after the passing of this Act;

(b) whether property constituting a benefit from conduct was obtained before or after the passing of this Act.

(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 include 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."

[33] The prosecution did not suggest that the appellants had a criminal lifestyle. Therefore only section 156(4)(c) applied and under this subsection the Crown Court has to decide whether a defendant has benefited from his particular criminal conduct. If a defendant is found to have benefited from his particular criminal conduct the Crown Court must then decide the recoverable amount which by virtue of section 157(1) is the amount equal to the defendant's benefit from the conduct concerned. In deciding whether a defendant has benefited from conduct and what that benefit is, the Court must take account of conduct occurring up to the time of the court's decision (section 158(1) and (2)). For the purposes of deciding the recoverable amount, the available amount is the total of all free property held by a defendant at the time of the making of the confiscation order.

[34] Mr and Mrs Allingham were convicted of keeping waste under Article 4(1)(b) and (c) of the 1997 Order. They were not charged with depositing or permitting the deposit of waste which is a separate offence contrary to Article

4(1)(a) of the 1997 Order. In accordance with the ruling of the trial judge this only came into force on 4 December 2003. A Statement of Information under section 166(5) of the 2002 Act by Dee Traynor, an accredited financial investigation officer, and dated 29 August 2006, was produced to the Crown Court in respect of each appellant. This details the nature and scale of the illegal disposal of waste emanating from the Republic of Ireland and the financial benefits to those involved in it. At paragraph 3.10, on which the appellants rely, the officer stated that "EHS inform me that it is estimated that the defendants would have been paid £5-£10 per tonne of waste which [they] permitted to be dumped on [their] land". It was agreed that some 4000 tonnes of waste was deposited at the Allinghams' farm and that they were paid £5 per tonne. In his ruling at page 4 the trial judge stated that the "sum of £20,000 was being sought in respect of payments received for permitting the waste to be deposited on the site". Later at page 5 in relation to the price per tonne he stated "this figure of £5.00 was agreed to be the figure that the defendants would have received for allowing a person or persons to dump waste on their land". It was suggested that the deposition or dumping of the waste discovered on the land, would have occurred well before 8 December 2003. In rejecting Mr Ferriss's argument that the money was paid for depositing the waste rather than for keeping it, the trial judge stated –

> "However the third party or parties paid for the disposal of the waste which, in my opinion, means not only just the actual dumping or deposition of it but the whole process which must, in this type of situation, involve keeping it as well. Having reached that conclusion I am of the view that as the actual offences postdate the relevant date for the legislation – 24 March 2003 – it does not matter that the defendant has received payment prior to that date."
>
> Indeed it is quite wrong, in my opinion, to say that the money had only been paid for depositing the waste. The money was paid so that the third parties had nothing more to do with the waste. In other words that it was for the defendants to keep and deal with as they intended and there is no other evidence before me that they intended to do anything other than keep it on their property. Neither defendant gave evidence at the trial nor at the confiscation hearing. It therefore does not matter that the payments for some of the waste were received prior to the commencement of the legislation as they clearly relate to the offences. The offences relate to the keeping of the waste and they occurred on certain dates after the commencement of the legislation. It is therefore quite clear in my mind that the defendants benefited from their particular criminal conduct and that criminal conduct, in strict terms, was a keeping of waste for which they received payment. It is not correct to say that they only received payment for depositing waste rather than keeping it."

[35] It was submitted that these findings, relating to keeping rather than depositing waste, were inconsistent and could not be supported by the evidence. There was no evidence that the payments were made for keeping the waste on the land or for doing so for any particular period of time. Mr Ferriss submitted that the depositors of the waste were not concerned with what happened to the waste once it was deposited. They were paying only for the deposition of the waste and not for keeping it into the future. It was submitted that as His Honour Judge Babington had ruled that depositing waste and keeping waste on land contrary to Article 4(1) of the 1997 Order did not become offences until 8 December 2003, any payment, for whatever purpose, whether depositing or keeping waste prior to that date, was not an unlawful payment or transaction. To treat any payments made before 8 December 2003 as a benefit for the purposes of the 2002 Act would have the effect of making Article 4(1) retrospective and offend against a cardinal principle of the criminal law namely that acts could not be made criminal retrospectively. Therefore if the Allinghams did receive a benefit in respect of keeping waste on land, it should not be for the whole of the agreed £20,000 sum but only such part as was paid after the legislation came into effect on 8 December 2003.

