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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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CASE STATED FROM THE COUNTY COURT FOR THE

DIVISION OF BELFAST

_____

BETWEEN:

CAIN McCARTHY

Appellant;

-and-

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Respondent.

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Weatherup LJ, Weir LJ and McBride J

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WEATHERUP LJ (delivering the judgment of the court)

[1] This is an appeal by way of Case Stated from the decision of Her Honour Judge Smyth upholding the decision of District Judge McNally to refuse the appellant's application under section 31 of the Police (Northern Ireland) Act 1998 ("the 1998 Act") for the return of property, namely, a quantity of tablets known as legal highs, lawfully seized by the Police Service of Northern Ireland on 17 January 2014. Mr Sayers appeared for the appellant and Mr Lennon for the respondent.

[2] The factual findings set out in the Case Stated were as follows –

"[2] The judgment is in Appendix B. The facts are not in dispute. On 17 January 2014 the appellant was stopped and searched by Constable McCallum pursuant to section 23 of the Misuse of Drugs Act 1971. The appellant was found to be in possession of 63 tablets and was arrested on suspicion of possession of drugs. Further analysis of the tablets revealed that they included so-called legal highs, which are not prohibited under the Misuse of Drugs Act and the PPS directed no prosecution.

[3] At the relevant time, the appellant was regarded by the PSNI Reducing Offending Unit as a "priority offender". Part of the role of police officers in this Unit is to identify triggers for offending behaviour, with a view to achieving the rehabilitation of offenders.

[4] A history of the appellant's contact with the PSNI between 2010 and December 2014 was provided to the Court in a document entitled 'Appendix A'. The appellant takes no issue with its contents. In summary, the appendix sets out the details of numerous occasions when the appellant was apprehended for offending behaviour whilst under the influence of substances. The substances included legal highs and prescription drugs as well as aerosols and alcohol.

[5] While under the influence of these substances, it is accepted that the appellant has acted aggressively and in a manner likely to cause harm to himself and others. An incident of particular concern occurred on 3 February 2013 when the appellant had consumed legal highs and other substances and his behaviour resulted in an armed response team being tasked to his mother's home. The appellant smashed items of furniture and took a knife to his bedroom, threatening to cut his wrists. On 9 February 2013 and 8 March 2013, whilst on bail for offences of criminal damage, the appellant was found to be highly intoxicated through legal highs in breach of his bail conditions.

[6] Following the decision of the PPS not to prosecute the appellant for possession of the legal highs seized on 17 January 2014, the PSNI made an

application to North Antrim Magistrates' Court seeking the Court's direction regarding the retention of the substances. In a letter to the appellant's solicitor dated 15 March 2015, the basis of the application was explained as follows –

> 'It is accepted that police no longer have power to retain these items. However, police have legitimate public policy concerns regarding the health risks associated with the ingestion of legal highs. There were also concerns that your client is nominated as a priority offender in the Coleraine area, with the majority of his offending fuelled by alcohol and drugs. Therefore we are seeking the direction of the Court as to the appropriate order …'

[7] On 20 March 2015, the learned District Judge declined to order the return of the substances to the appellant and instead allowed him a period of six months in which to make his own application pursuant to section 31 of the Police (Northern Ireland) Act 1998 . The appellant brought an application and on 30 March 2013 it was refused by the District Judge."

[3] Her Honour then stated the conclusions on the factual findings as follows –

> "[11] It is clear from the divergence of judicial opinion in England and Wales that the question whether a public policy defence to applications for the return of property is available may not yet be settled. Although by custom Judges in Northern Ireland do follow decisions of the English Court of Appeal and accord them, where appropriate, due deference, we are not bound by them. In this case, the reservations expressed by Carnworth and Potter JJs [in Gough v The Chief Constable for West Midlands Police [2004] EWCA Civ. 206] that the issue requires further consideration and legal argument is carefully noted. Having reflected on the case law I am inclined to the view that the District Judge would be entitled to decline to make an order under section

31(1) of the 1998 Act where it is clear that it would be contrary to public policy to do so.

[12] The issue to be determined, is whether, on the facts of this particular case, the Court should refuse the appellant's application on public policy grounds. In my view, in the context of legislation the purpose of which is to ensure that possessions are returned to their rightful owner after legitimate interference by police for the purpose of a criminal investigation, public policy exceptions should be narrowly construed.

