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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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2007/036592

THE QUEEN

-v-

HENRY PATRICK McLAUGHLIN
AND
AIDAN FRANCIS GREW

_____

Before: Deeny LJ, Sir John Gillen and Sir Reginald Weir

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DEENY LJ (delivering the judgment of the court)

Introduction

[1] On 30 November 2015 Weatherup LJ made confiscation orders in regard to Henry Patrick McLaughlin (McLaughlin) and Aidan Francis Grew (Grew).

[2] The order in relation to McLaughlin records that he was convicted by the Crown Court on 18 November 2008 of one count of evading customs duty charge on goods, contrary to Section 170(2) (a) of the Customs and Excise Management Act 1979 and one count of possession of criminal property, contrary to Section 329(1) (c) of the Proceeds of Crime Act 2002. The order records that on foot of Section 156 of the Proceeds of Crime Act 2002 the court found that the defendant did not have a criminal lifestyle but had benefited from his particular criminal conduct and ordered recovery of £77,136.00. McLaughlin sought leave to appeal that order by notice of 11 December 2015.

[3] On 30 November 2015 Weatherup LJ also made a confiscation order in respect of Grew. The order records that he had been convicted on 18 November 2008 of one count of evading customs duty charge on goods contrary to Section 170(2) (a) of the Customs and Excise Management Act 1979. It further recorded that he did not have a criminal lifestyle but had benefited from this particular criminal conduct. Recovery was ordered in the sum of £601,355.00. He sought leave to appeal against

that "sentence" (sic) on 31 December. The Court of Appeal had the assistance of extensive written and oral argument from Mr David McDowell QC for the prosecution with Mr Sam Magee, Mr Hugh Southey QC with Ms Sophie Laverty for Grew and Mr Julian Knowles QC with Miss Frances Lynch for McLaughlin.

History

[4] This matter has a relatively simple factual basis but a complex legal history. The factual background may be summarised as follows. On 16 November 2005 observations were made of an articulated cab and lorry parked at premises in County Tyrone. Two individuals were observed, including the driver, using a forklift truck, with movement between the lorry trailer and a shed in the yard. The lorry left the yard and travelled to another yard in Armagh. At that address police arrested three males, one of whom was Grew and another was the driver of the lorry, on suspicion of involvement in the distribution of cigarettes in the United Kingdom on which duty had not been paid. Large quantities of cigarettes were recovered from the trailer and the outbuildings.

[5] A search was carried out at the home of Grew. During the search a sheet of paper was identified on a coffee table, bearing the date 7 October 2015. On it were written references to various brands of cigarettes and their numbers. The defendant's wife attempted to destroy the sheet of paper but it was largely saved. Grew was arrested and questioned by the police but exercised his right of silence during police interviews. Mobile phone records obtained from his phone showed that he had been in touch not only with the lorry driver, who had also been arrested, but with McLaughlin on 16 November 2015 immediately prior to the arrest.

[6] On 20 July 2006 police arrested McLaughlin at his home after searches revealed a substantial amount of cash in sterling, Euros and US dollars. The search of McLaughlin's home also unearthed various ledgers and notebooks containing names and details of accounts pertaining to the sale of movement and distribution of cigarettes. The charges against McLaughlin related to the cigarettes recovered from the trailer and that much of the currency which was not returned to McLaughlin.

[7] Both applicants were committed for trial on 17 April 2007 to the Crown Court; as recorded above both ultimately pleaded guilty on 18 November 2008. The third person is not involved in these confiscation orders or this appeal.

[8] Weatherup J in his sentencing remarks stated the following:

> "The defendants Grew and [the third co-accused, Abernethy] were present at the time of the recovery of the items. The matter is put forward on the bases that neither was an importer or organiser in respect of the matter but were present at the time the contraband

> was recovered. McLaughlin on the other hand was not present. It is the case that is (sic), that the lorry which carried the contraband had stopped at his premises earlier in the day. He was not present when the lorry called at his premises but then connections were made between the contraband and McLaughlin and eventually that led to searches which led to the recovery of other items which it is agreed were the proceeds of criminal, were in fact criminal property."

[9] Grew was sentenced to three years imprisonment suspended for two years. McLaughlin was sentenced to two years imprisonment suspended for two years.

