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Judgment: approved by the Court for handing down | *Delivered:* **08/12/2014**

*(subject to editorial corrections)**

IN THE CROWN COURT OF NORTHERN IRELAND

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THE QUEEN

-v-

PATRICK MACKLE

BENEDICT MACKLE

PLUNKETT JUDE MACKLE

HENRY McLAUGHLIN

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WEATHERUP J

[1] This is a preliminary ruling on the scope of confiscation hearings in respect of the four defendants, further to the remittal of the cases to the Crown Court by the Supreme Court on 29 January 2014. Mr McDowell appeared for the prosecution, Mr Knowles QC and Ms Lynch for Patrick Mackle and Mr McNamee as solicitor for the other three defendants.

[2] The background appears from the judgment of the Supreme Court [2014] UKSC 5. Before Deeny J the Mackles pleaded guilty to fraudulent evasion of duty, contrary to the Customs and Excise Management Act 1979 and were given suspended prison sentences. The prosecution proceeded with applications for Confiscation Orders on the erroneous basis that Regulation 5(3) of the Excise Goods Holding Movement Warehousing and REDS Regulations 1992 was applicable so as to make the defendants liable as consignees of the goods for the payment of the relevant import duty and VAT. As a result the prosecution proceeded on the basis that the defendants could be shown to have derived a pecuniary advantage in connection with the commission of an offence, within the provisions of the Proceeds of Crime (Northern Ireland) Order 1996, for the purpose of the making of Confiscation Orders. Each defendant, having been advised by Counsel that the Regulations were applicable, consented to a Confiscation Order being made.

[3] In a separate prosecution before me involving several defendants, McLaughlin also pleaded guilty to offences under the 1979 Act, the offences having taken place after the coming into force of the Proceeds of Crime Act 2002. The

defendants pleaded guilty and received suspended prison sentences. The prosecution applied for Confiscation Orders, again relying on the 1992 Regulations. McLaughlin consented to the making of a Confiscation Order.

[4] All defendants were subsequently advised that, when the importation of excise goods related to tobacco products, liability to pay duty arose under the Tobacco Products Regulations 2001 and was limited to those persons who held the tobacco at, or had caused it to reach, the excise duty point. The defendants' appealed to the Court of Appeal against the Confiscation Orders and the appeals were dismissed.

[5] The Confiscation Orders were set aside by the Supreme Court. The Supreme Court found that a defendant having played an active part in the handling of goods, so as to assist in their commercial realisation, did not by itself establish that the defendant had obtained a benefit for the purposes of the 1996 Order or the 2002 Act. It was found to be necessary to establish, from the evidence or by reasonable inferences drawn therefrom, that each defendant had actually obtained a benefit. It followed that since the only basis on which the prosecution had claimed that the defendants had benefited from their criminal conduct had been wrong in law and since it could probably be inferred that there had been no other reason for them to have given their consent, the Confiscation Orders could not stand. Accordingly the Confiscation Orders were quashed and the cases were remitted to the Crown Court to proceed as appropriate.

[6] The prosecution and the defendants then disagreed on the scope of the rehearing of the applications for Confiscation Orders. It was agreed by all concerned that, while Deeny J had been the trial judge in the prosecution of the Mackles, I should deal with the preliminary ruling on the scope of the rehearing of the confiscation proceedings in relation to all four defendants.

[7] Liam McCollum QC, who with David McDowell was Counsel for the prosecution in both trials, filed an affidavit as to the circumstances in which the pleas of guilty and the making of the Confiscation Orders had been arranged between the prosecution and the defendants. As a consequence Mr McCollum withdrew as Counsel for the prosecution and Mr McDowell dealt with the argument on behalf of the prosecution in relation to the scope of the confiscation proceedings.

[8] The defendants applied for leave to cross-examine Mr McCollum because they did not accept the contents of his affidavit. I deferred the decision on leave to cross-examine pending further consideration of the other issues.

[9] Mr McCollum's affidavit states, in respect of the defendant Patrick Mackle, that in the discussions with Counsel it was agreed that, while the prosecution accepted that it might not be able to prove that Patrick Mackle was a major organiser in relation to smuggled cigarettes, the prosecution was reserving its position in this regard as far as compensation proceedings were concerned.