[36] The second argument put forward on behalf of the Allinghams was that the trial judge was wrong to hold that they had obtained a pecuniary advantage through their particular criminal conduct namely, that they had avoided the payment of landfill tax. It was submitted by Mr Ferriss QC that landfill tax is a tax payable on the lawful disposal of waste at a landfill site operated by the holder of a waste management licence. The farm was not such a site and neither appellant operated a landfill site with a licence. In those circumstances they were never liable to pay landfill tax and therefore did not obtain any pecuniary advantage by not paying the tax. As they were not liable to pay landfill tax they could never be charged with the statutory offence of evasion of landfill tax contrary to the Finance Act nor was that ever suggested. The offences of which the appellant were found guilty did not involve conduct which included any evasion of landfill tax. Unlike the cases involving the importation into the United Kingdom of smuggled goods, usually cigarettes, the appellants were not in possession of any goods which attracted tax. It was further submitted that if the appellants did obtain a pecuniary advantage through failing to pay landfill tax, it was wrong of the prosecution to seek, in addition, confiscation of the full sum they received in respect of the deposit of the waste. This is because the sum received for the waste would have included a sum for making the land available, as well as sums representing elements of profit and landfill tax. Alternatively it was submitted that in calculating the benefit received, allowance should be made for the fact that the sum received included an element of landfill tax.

[37] In relation to the appellant McKenna similar arguments were deployed. It was submitted that the learned trial judge was wrong to find that this appellant received a pecuniary benefit of £88,080.00 (at £7.50 per tonne) when the evidence was that he received the money for the deposit of the waste and not for keeping it on the land. The trial judge found that while this appellant was convicted of keeping waste on land and not of depositing or permitting the deposit of waste on land, he was satisfied from the verdict of the jury that the appellant was a vital component of the overall criminal enterprise. It was submitted that the learned trial judge was wrong to find that the appellant McKenna obtained a pecuniary advantage through the avoidance of landfill tax amounting to £152, 672 (11,744 tonnes at £13 per tonne).

[38] It was submitted by Mr Mateer QC that section 156 of the Proceeds of Crime Act 2002 permits the Crown Court to determine whether a defendant has benefited from his general criminal conduct. Section 224(4) provides that a person benefits from conduct if he obtains property as a result of or in connection with the criminal conduct. This is a broad definition and catches not just property obtained as a result of criminal conduct but property obtained in connection with the defendant's criminal conduct. All three appellants were convicted of keeping waste on land and were paid sums for doing so. Those payments were at the very least, on the dates the waste was detected, made in connection with the keeping of the waste. Therefore they benefited from their criminal conduct and the trial judge in each instance was correct to make a confiscation order in respect of the sums they had received. Section 224(5) provides that a person who obtains a pecuniary advantage as a result of criminal conduct is to be taken as having obtained a sum of money equal to the value of the pecuniary advantage. To evade tax is to obtain a pecuniary advantage. It was argued that the lawful disposal of the waste found at the appellants' premises would have attracted significant sums in landfill tax if deposited at a proper licensed landfill site. Dumping it illegally enabled those involved to evade the landfill tax and thus obtain a pecuniary advantage. Mr Mateer submitted that the trial judges were correct in each case to find that a pecuniary advantage had been obtained by the appellants through the evasion of landfill tax. In addition the judges were correct to order confiscation of sums representing the sums received and the tax evaded. There was no evidence that the sums received included any element of tax, which was an unrealistic assertion, nor was there any basis for the submission that an allowance should be made in respect of the payments received against the landfill tax evaded.