[10] Following the convictions the prosecution asked the court to make confiscation orders on foot of the Proceeds of Crime Act 2002, Section 156. In respect of that application the court initially made an order against Grew in the sum of £500,000. In respect of McLaughlin the benefit was stated by the Crown and agreed by McLaughlin to be £100,000. That was the available amount found by the court and agreed at £100,000 and became the amount under the confiscation order.

[11] However following these confiscation orders both these applicants brought appeals against them. On 30 June 2011 the Court of Appeal in Northern Ireland dismissed the appeals against the confiscation orders on the grounds that the orders had been made on consent and there was no reason to re-open them: [2011] NICA 31.

[12] McLaughlin further appealed to the Supreme Court of the United Kingdom, which on 29 January 2014, reported at R v Mackle, Mackle, Mackle and McLaughlin [2014] UKSC 5, held in favour of his appeal.

[13] The judgment of the court was delivered by Lord Kerr. He set out the factual and legal background of both cases. He said the following at paragraphs 39 and 40.

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

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

[14] Lord Kerr went on to reject the reasoning of Girvan LJ on behalf of the Court of Appeal arising from the possibility that the men could be found to have obtained a benefit which brought them within the purview of the confiscation order. That needed to be established before the court imposed such an order. The Supreme Court therefore recast the first certified question thus. "Is the defendant precluded from appealing against a confiscation order made by consent on the ground that the consent was based on a mistake of law, as a result of wrong legal advice?" It answered that question 'No'.

[15] Lord Kerr proceeded to consider the leading appellate decisions in England and Wales with regard to the second certified question. He, and the court, reached the conclusions set out at paragraph [67], [68] and [69] of the judgment.

> "67. The Court of Appeal in the present case did not examine the evidence with a view to ascertaining whether the appellants could be shown to have had possession of the cigarettes in such a way as is contemplated by the legislation. Before a confiscation order could be made in any of the appellants' cases, such an examination must take place. In its absence the Court of Appeal's decision cannot be upheld. Furthermore, the court's conclusion that the appellants could be considered to have obtained a benefit simply because they admitted participation in a joint criminal enterprise cannot, in the light particularly of the decisions in *Sivaraman* and *Allpress*, be accepted.
>
> 68. I would therefore answer the second certified question, "Not necessarily. Playing an active part in the handling of goods so as to assist in their

> commercial realisation does not alone establish that a person has benefited from his criminal activity. In order to obtain the goods for the purposes of section 156 of POCA 2002 or article 8 of the Proceeds of Crime (Northern Ireland) Order 1996, it must be established by the evidence or reasonable inferences drawn therefrom that such a person has actually obtained a benefit."
>
> 69. On an appeal against sentence the Court of Appeal has power under section 10(3) of the Criminal Appeal (Northern Ireland) Act 1980 to quash the sentence passed by the Crown Court and pass such other sentence as is authorised by law. Section 10(3A) of the 1980 Act (as inserted by the Coroners and Justice Act 2009, section 141(2)) provides that where the Court of Appeal exercises its power under subsection (3) to quash a confiscation order, the court may, instead of passing a sentence in substitution for that order, direct the Crown Court to proceed afresh under the relevant enactment. Section 33(3) (as substituted by the Constitutional Reform Act 2005, section 40, Schedule 9, para 33(4)(b)) provides that, for the purpose of disposing of an appeal under this Part of the Act, the Supreme Court may exercise any powers of the Court of Appeal. I would therefore quash the confiscation orders and remit the cases to the trial courts to proceed afresh in light of this judgment."

[16] The cases were then relisted by the summer of 2014 before the original trial judges. It was decided that it was preferable if Weatherup J held the confiscation order hearings for both the Mackle cases and McLaughlin.

[17] On 10 November 2014 Grew's case was referred back to the Court of Appeal in Northern Ireland by the Criminal Cases Review Commission in the light of the judgment of the Supreme Court.

[18] On 8 December 2014 Weatherup J gave a preliminary ruling on the scope of the confiscation rehearing in respect of Mackles and McLaughlin: [2014] NICC 24.

[19] On 6 February 2015 the Court of Appeal allowed Grew's appeal, quashed the confiscation order and remitted his case to Weatherup J.