[13] The Court takes Judicial Notice that legal highs are inherently dangerous and have resulted in the death of a number of individuals. The fact that injunctions have been granted banning traders in Northern Ireland from selling such products following their conviction for failing to comply with safety regulations is evidence of society's concern that such substances are readily available.

[14] There is overwhelming evidence in this case that the appellant has caused harm to himself and to others while under the influence of legal highs. The undisputed contents of Appendix A demonstrates the dangerous effects of these substances. The appellant is a young person whose prolific offending has resulted in him becoming subject to the Police Reducing Offending Unit. It is part of the function of this Unit to identify particular triggers for offending in order to achieve rehabilitation. The use of legal highs has been identified as a trigger in this case. The Court is being asked to overturn a decision of the PSNI which has been taken in order to safeguard the appellant's health and welfare and to protect the public. In my view, it would be utterly repugnant to compel the police to return dangerous products which have caused harm to the appellant, members of his family and the community in which he lives. There is no benefit to the appellant in having these substances returned. I consider that this case falls within one of the narrow public policy exceptions which justifies the police withholding the appellant's property.

> [15] For these reasons, I dismiss the appellant's appeal from the decision of District Judge McNally."

[4] The questions for the opinion of the Court of Appeal are –

> "[16] Was I correct in law in holding that the Court has a discretion to refuse an order for the return of the appellant's property.
>
> [17] If so, was I correct in law in holding that the discretion should be exercised in the respondent's favour."

[5] The issue on this appeal is whether on the hearing of applications under section 31 of the 1998 Act for the return of property lawfully seized by police, there are public policy grounds on which the return of the property may be refused and if so what is the scope of such public policy grounds.

Statutory return of property seized by police.

[6] Section 31 of the 1998 Act provides as follows –

> "(1) Where any property has come into the possession of the police in connection with their investigation of a suspected offence, a court of summary jurisdiction, on an application under this subsection, may—
>
> (a) make an order for the delivery of the property to the person appearing to the court to be the owner of the property; or
>
> (b) where the owner cannot be ascertained, make such order with respect to the property as the court thinks fit.
>
> (2) An application under subsection (1) in relation to any property may be made—
>
> (a) by a member of the police force; or
>
> (b) by a person claiming an interest in the property.

> (3) An order under subsection (1) does not affect the right of any person to take, within 6 months from the date of the order, legal proceedings against any person in possession of property delivered by virtue of the order for the recovery of the property; but, on the expiration of that period, the right shall cease."

[7] In England and Wales the equivalent provision is contained in section 1 of the Police (Property) Act 1897 ("the 1897 Act") and reads as follows –

> "(1) Where any property has come into the possession of the police in connection with [their investigation of a suspected offence] . . . a court of summary jurisdiction may, on an application either by an officer of the police or by a claimant of the property, make an order for the delivery of the property to the person appearing to the magistrate or court to be the owner thereof, or, if the owner cannot be ascertained, make such order with respect to the property as to the magistrate or court may seem meet."

[8] Lord Widgery CJ explained the operation of the 1897 Act in Raymond Lyons and Company v Metropolitan Police Commissioner [1975] QB 321 at 326 –

> "What is intended both in regard to compensation orders and orders under the Police (Property) Act 1897 in my judgment is that in straightforward simple cases where there is no difficulty of law and the matter is clear the justices should be able to make a decision without involving the expense of civil proceedings. But I would actively discourage them from attempting to use the procedure of the Act of 1897 in cases which involve a real issue of law or any real difficulty in determining whether a particular person is or is not the owner."

[9] Police powers of seizure and retention of goods include the provisions of the Police and Criminal Evidence (NI) Order 1989 where article 24 provides, in relation to the retention of seized goods, that anything seized for the purposes of a criminal investigation may be retained for use as evidence or for forensic examination or for investigation and anything may be retained in order to establish its lawful owner, where there are reasonable grounds for believing that it has been obtained in consequence of the commission of an offence. Nothing in article 24 affects any power of a court to make an order under section 31 of the 1998 Act.