[10] As to Jude and Benedict Mackle, Mr McCollum avers that, being aware of the different roles of the defendants, on the day of the confiscation proceedings the prosecution was concentrating more on Patrick Mackle than the others, but that he, Mr McCollum, told Counsel for the defendants that the prosecution would be content with an order for the full amount that was sought to be recovered in the proceedings being obtained against Patrick Mackle. In the event the breakdown of the full amount of the confiscation sum was agreed between the defendants.

[11] As to the defendant McLaughlin, Mr McCollum also had discussions with defence Counsel and states that the prosecution made it clear that for confiscation purposes the prosecution considered the defendants to have been members of a gang of professional smugglers who imported the contraband cigarettes. He avers that, after discussions, the Confiscation Orders were agreed and this agreement was reached before the roles of the defendants were discussed in relation to any proposed plea of mitigation. After the confiscation amounts had been agreed it is said that the prosecution conceded that it would accept a lesser degree of culpability for the purposes of the pleas of guilty by virtue of the higher standard of proof placed upon it.

[12] The defendants do not accept Mr McCollum's account of the discussions, hence their application for leave to cross examine Mr McCollum.

[13] The prosecution position is first of all that in a confiscation hearing the Court is entitled to look afresh at all the evidence against each of the defendants and is not bound by any factual determination made in relation to the sentence imposed or any basis of plea put forward on behalf of the defendants at the sentencing hearing. Secondly, the prosecution contend that it is implicit in the decision of the Supreme Court to remit the cases to the Crown Court that on the rehearing of the confiscation proceedings the Court is entitled to look afresh at the evidence. It is said that had the Supreme Court considered that the basis of plea at the sentencing hearing was binding in the confiscation proceedings, the remittal would not have been necessary. Thirdly, the prosecution contend that during the argument in the Supreme Court, Counsel on behalf of three of the defendants, Mr Knowles, conceded that renewed confiscations hearings could begin afresh in the Crown Court without the Court being limited by the approach at sentencing. The prosecution referred to an exchange between Lord Neuberger and Mr Knowles appearing in the transcript. Fourthly, the prosecution contend that in respect of the Mackles there was no written basis of plea and to the extent that any basis of plea put forward was accepted by the prosecution it was for the purposes of sentencing only and not for the purpose of confiscation proceedings. In respect of the defendant McLaughlin the prosecution contend that the basis of plea at the sentencing hearing was not binding in respect of the confiscation proceedings as the prosecution had consistently made it clear that any concession on the facts at the sentencing stage would not bind the prosecution in any confiscation proceedings.

[14] The defendants' position on the other hand is that the basis of sentencing determines the basis for deciding the benefit which any defendant would have obtained for the purposes of confiscation proceedings. Further the defendants' contend that the prosecution did not express any reservation of their position in relation to confiscation proceedings.

[15] What was the basis on which each of the defendants was sentenced? In respect of Jude and Benedict Mackle they were unloaders of the contraband consignment and that was the extent of their role. The Supreme Court, at paragraph [15], stated that in respect of Jude and Benedict Mackle, Counsel for the prosecution told the trial Judge that the prosecution had no evidence to suggest that they were involved in any capacity other than as assisting in the unloading of the container and that this appears to have been accepted by the Judge in sentencing.

[16] In respect of the defendant Patrick Mackle he had what was described as a limited organisational role. The Supreme Court, at paragraph [14], stated that the trial Judge concluded that, since Patrick Mackle had asked his brothers to carry out the unloading of the cigarettes and since this had taken place at Patrick Mackle's yard, he had a limited organisational role. It was noted that the prosecution had accepted the appellant's plea of guilty on the basis that he was not the ringleader in the enterprise. It was stated that the Judge considered that it was appropriate to sentence Patrick Mackle on that basis. On this application Mr McDowell on behalf of the prosecution stated that he could find no record of the prosecution having so agreed. However the transcript includes the remarks attributed to the trial Judge that it had been agreed by the prosecution that Patrick Mackle was not a ringleader and that he had a limited organisational role and the prosecution at that time raised no objection.

[17] In respect of McLaughlin he was found to have no organisational role. The Supreme Court, at paragraph [19], stated that in sentencing reference had been made to Cryzewski [2004] EWCA Crim 2139 in which a number of possible aggravating features in fraudulent evasion of duty cases were considered and the first of those was 'playing an organisational role'. It was stated that the sentencing remarks concluded that neither this nor indeed any other aggravating feature was present.