[39] Following the issue of the EU Directive on Waste, legislation was passed throughout the United Kingdom, and in other EU countries, to impose controls on the disposal of various types of waste and to levy charges and taxes in connection with such disposal. The local legislation in the various jurisdictions was not introduced throughout the EU at the same time.

In particular the timing of the introduction of the legislation in the Republic of Ireland and in Northern Ireland, led to a marked disparity between the cost of disposing of waste legally in the two jurisdictions. In 2003 – 4 it was much more expensive to dispose of waste legally in the Republic of Ireland. As a consequence owners of substantial areas of land in Northern Ireland found it financially attractive to permit illegal dumping of waste from the Republic of Ireland on their land and the hauliers in the that jurisdiction saved substantial costs. The effect on the environment of such illegal dumping of waste, sometimes hazardous, through contamination and pollution of the landscape, is incalculable. The profits for those involved would have been substantial. The owner of the land receives payment for providing a cavity in the ground where the waste can be buried and covered over and the haulier profits from having disposed of the waste other than at a legal landfill site where landfill tax would otherwise have been generated. This enabled the payment of landfill tax, imposed at a rate per tonnage, to be avoided. All of this was at the expense of the environment.

[40] Article 4 of the 1997 Order created various offences relating to the disposal of controlled (household, industrial or commercial) waste. By Article 4(1)(a) it is an offence to deposit or knowingly cause or permit such waste to be deposited on any land, unless a waste management licence authorising the deposit is in force. By Article 4(1)(b) it is an offence to treat, keep or dispose of waste or knowingly permit waste to be treated kept or disposed of in or on any land except under a waste management licence. By Article 4(1)(c) it is an offence to treat, keep or dispose of controlled waste in a manner likely to cause pollution of the environment or harm to human health. Mr and Mrs Allingham were convicted of keeping controlled waste in or on land otherwise than under or in accordance with a waste management licence contrary to Article 4(1)(b) and with keeping controlled waste in a manner likely to cause pollution of the environment or harm to human health. Mr McKenna was convicted on three counts – two counts of keeping waste in a manner likely to cause pollution of the environment or harm to human health contrary to Article 4(1)(c) and one count of keeping waste otherwise under and in accordance with a waste management licence. No waste management licence existed in respect of any party, either parcel of land or any of the deposited waste. The waste had simply been placed in a cavity in the ground and covered over. There is no evidence to suggest that this was anything other than a permanent disposal of the waste in the land. It was a continuing offence which comprised keeping the waste in the land for which the Allinghams and McKenna were paid substantial sums of money. The suggestion that the money was paid for depositing the waste on the land at the time it was placed there and not for keeping it in the land thereafter is artificial. This was, as His Honour Judge Babington found in Allinghams' case, a single process whereby the waste was deposited in the land to be kept there and in McKenna's case, as His Honour Judge Finnegan QC found, formed part of the overall criminal enterprise designed to dispose of waste

without payment of the appropriate tax or charges. Whatever language was used to describe the nature of the payments made to the appellants, the reality was that the land was used as the repository for the waste and covered over to conceal its presence. It was still being kept long after the offence came into force in early December 2003 and was being kept there on the dates of the inspections and excavations. To suggest that the payments were made solely for depositing the waste on the land and not for keeping it there flies in the face of reality. Therefore the argument that the payments were in respect of depositing only and not for keeping the waste in the ground is rejected.

[41] The purpose of the Proceeds of Crime Act 2002 is to deprive defendants of any benefit they have gained from their relevant criminal conduct through confiscation of the benefit. In R v May (2008) 2 Cr App R 28 the House of Lords provided guidance on how a Crown Court should proceed. Three questions should be posed:

Has the defendant benefited from relevant criminal conduct?;
If so, what is the value of the benefit obtained?; and
What sum is recoverable from the defendant?