[10] Different views have emerged in the authorities in England and Wales in relation to the operation of section 1 of the 1897 Act, where (as under the 1998 Act) it will be noted the inquiry is as to the *ownership* of the property. In The Chief Constable of West Midlands v White [1993] 157 JP 222 and Jackson v Chief Constable of the West Midlands Police (Unreported 22 October 1993) the Divisional Court dealt with applications under the 1897 Act and found that, where the owner could be ascertained, Magistrates could make an order refusing the return of the property on public policy grounds.

[11] In White police had seized a quantity of liquor and a substantial sum of money and the defendant was convicted of offences under the Licensing Act. The Magistrates ordered the forfeiture of the liquor under the legislation. The defendant applied under the 1897 Act for the return of the money. The police argued that the defendant was not the owner of the money because he had acquired it under illegal contracts of sale and that it would be contrary to public policy to permit him to retain the money. The Divisional Court held that the contracts for the sale of the liquor were void and unenforceable and that the Magistrate was entitled to find that property in the money had passed to the defendant under the illegal contracts.

[12] Tudor Evans J stated that it could not be doubted that a Magistrate would be fully entitled to decline to make an order under the 1897 Act where it was clear that it would be contrary to public policy to do so. However it was held that in the circumstances there were no grounds of public policy which constrained the Magistrate from making the order in favour of the defendant for the return of the money. Public policy in connection with the Licensing Acts had been decided by Parliament and there was no provision that money found on unlicensed premises should be confiscated.

[13] In Jackson police seized cannabis resin and a sum of money and the defendant was convicted of possession with intent to supply. No confiscation order having been made, the defendant applied under the 1897 Act for the return of the money. Laws J stated the issue as being whether "…. in a case where the Magistrate finds the property in question indeed belonged to the claimant appearing before him, is he nevertheless entitled, when acting under section 1 of the Act of 1897, to refuse to order its delivery to the claimant on public policy grounds?" Laws J concluded that the return of the property could be refused on public policy grounds. Counsel had conceded and Laws J had agreed that, in a civil claim against the police for the recovery of property, the police would be entitled to raise a public policy defence and the Court would be entitled to give effect to it.

[14] The argument was advanced, as in the present case, that the verb "may" in the sub-section was not used so as to confer anything in the nature of a general discretion on the Magistrate. It was said to be used simply because the section provided two alternative courses, one of which the Magistrate would take according to his finding as to the ownership of the property. On the one hand, where a person appeared to be the owner, the Magistrate was to make an order for the delivery of

the property to him, and on the other hand, where the owner could not be ascertained, the Magistrate was to make such order as was thought fit. However Laws J did not consider that the statute was to be construed so narrowly, a conclusion that was not to be followed in later decisions in the Court of Appeal.

Civil claims for the return of property seized by police.

[15] An alternative to an application under the statute is a civil claim for recovery of the property, a claim in conversion and the Torts (Interference with Goods) Act 1977. It will be noted the inquiry is not as to ownership but as to the *right to possession* of the goods. However, as the claimant's right to possession may be defeated by a superior right to possession, the ownership of the goods is part of the equation. This introduces the issue as to whether property in goods has passed when they have been acquired as a result of illegal conduct. The general rule is that illegality does not prevent title in the goods passing and the person who has acquired such title will be entitled to recover the goods.

[16] The scope of the exceptions to that general rule has remained uncertain. That leads to three cases to be considered together, namely, Webb v Chief Constable for Merseyside Police [2000] QB 427, Costello v Chief Constable of Derbyshire Constabulary [2001] 1 WLR 1437 and R (Carter) v Ipwich Magistrates' Court and the Chief Constable of Suffolk [2002] EWHC 332 (Admin), where the limited scope of public policy exceptions was outlined.

[17] In Webb the plaintiffs brought civil proceedings for the return of money lawfully seized by the police on suspicion that it constituted the proceeds of drug trafficking. The plaintiffs were not convicted of drug trafficking offences. The police appealed against a finding that the plaintiffs were entitled to recover the money. The Court of Appeal held that, even where it was established on the balance of probabilities that the money was the proceeds of drugs trafficking, public policy was no defence to the plaintiffs' claims since the plaintiffs could rely on their right to possession as against the police.