[18] As far as agreement between prosecution Counsel and defence Counsel in relation to the pleas is concerned, in respect of Jude and Benedict Mackle it was agreed that they were unloaders only. In respect of Patrick Mackle the prosecution states that it was agreed that the prosecution was reserving its position that Patrick Mackle was a major organiser and that this would be relied on in confiscation proceedings. The defendant's position is that the prosecution did not make any reservation in respect of the basis of the defendant's plea. In respect of McLaughlin the prosecution position is that the prosecution told the defence that it would accept lesser culpability for the purposes of sentencing because of the standard of proof but that that would not be the approach in confiscation proceedings. However the defendant contends that the Confiscation Order was agreed before the roles of the

respective defendants were addressed in mitigation and that there were no reservations made in respect of the confiscation proceedings.

[19] The statutory scheme in its present form is in the Proceeds of Crime Act 2002. Section 156 provides that the Crown Court must proceed under the section if two conditions are satisfied, namely the defendant has been convicted of an offence before the Crown Court and the prosecutor asks the Court to proceed under the section. In that event the Court must proceed as follows -

> (a) It must decide whether the defendant has a criminal lifestyle;
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> (b) If it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;
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> (c) If it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.
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> If the Court decides that the defendant has so benefited then it must decide the recoverable amount and make a Confiscation Order requiring him to pay that amount.
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> The court must decide the questions arising on a balance of probabilities.

[20] Section 223 provides that criminal lifestyle arises where the offence concerned is a specified offence or it constitutes conduct forming part of a course of criminal conduct or is an offence committed over a period of at least six months and the defendant have benefited from the conduct. In such cases the Court must make four assumptions unless they are shown to be incorrect or there would be a serious risk of injustice if the assumptions were made. The assumptions are that any property transferred within the previous six years or held after conviction or any expenditure in the previous six years was the result of general criminal activity and that any property obtained was free of any other interests. The present cases are not criminal lifestyle cases, as the prosecution and defendants have agreed.

[21] Section 224 provides that particular criminal conduct of the defendant includes all his criminal conduct which constitutes the offence or offences concerned. The present cases all concern particular criminal conduct.

[22] Section 171 provides for reconsideration of a Confiscation Order if there is evidence that was not available to the prosecutor when the matter was earlier considered by the Court.

[23] The prosecution relied on R v Lunnan [2004] EWCA Crim. 1125 involving a plea to conspiracy to supply cannabis where the defendant received a sentence of 13 months imprisonment. Subsequently a confiscation order was made under the Drug Trafficking Act 1994 in the sum of £12,000. The circumstances of the offence related to the importation of drugs from Holland. There was an agreed basis of plea. It was accepted by the prosecution that, prior to the incident in question, the defendant had no previous involvement in drug trafficking.

[24] The 1994 Act was a statutory predecessor of the Proceeds of Crime Act 2002 and enabled Confiscation Orders to be made when a defendant was convicted of drug trafficking. A similar scheme of statutory assumptions applied under the 1994 Act, namely that any property held since conviction or transferred to that defendant at any time during the previous six years or any expenditure by him during that period were assumed to have arisen from drug trafficking. A statutory assumption would not be made if the assumption was shown to be incorrect or if the Court was satisfied that there would be a serious risk of injustice if the assumption were to be made.

[25] The statutory assumptions were not consistent with the concession that the defendant had not previously been engaged in drug trafficking. However the trial judge found that there was nothing to displace the statutory assumptions in the light of the fact that the appellant had admitted telling lies and the notable paucity of documentation in respect of the defendant's business. The Court of Appeal stated that it was thus apparent that the Judge had put to one side the agreed basis of plea and in particular put to one side the acknowledgement by the prosecution that the appellant had no previous involvement in drug trafficking. The Court of Appeal concluded that the Crown's concession had simply not been addressed and the appeal was allowed and the confiscation order was quashed.

[26] On this application the prosecution relied on paragraph [17] of the judgment in Lunnan to support the contention that the matters stated on the hearing of the plea are not determinative of matters to be dealt with in the confiscation hearing and that the prosecution has the right to introduce new matters at a confiscation hearing.

> "No doubt one could envisage circumstances where the Crown had discovered prior to the conclusion of a confiscating hearing that such a concession had been wrongly made…. In such circumstances, the appropriate course would be for the Crown to notify the defendant that the concession had been withdrawn and that, accordingly, he will have the choice of proving on the balance of probabilities that he was, after all, a first time offender, or of inviting the court to be satisfied that there would be a serious risk of injustice, for some other reason, if the statutory assumptions were to be applied. What is plainly unacceptable is for the concession to be made for part of the

> sentencing process, without qualification, but for reliance to be placed, tacitly, on the assumptions when it comes to the confiscation hearing."