[42] The Court must establish the facts on the material available as these will be decisive as to the outcome. Critically the House of Lords stated at page 414 –

"(4) In addressing the questions the court should focus very closely on the language of the statutory provision in question in the context of the statute and in the light of any statutory definition. The language used is not arcane or obscure and any judicial gloss or exegesis should be viewed with caution. Guidance should ordinarily be sought in the statutory language rather than in the proliferating case law.

(5) In determining under the 2002 Act whether D has obtained property or a pecuniary advantage and, if so, the value of any property or advantage so obtained, the court should (subject to any relevant statutory definition) apply ordinary common law principles to the facts of the case as found. The exercise of this jurisdiction involves no departure from familiar rules governing entitlement and ownership. While the answering of the third question calls for inquiry into the financial resources of D at the date of determination, the answering of the first two questions plainly calls for a historical inquiry into past transactions.

(6) D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or

conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. 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. It may be otherwise with money launderers."

[43] Criminal conduct is conduct which constitutes an offence in Northern Ireland – section 224(1)(a). Particular criminal conduct, for the purposes of this appeal, is conduct which constitutes the offence or offences concerned – section 224(3)(a). A person benefits from conduct if he obtains property as a result of or in connection with the conduct – section 224(4). If a person obtains a pecuniary advantage as a result of or in connection with conduct he is taken to obtain a sum of money equal to its value - section 224(5).

[44] The facts in these cases are really quite simple. Areas of land were used as landfill sites and waste concealed in the land and the appellants were paid for the provision of that on-going facility. The Allinghams accept that payments were made to them but contend that some of these payments were made before Article 4 came into effect. McKenna told the police in interview that he knew nothing about the waste found on his land and that he received no payments in respect of it. His land was inspected on 8 December 2003 when it was evident that waste had been deposited there and a large hole had been excavated in preparation for further deposition of waste. In a subsequent affidavit he averred that he received no payment in respect of the waste found on his land. The learned trial judge found as a fact that the appellant McKenna did receive payment to the extent of £7.50 per tonne of waste found on his land, amounting to £88,080. This was based on 11,744 tonnes of waste, being the very least tonnage of contaminated waste found on the land. Mr Miller's report indicated that there was 16,441m3 of waste on the land, which if disposed of legally would, in Northern Ireland have cost £968,942 and in the Republic of Ireland have cost between Euros 3.6 million and 5.7 million. This provides significant evidence of the scale of the criminal enterprise involved. There was no evidence as to when the appellant McKenna received the payments, which the trial judge found had been made, but the probability must be that many were made prior to the first inspection of the land on 8 December 2003, when waste was present. Therefore in the case of each appellant the court has to determine whether payments made prior to the date of the offence, can constitute a benefit obtained from his criminal conduct, namely the keeping of waste on land in the period December 2003/January 2004. The first question is whether the appellants have benefited from their particular criminal conduct, namely the keeping of waste on their land. The answer to that question must surely be yes. Does it matter that the dates of payments cannot be proved or that some may have preceded the date on which Article 4 of the 1997 Order took effect. Mr Ferriss