[18] May LJ referred to the general rule that, while there may be illegal conduct, the property in the goods may pass to the transferee. The principle had been applied by the Court of Appeal in Bowmakers Limited v Barnett Instruments Limited [1945] KB 65 and approved and applied in the House of Lords in Tinsley v Milligan [1994] 1 AC 340. However there were stated to be exceptions to the general rule and the one obvious exception was stated to be that class of case where it was unlawful to deal in the goods claimed, giving the example of obscene books. May LJ stated that if Webb had claimed the return of the controlled drugs seized by the police that would have come within the exception where it was unlawful to deal in the goods and they would not have been returned. However that exception was found not to apply to the application for the return of the money as it was stated "…. money is not something which it is unlawful to deal in at all".

[19] May LJ rejected the police contention that a wider public policy defence existed based on offending public conscience in ordering the return of the goods in such cases as Webb. He referred to the rejection of such a general public conscience defence by the House of Lords in Tinsley v Milliken where Lord Browne-Wilkinson stated - "The consequences of being a party to an illegal transaction cannot depend, as the majority of the Court of Appeal held, on such an imponderable factor as the extent to which the public conscience would be affronted by recognising rights created by illegal transactions."

[20] However, May LJ did recognise the possibility of a narrower defence to a claim for the return of such property when he stated at 445E - "I would not, however, rule out the possibility that circumstances might arise where the court would refuse relief where to grant it would be 'indirectly assisting or encouraging the plaintiff in his criminal act'."

[21] The words quoted had been suggested by Counsel for the defendant in Thackwell v Barclays Bank plc [1986] 1 All ER 676. 687. The plaintiff was found to be party to a fraudulent refinancing transaction and the Bank succeeded in defending a claim in conversion for a cheque generated by the fraud, relying on the doctrine that a party may not base his claim on a wrong - ex turpi causa non oritur actio. Henderson J went on to state that had the plaintiff not been a party to the fraud his claim would in any event have been defeated on public policy grounds as to permit the plaintiff to recover the cheque would have been indirectly assisting in the commission of a crime.

[22] In Costello the plaintiff undertook civil proceedings for the return of a motor vehicle seized by police. It was found that the vehicle had been stolen and the plaintiff knew it was stolen. Following Webb, the Court of Appeal ordered delivery up of the vehicle on the basis that the limited right of the police to retain property for the statutory purpose and their obligation thereupon to return it to the 'owner' were unaffected by any perceived public policy consideration that the fruits of criminal activities ought to be withheld from a criminal. However, there was stated to be an exception to the effect that a party cannot assert a right to immediate possession of the goods if that possession would be illegal or it would be illegal for the police to give up possession to the claimant. Lightman J gave the examples of controlled drugs or a gun in a case where the claimant did not have the necessary authorisation to have possession.

[23] The further contention was rejected that no possessory (or other) title in stolen property vests in the thief or the receiver of stolen property and that accordingly, on seizure of stolen property, the police become possessory owners and had no obligation to restore the stolen property to the person from whom it was seized. Lightman J stated that the Court cannot withhold an order for delivery up of the goods to the person legally entitled to possession, whether or not that person is a theft or a receiver of stolen property.

[24] In Carter an application was made under the 1897 Act for the return of £10,000 paid to an undercover police officer posing as a hired assassin. Mrs Carter was convicted of soliciting murder and Mr Carter was acquitted. Mrs Carter disclaimed any interest in the money and Mr Carter claimed the money. The Magistrates refused the return of the money as it had been intended for use to bring about a death. On an application for Judicial Review, Maurice Kay J, applying Webb, found that the police had no right to retain the money.

[25] Thereafter there may appear to have been some softening of the approach taken in Webb and Costello and Carter. Two further cases fall to be considered, Gough v The Chief Constable for West Midlands Police [2004] EWCA Civ. 206 and Chief Constable of Merseyside Police v Owens [2012] EWHC 1515 Admin.

[26] Gough involved civil proceedings in respect of vehicles and vehicle parts that had been lawfully seized by the police. The Court of Appeal followed Webb and Costello and ordered the return of the goods. Park J stated that the decision of Maurice Kay J in Carter was correct. He stated that despite the use of the word "may" in the 1897 Act and despite the Act referring to ownership rather than possession "…. it would not be a proper exercise of discretion by the Magistrates to refuse to order a return of property to the only known person who is admittedly entitled to possession at common law. At least that is so in a case where no one else claims to the owner of the property and where there is no realistic possibility of anyone else putting forward such a claim."