[27] In a further instance of the same approach with a different outcome the prosecution relied on R v Lazarus [2004] EWCA Crim 2297, which again involved drug trafficking. The relevant statutory provisions were the Drug Trafficking Act 1994 and by reason of the dates of offending the Proceeds of Crime Act 2002. The defendant was convicted of being concerned in the supply of cocaine after a search at his house. He received a sentence of imprisonment upon his plea of guilty. He pleaded guilty on the basis that for about six months before his arrest he had offered his home as a place of safe storage for money generated by drug dealing by someone else and that money found in his premises was being kept on behalf of the dealer. The defendant contended that the statutory assumption that income and expenditure over the period of six years prior to offending were the products of drug dealing would not be consistent with the agreed basis of plea that he had been involved for six months in keeping the money for a dealer and having the drugs for his own use.

[28] The Court of Appeal's conclusion was that the appellant's admitted involvement in the supply of cocaine for a period of six months prior to his arrest left wholly open the question whether there had been any benefit from drug dealing before that period. The Court was unable to agree that the Crown's acceptance of that basis of plea carried with it the further assertion that the appellant had never done it before. There was found to be no concession by the Crown that the defendant had never previously been involved with drug dealing. The court therefore found that the confiscation order was not limited to the proceeds of the offence which was charged on the indictment.

[29] The Court of Appeal reaffirmed the position that the basis of plea by the Crown was not final but could be withdrawn. However unlike the defendant in Lunnon the defendant knew perfectly well that the Crown was seeking to rely on the statutory assumptions and had ample opportunity to rebut the assumptions. Thus a further matter relied on by the prosecution was that what is important is not the basis of plea but the knowledge of the defendant as to whether or not there will be reliance by the prosecution on wider matters for the purpose of confiscation proceedings. It was found that there was no unfairness to the defendant and no injustice in applying the statutory assumptions.

[30] The Court of Appeal returned to the subject in R v May (2005) EWCA Crim. 97 where there was no finding that the defendant had a criminal lifestyle and confiscation proceedings were based on particular criminal conduct. The defendant was convicted on one count of conspiracy to cheat by the withholding and reclaiming of VAT and was sentenced to five years imprisonment. It was submitted on behalf of the appellant that the Judge was not entitled to attribute to the appellant a role different from that agreed with the Crown or to proceed on factual findings

which were inconsistent with the basis of plea. The Court of Appeal stated that the making of a confiscation order is part of the sentencing process and a Judge is bound by facts agreed between the parties. However the position was different where there was no agreed factual basis of plea and the Judge is required to hear the evidence placed before him and reach his own conclusion as to the part by a defendant. It was held that the Judge misdirected himself in determining that he was required to investigate the factual degree of involvement of the appellant further than that prescribed by the agreed basis of plea.

[31] R v Chambers (2008) EWCA Crim. 2467 is a further instance of confiscation proceedings based on particular criminal conduct. The defendant pleaded guilty to customs and excise offences of knowingly being concerned in dealing with tobacco products and avoiding the duties. The plea of guilty was entered on a specific written basis. According to the Court log the Crown asserted at the time that it was not bound by the basis of plea. The Court of Appeal, referring to May, reaffirmed that where the Crown agree a basis of plea that basis is binding when considering confiscation. However, if the basis is not agreed the Judge will be required to hear evidence and reach his own conclusion as to the part played by the defendant. It was held that the prosecution was not bound by the plea because it had made clear at the sentencing exercise that it would not be bound.

[32] First of all the confiscation proceedings in all these cases will proceed on the basis of the particular criminal conduct constituted by the offences and are not cases concerning criminal lifestyle. Thus the statutory assumptions that apply to criminal lifestyle cases will not apply.

Secondly, the basis of confiscation proceedings should not be contrary to the basis of plea at the sentencing hearing, with this qualification, that there may be a reservation by the prosecution of its position for the purposes of the confiscation proceedings.

Thirdly, the basis of plea is that which is agreed between the prosecution and the defence or as may be determined by the Judge for the purposes of sentencing.