seeks to draw on the well-known principle that criminal offences cannot be retrospective. There is also a general presumption against retrospective legislation. The court is not considering a criminal offence but whether the defendant has benefited from criminal conduct existing at the relevant time. Section 158(2) provides that the court when deciding whether a defendant has benefited from criminal conduct must take into account conduct occurring up to the time it makes its decision and to take account of property obtained up to that time. By section 158(3) – (7) where the conduct is general criminal conduct (as opposed to particular criminal conduct) the Court must take into account any earlier confiscation order based on general criminal conduct as being his benefit from general criminal conduct at the time that earlier order was made. In other words the later confiscation order cannot be based on earlier general criminal conduct which grounded the earlier confiscation order. Section 224 defines conduct and benefit. Other than that the legislation is silent on the benefit which can be considered. The answer must lie in the first of the three simple questions posed by the House of Lords in R v May, namely, has the defendant benefited from his criminal conduct. The criminal conduct was the keeping of waste in the land in December 2003/January 2004 from which the appellants, as found by the trial judges, benefited from payments made to them. At the time the waste was discovered the appellants had and retained the benefit of the sums paid to them, regardless of when the payments were made. It would be contrary to the intention of this legislation to hold that the appellants had not benefited from the keeping of the waste in their land in December 2003/January 2004. In the case of the Allinghams it was agreed that they had received the sum of £20,000. In McKenna's case the learned trial judge accepted the evidence of Mr Miller about the sums which that appellant would have received for the amount of waste found in the land. The appellant provided no contrary evidence. The judge was entitled to accept that evidence and act upon it. Therefore in each case there was certainty as to the amounts involved following a sufficient inquiry by the trial judges.

[45] Did the appellants obtain a pecuniary advantage through the non-payment of landfill tax? Landfill tax is levied on the disposal of waste. The person liable to the tax is the disposer of the waste (or the haulier). The landfill site operator (the holder of the waste management licence) adds tax at a fixed rate per tonne to the amount the disposer is charged for the deposit of the waste. After payment by the disposer the landfill site operator then accounts to HMRC for the tax collected. It is not material that the parcels of land were not recognised landfill sites or that none of the appellants was the holder of a waste management licence. If this waste had been disposed of legally then substantial sums would have been paid to HMRC in tax at a fixed rate per tonne. It is clear that a major criminal joint enterprise was involved at each site, the objective of which was to avoid substantial tax and disposal charges. The hauliers and landowners were parties to that joint enterprise probably along with others involved in the excavation of the land

and the deposition and concealment of the waste involving heavy machinery. In R v May Lord Bingham, in the Endnote quoted above, stated that a person ordinarily obtains a pecuniary advantage if he evades a liability to which he is personally liable. He went on to say 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 are unlikely to have obtained that property or a pecuniary advantage. Some reliance was placed in the lower court on cases involving evading of duty on cigarettes (often counterfeit) imported from abroad. Mr Ferris submitted that these cases can be distinguished on their facts. In those cases the defendants were in possession of goods of value on which duty was due and could not argue that they had not obtained a pecuniary advantage through the non-payment of the duty. A person obtains a pecuniary advantage within the Proceeds of Crime legislation if he evades a liability which otherwise would be due. Where he obtains such pecuniary advantage he is treated for confiscation purposes under the 2002 legislation as having received a sum of money equal to the pecuniary advantage – see section 224(5). His benefit will be deemed to include a sum of money equal to the pecuniary advantage. However he is only liable for it if he personally owes the tax or duty. In R v White & Others (2010) EWCA Crim 978 the Court of Appeal summarised some of the general principles applicable in confiscation cases and said at paragraphs 4 and 5 –

"[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, [2008] 1 AC 1028, [2009] 1 Cr App Rep (S) 31 and Jennings [2008] UKHL 29, [2008] 1 AC 1046, [2008] 2 Cr App Rep 29 and applied in Chambers [2008] EWCA Civ 2467 and Mitchell [2009] EWCA Crim 214, [2009] 2 Cr App Rep (S) 463, [2009] Crim LR 469.

[5] In May the House of Lords said in para 48 that a 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.

[46] McKenna was the owner/operator of the site on which the waste was kept and is personally liable for the landfill tax evaded. Mr and Mrs Allingham were joint owners and operators of the site on which the waste was kept and are personally and jointly liable for the tax evaded. At the date the waste was discovered landfill tax was due in respect of all of the waste. There is no basis for apportioning the landfill tax in accordance with the date when it was deposited or the date when Article 4 of the 1997 Order came into force. Nor is there any basis for reducing the benefit obtained in respect of

keeping the waste on the basis that some of the sums paid to the appellants included an amount of tax. In each case the trial judges were correct that the appellants had benefited from the evasion of landfill tax in the amounts which he found. Accordingly there is no reason to reconsider the amounts imposed in either case to reflect the change in the value of the property obtained (inflation) in accordance with sections 227 and 228 of the 2002 Act. The appeals by both the Allinghams and McKenna against the confiscation orders in respect of their benefit and evasion of tax are dismissed.