[27] Carnwath LJ did not agree. At paragraph [42] he stated that the ambit of the County Court proceedings differs from proceedings under the 1897 Act in two potentially significant respects. First that the term "owner" under the 1897 Act is "a person who is entitled to the goods in question, a person whose goods they are, not simply the person who happens to have them in his hands at any given moment". Thus the mere fact that the claimant can show a possessory title, which would be sufficient for a claim in the County Court, does not oblige the Magistrates to return the property to him if they are satisfied that there is someone else with a better legal title. Secondly, that it was held in White that the Magistrates' Court would be entitled to decline to order the return of property on public policy grounds. It was said to be unnecessary to decide whether that aspect of the 1897 Act had been wholly displaced by the subsequent cases and the issue was reserved.

[28] Potter LJ shared the reservations and endorsed the qualifications expressed by Carnwath LJ. He found it inherently rebarbative that by civil proceedings a person may be held entitled to recover and continue to enjoy property even though the Court may be satisfied that he is not the true owner and has acquired the property illegally, albeit the true owner is not identifiable - "It seems to me that the terms of the 1897 Act are such that, in those circumstances, Magistrates may well not be obliged to make an order in favour of such a claimant and in that respect the decision of Maurice Kay J in Carter may need revisiting should a case arise where the issue is a live one".

[29] In Owens the police seized a video from the defendant's CCTV system while investigating arson at the defendant's property. The defendant applied under the 1897 Act for the return of the video and police resisted on the basis that to return the video would be indirectly assisting or encouraging a criminal act in that it was believed that the defendant would see the video and seek revenge against the person who was the actual offender or mistaken innocent third party. Thomas LJ referred to Thackwell v Barclays Bank and Tinsley v Milliken and May LJ in Webb and stated:

> "We are therefore prepared to assume, whether the claim is brought in a civil court or an ordinary action or in a Magistrates' Court under 1897 Act, the court could refuse to grant relief and refuse to order the return if on the facts it could be established that the return of property would indirectly encourage or assist a person in his criminal act."

[30] The Court concluded that no findings had been made by the District Judge which enabled the Court to conclude not merely that the police believed that the defendant would use the tape to enable him to commit a criminal act but that the Court itself could be satisfied that ordering the return would in fact do so. While recognising that it was sometimes possible for a Court, without remitting the case at considerable cost, to fill in findings of fact which should have been made by the Judge or Magistrate and that normally a Court would do so by agreement, the Court could not make findings which the Judge was not asked to make and would be disputed by the defendant where he to be asked. The video was returned.

The public policy grounds for refusing the return of the goods.

[31] We are satisfied that in relation to goods lawfully seized by police -

(1) Applications under article 31 of the Police Property (NI) Order 1998 entitle the District Judge to order delivery of the goods to the owner or, where no owner can be ascertained, to make such order as the District Judge thinks fit. Such proceedings are concerned first of all to establish the 'ownership' of the goods.

(2) In the alternative the claimant may take civil proceedings against the police in conversion and the Torts (Interference with Goods) Act 1977. Such proceedings are concerned with the right to 'possession' of the goods and any such right of the claimant may be defeated by the superior right of another.

(3) There is no general public conscience defence to applications for recovery of goods lawfully seized by police, whether under the statutory claim or the civil claim.

(4) There is a public policy defence to the claims to the extent that –

(a) It would be unlawful for the claimant to be in possession of the goods or it would be unlawful for the police to give up possession of the goods to the claimant (eg drugs or weapons without a required prescription or permit),

(b) The return of the goods would directly or indirectly assist or encourage the commission of a crime (eg directly, by the goods being the instrument of crime, or indirectly, by facilitating the crime, such as the use of a video to identify a person for criminal purposes),

(c) The return of the goods would be contrary to the policy of Parliament as contained in legislation (eg in relation to restrictions on items).

(5) In each case it would be necessary for the police to establish the public policy ground on the balance of probabilities.

(6) Accordingly, the District Judge has a discretion in relation to both limbs of article 31 of the 1998 Act, namely as to the return of the goods both when the owner has been ascertained and when the owner has not been ascertained.