Fourthly, a reservation should be clear and unequivocal. It should be stated in Court. It should be a matter of record. It should not be relied on if it is only something spoken of privately between Counsel. This is not simply a matter of whether the defendant knew that the prosecution were contending that they would rely on other matters for the purposes of confiscation, although that in itself is important. This is a matter of the Court record showing clearly that there has been a reservation expressed by the prosecution.

Fifthly, criminal lifestyle cases, which are not these cases, include consideration of the application of the statutory assumptions, subject to an assumption being shown to be incorrect or that there would be a serious risk of injustice if the assumption were made. That approach may have implications for the relationship between the sentencing hearing and the confiscation hearing. There may be tension between the conduct relating to the offences of which the defendant has been convicted and for which he is sentenced and the wider conduct that may be taken into account in applying the statutory assumptions.

[33] The prosecution and the defence and the Court proceeded on a certain basis on each plea. The prosecution seek to rely on reservations of their position stated to have been made for the purposes of the confiscation proceedings, which reservations are disputed on behalf of the defendants. The basis on which each reservation is said to have been expressed is not accepted as having been an effective reservation.

[34] Further, the prosecution contend that the Supreme Court's decision to remit the case was based first of all on the need to re-examine the basis for confiscation and secondly, that the defendants' Counsel accepted the prosecution's entitlement to call new evidence. As to the first matter, what has to be established on a confiscation hearing includes the benefit to the defendant and the Supreme Court was not in a position to decide that issue. Thus the appeal was remitted in order for this Court to address the question of benefit. The fact of remittal is not itself a finding in relation to the scope of the confiscation rehearing but simply an exercise that requires the Court of first instance to make the determination of benefit. Secondly, as to Counsel's acceptance of the scope of the rehearing, there was an exchange between Lord Neuberger and Mr Knowles that related to the defendants Jude and Benedict Mackle and appears to contemplate the introduction of new evidence. Lord Neuberger's comments cannot have contemplated that the re-hearing would be other than in accordance with whatever was found to be the legal position, whatever Counsel might have said at the time.

[35] Further the prosecution rely on observations at paragraph [40] of the Court of Appeal judgment ([2011] NICA 31) where it was stated that the appellants knew perfectly well what their respective roles were in the joint enterprise and what was likely to emerge if they contested the applications for the Confiscation Orders, thereby implying, the prosecution contend, that the knowledge of the defendants was of importance in determining the basis on which the Court would examine the question of benefit. The Court of Appeal was not there addressing the issue that now arises. It was addressing the circumstances in which the consent was given to the Confiscation Orders. I do not consider that this assists the argument on the scope of the rehearing.

[36] Further the prosecution rely on the issue of fairness. The prosecution contends that this Court should reopen the roles of the defendants on the basis that each defendant has set aside the approach agreed between the prosecution and the defendants as to sentencing and confiscation by launching their appeals against the Confiscation Orders. Therefore, says the prosecution, fairness requires that the prosecution should not be restricted by what occurred at the sentencing hearing and should be entitled to reopen the roles of the defendants for the purposes of the confiscation hearings.

[37] The defendants' appeals were directed at the jurisdiction of the Court to make the Confiscation Orders and that challenge was ultimately successful on the basis

that the Orders were made on an incorrect legal basis. The defendants were clearly entitled to have the legality of the Confiscation Orders further examined. That the defendants undertook the appeals is not any basis for contending that there is unfairness in confining the scope of the confiscation hearings to that which should otherwise prevail.

[38] I am satisfied that the basis of the confiscation rehearings in relation to these defendants must not conflict with the basis of sentencing of each defendant. The basis of sentencing was concerned with each defendants particular criminal conduct, being the offence or offences of which each defendant was convicted. The role of each defendant was defined for the purposes of sentencing and is recorded in the decision of the Supreme Court as outlined above. That position would not apply had the prosecution entered an effective reservation in respect of the basis of the plea of any defendant. That reservation should be clear and unequivocal and stated in Court at the sentencing hearing. There were no such reservations in the present cases.

[39] The affidavit evidence of Mr McCollum as to what was stated by the prosecution or agreed or not agreed between the prosecution and the defendants outside Court in relation to the evidence concerning confiscation is irrelevant. I refuse the application for cross-examination of Mr McCollum as being unnecessary.

[40] I was the trial judge in respect of McLaughlin, and I will deal with the McLaughlin confiscation rehearing. Deeny J will deal with the confiscation rehearings in the Mackle cases.