[47] His Honour Judge Finnegan QC imposed on McKenna a sentence of five years imprisonment in default of payment of the confiscation sum of £252,252.00. It was submitted that this term of imprisonment was excessive.

[48] Section 185(2) of the 2002 Act provides that section 35 of the Criminal Justice Act (Northern Ireland) 1945 (function of court as to fines) shall apply to confiscation orders in the same manner as it does to fines. Thus in accordance with the Table set out the period of imprisonment is set by reference to the amount of a fine. For a fine (or sum of confiscation) of an amount of £100,000 but not exceeding £250,000 the term of imprisonment is three years. For an amount exceeding £250,000 but not exceeding £1 Million the term is five years. It was submitted that it was excessive to impose a term of five years in respect of a sum which exceeded £250,000 by a small amount. The period set out in the Table is the maximum term for the particular band. Thus five years is the maximum term for the band £250,000 to £1 Million. In R v Quema (2006) EWCA Crim 2806 the Court said:

> "Normally the court is likely to determine that the appropriate period in default will fall between the maximum for the band immediately below that which was being considered and the band itself."

[49] This is clearly the correct approach. The amount of £252,250 is above the maximum for the band below by a small figure. It is so close to that maximum and the minimum in the next band that it is appropriate that the term imposed for the lower band should apply. The appeal in respect of the term of imprisonment to be served in default by McKenna will be allowed to that extent. A term of three years will be substituted in respect of the term of five years.

THE PROSECUTION APPEAL

[50] The learned trial judge found that McKenna had benefited from his criminal conduct in the sum of £264,252. He also found that this appellant had assets of £300,000. In determining the amount of the confiscation order the judge deducted the sum of £12,000 from the amount in which the appellant had benefited and made the confiscation order in the sum of

£252,252. The sum of £12,000 was the amount which the appellant's solicitor stated would be required to realise the appellant's assets in order to discharge the confiscation order. The prosecution did not contend that no allowance should be made in respect of the costs of realisation of the assets, but that the sum should be deducted from the total assets and not from the amount by which the appellant had benefited from his criminal conduct. If the cost of realising the assets was deducted from the total of the assets this would leave £288,000 which would be in excess of the amount by which the appellant benefited and sufficient to discharge the recoverable amount and therefore the confiscation order should have been made in the amount of the recoverable sum (£264,252) without any deduction.

[51] If, under section 156(5) of the 2002 Act, the court decides that the defendant has benefited from his criminal conduct, the court must then decide what the recoverable amount is, and make an order in that amount. By section 157(1) the recoverable amount is the amount equal to the defendant's benefit. However under section 157(2) if the defendant shows that the available amount is less than the benefit, then the recoverable amount is the available amount, which is the lesser sum. In R v Cramer (1992) 13 Cr App R(S) it was held that the market value of property is the net market value after the costs of sale have been deducted. In this case the appellant has assets valued at £300,000. The cost of sales will be £12,000 which when deducted from the assets will produce a net market value of £288,000. Thus the available amount is £288,000 which is greater than the benefit of £264,252. Therefore the recoverable amount is equal to that amount by which the appellant benefited namely £264,252. The confiscation order should therefore have been in the amount of £264,252, which sum is available after the deduction of the realisation costs. As Mr Mateer QC stated in his skeleton argument, by deducting £12,000 from the recoverable amount, the trial judge "effectively allowed the appellant to keep some of his 'ill-gotten gains' ". Therefore the prosecution appeal is allowed and the confiscation order varied upward to the sum of £264,252.