[32] As the statutory claim is concerned with ownership we doubt that Parliament would have intended that the thief and handler of stolen goods or any party to illegal conduct that produced the seized goods would have been entitled to the return of the goods. This case was not concerned with such illegal activity and we did not hear argument in that regard and reserve for a further occasion the manner in which the incidence of illegal conduct bears on the return of the goods, whether in civil proceedings or under the statutory scheme.

[33] The issue for present purposes is whether the return of the goods may be refused under any of the public policy grounds referred to above, namely that it would be unlawful to be in possession or to give up possession or that the return would directly or indirectly assist or encourage the commission of a crime or that the return of the goods would be contrary to the policy of Parliament.

[34] Her Honour addressed the matter on broad public policy grounds rather than any of the narrower public policy grounds referred to above. The reasons for refusing to return the goods on the wider public policy grounds were stated by Her

Honour to be causing harm to himself and to others, the dangerous effects of the substances, the prolific offending, the use of legal highs as a trigger for offending, the threat to the appellant's health and welfare, the protection of the public, the dangerous products which had caused harm to the appellant, members of his family and the community and the absence of benefit to the appellant in having the substances returned.

[35] The factual basis for these reasons concerned first of all the nature of the goods seized. The police seized 63 tablets namely, 32 Diclazepam, Benzodiazepine designer drug and functional analogue of Diazepam with approximately 10 times it potency, one capsule with indications of Propranolol, a beta blocker, 14 tablets with indications of Flubromazepam, Benzodiazepine derivative and a white crystal material Ethylphenidate a psycho-stimulate and close analogue of Methylphenidate.

[36] Further, the factual basis for the reasons concerned the history of the appellant. The appellant was regarded by the PSNI Reducing Offending Unit as a priority offender. The appellant's contacts with police included an incident on 16 November 2012 when he had taken 15 Diazepam and had broken a window and stated at interview that he did not know what he was doing. On 3 February 2013 a domestic incident involved the legal high Dupe and abuse of alcohol and aerosols when he took a knife to his bedroom and threatened to cut his wrists and threatened to stab his mother. Of note is that the incident resulted in an armed response police team being tasked to assist. On 9 February 2013 and again on 8 March 2013 in breach of bail he was highly intoxicated through legal highs. On 7 June 2013 he was abusing alcohol and Diazepam and had threatened his parents with a knife. On 22 January 2014 he had printed a prescription slip on his computer for 350 Diazepam. Other incidents involving abuse of alcohol or aerosols occurred on 10 April 2012, 30 November 2012, 7 April 2013, 29 June 2013, 18 July 2013, 2 August 2013, 12 September 2013, 13 December 2013, 16 April 2014, 24 May 2014, 2 July 2014 and 29 December 2014.

[37] In addition, the factual basis for the reasons included a finding of a causal connection between the legal highs and the offending behaviour of the appellant. Apart from the PSNI Reducing Offending Unit having identified the legal highs as a trigger for the appellant's offending behaviour it was accepted that under the influence of such substances the appellant had acted aggressively and in a manner likely to cause harm to others. The history shows a coincidence between the use of the substances and the offending behaviour, including the requirement on one occasion for the presence of an armed response police team.

[38] As stated above we reject the general public policy grounds stated by Her Honour. Accordingly we proceed to consider the circumstances of the present application before Her Honour for the return of the items based on the public policy grounds stated above.

[39] The first public policy ground arises where it would be unlawful for the claimant to be in possession of the goods or it would be unlawful for the police to give up possession of the goods to the claimant (eg drugs or weapons without a required prescription or permit).

[40] At the date when the application was before Her Honour it was not unlawful for the appellant to be in possession of the items and that remains the position. At that date it was not unlawful for the police to give up possession of the items to the appellant. When the matter was under consideration by Her Honour the Psychoactive Substances Act 2016 ("the 2016 Act") was not on the statute book. At that time the first public policy ground did not apply to the circumstances of the present case. The effect of the 2016 Act will be discussed below.

[41] The second public policy ground arises where the return of the goods would directly or indirectly assist or encourage the commission of a crime (eg directly, by the goods being the instrument of crime, or indirectly, by facilitating the crime, such as the use of a video to identify a person for criminal purposes).

[42] Among the reasons relied on by Her Honour were matters that might be considered relevant to this public policy ground of indirectly assisting or encouraging the commission of a crime. Those reasons were causing harm to others while under the influence of legal highs, the use of legal highs identified as a trigger for offending, the causing of harm to members of the appellant's family and the community and the protection of the public.

[43] Has it been established on the balance of probabilities that the return of the legal highs would directly or indirectly assist or encourage the commission of offences, namely harm or the threat of harm by the appellant to members of his family and of the public?

[44] The connection between the return of the items and the offences is the prospect that the use by the appellant of the returned items may result in the appellant committing offences of violence. We are satisfied that the connection between the return of the items and the prospect of offending is too remote to fall within this public policy ground. The items would not be the instruments of or the product of crime but rather would effect a change in the potential offender. We are satisfied that this case does not fall within the public policy ground of directly or indirectly assisting or encouraging the commission of offences of occasioning harm or the threat of harm by the appellant on members of his family and of the public.

[45] The third public policy ground arises where the return of the goods would be contrary to the policy of Parliament as contained in legislation (eg in relation to restrictions on items).

[46] The 2016 Act was not in force when the District Judge and the County Court Judge made their decisions. The Act reflects the public concern about legal highs as

psychoactive substances. It has not been made an offence simply to be in possession of a psychoactive substance. However it is now an offence to supply, or offer to supply, a psychoactive substance, punishable on summary conviction with 6 months imprisonment or a fine or on indictment with 7 years imprisonment or a fine. There are further offences under the 2016 Act of being in possession of psychoactive substances with intent to supply, producing a psychoactive substance and importing or exporting psychoactice substances.

[47] In addition, the 2016 Act contains powers of seizure and retention of psychoactive substances. If legal highs were to be seized under the powers in the 2016 Act, a police officer, who reasonably believed that the psychoactive substances were likely to be consumed for their psychoactive effects, may dispose of the items as the officer thinks is suitable. Further, on application, the Court, if satisfied that the items were likely to be consumed for their psychoactive effects may order forfeiture. There are exemptions for health care professionals and approved scientific research.

[48] The police and the courts may now refuse to return such items if satisfied that they are likely to be used for their psychoactive effects. The legislation creates offences in relation to the export or import or supply of the items or possession with intent to supply but does not criminalise the user. Nevertheless the statutory purpose is to restrict the use of the items and to prevent them getting into the hands of a user. The return of the legal highs would be contrary to the statutory purpose of the 2016 Act as it is clear that the appellant is likely to consume these items for their psychoactive effects.

[49] If the third public policy ground falls to be determined at the date of the decision on the application for the return of the items and this Court were to remit this matter to Her Honour for reconsideration in light of this judgment, the relevant policy considerations at that date would include the 2016 Act. In that event it is evident that the return of the items to the appellant would be contrary to the policy of the 2016 Act in preventing these items falling into the hands of a user, in this case the appellant.

[50] If, on the other hand, the third public policy ground falls to be determined at the date of Her Honour's original decision and hence before the commencement of the 2016 Act, and the items were required to be returned to the appellant, the police would have powers of seizure of the items under the 2016 Act if a police officer reasonably believed that the psychoactive substances were likely to be consumed for their psychoactive effects and may dispose of the items as the officer thinks is suitable.

[51] We have considered whether to remit the case to Her Honour for further consideration of the issue in light of this judgment on the relevant public policy grounds. However we have concluded that we are able to consider the application of the public policy grounds in light of the factual findings already made by Her Honour. Accordingly we find it unnecessary to remit the case for further findings or

determination. We are satisfied that, on the basis of the findings already made by her Honour, the return of the items to the appellant would result in their seizure and disposal by the police under the powers in the 2016 Act.

[52] Accordingly, while recognising that there were no general public policy grounds for refusing the return of the items, as relied on by Her Honour, in the circumstances where the items are now liable to seizure and disposal by the police, we do not propose to take any step that would interfere with the Order made by Her Honour.

[53] In answer to the questions -

1. 'Was I correct in law in holding that the Court has a discretion to refuse an order for the return of the appellant's property'

2. 'If so, was I correct in law in holding that the discretion should be exercised in the respondent's favour' -

   The Court has a discretion to refuse the return of seized property in the circumstances set out in paragraph [31] above but in the present case the Court did not have a discretion to refuse the return of the appellant's property on the general public policy grounds relied upon.