[20] A further preliminary hearing of the renewed confiscation order cases took place on 22 April 2015 on foot of an application by the prosecution. Weatherup J ruled that the confiscation rehearing must proceed on the basis of the sentencing of the defendants. The case was listed to be heard by him on 10 September 2015. As set out above he made the confiscation orders following his written judgment on 30 November 2015. Leave to appeal on the ground of the challenge to the assessment of benefit with regard to both appellants and also on the issue of delay with regard to making a confiscation order outside the two year period permitted under Section 164 was subsequently given on 17 February 2017 by Keegan J.

Grounds for leave to appeal or appeal of Henry Patrick McLaughlin

Procedural irregularity.

[21] The first ground advanced on behalf of this appellant related to the making by Weatherup LJ, as he had become, of the confiscation order against McLaughlin on the basis of matters which had not been proven in evidence before him and were in dispute. Counsel for McLaughlin expressly made no submissions on the point earlier taken on the papers as to the correct venue for the hearing of proceedings remitted by the Supreme Court under Section 33(3) of the Criminal Appeal (Northern Ireland) Act 1980.

[22] A further concession can be noted at this point. This appellant acknowledged in his response to the prosecutors statement in 2015 that he had received £5,000 for his involvement in these offences, while denying that he had any interest in the cigarettes other than that 'fixed fee'. At the conclusion of his submissions counsel acknowledged that the court was entitled to substitute a confiscation order for £5,000 in all the circumstances. That did not require any realisation of Mr McLaughlin's property.

[23] The first principal ground of complaint arose with regard to the hearing of the applications for the confiscation order on 10 September 2015. On 9 September 2015 at 16.48 the defendant's solicitor had received an e-mail from the Public Prosecution Service attaching an index to a witness list and an index to a book of authorities referring to a number of cases not previously referred to. There was also a notice of intention to adduce additional evidence. On the actual morning of the hearing on 10 September the appellant's solicitor was provided with a file of statements and a file of cases and was advised by prosecution counsel that he intended as a first step to apply to the court to adduce this material as evidence before the court. This Court of Appeal has been provided with a file at appeal book ('AB') tab 24 containing some 129 pages of material, some of which, at least, was completely new to the appellant and his advisor. It should be noted that at this stage of the proceedings Mr McNamee, solicitor, was appearing on behalf of the appellant without the assistance of counsel.

[24] A transcript of that hearing has been furnished to the court. At one point Mr McDowell QC on behalf of the prosecution confirmed that there was agreement between himself and Mr Southey QC as to the factual matrix in respect of Grew. (AB 14/134). At pages 139/140 the judge refers to the appellant McLaughlin and correctly states that in his case the evidence is not agreed. Mr McDowell asked the Lord Justice to proceed on the basis of the papers and what was agreed "and then hear from the defendant if he wishes to give evidence".

[25] At page 178 Mr McNamee begins his submissions on behalf of his client by contending that the prosecution were really inviting the judge to depart from his own previous ruling that the confiscation order would be determined within the scope of the earlier plea. But he went on to refer to the fact that he had received the documents that the prosecution now wished to rely on only that morning and "these documents are not evidence, My Lord". He repeats that quite clearly at pages 179, 180 and 184. There were further submissions from both senior counsel for the Crown and from Mr McNamee. Following those submissions the judge rose from 12.01 to 12.30 on 10 September. When he returned he did not rule on the admissibility of the documents that the prosecution now wished to rely on but proceeded directly to find as follows at page 197:

> "I am satisfied on the balance of probabilities that each defendant did obtain the cigarettes and benefited to the value of the cigarettes. I will give my reasons for reaching that conclusion in writing in due course but for present purposes we can proceed on that basis, Mr McDowell and I think we will move on to consider what is the value."

[26] The court adjourned again until 1.00 pm. At that time Mr McNamee told the court that he had anticipated that Mr McDowell's application was simply an application to the court to see if the court would agree to his admitting evidence and he had not anticipated the court going on to make a full ruling. The judge did not alter his existing ruling but went on to receive further submissions from Mr McNamee.

[27] Given that McLaughlin had in his response to the prosecutor's statement expressly denied those documents that he had seen then and never agreed the new documents, it was clear, in his case, that the evidence contained within them did have to be formally proved and was not the subject of agreement.

[28] Mr McNamee returned to the topic at page 221 of AB tab 14 but the judge said the following:

> "Mr McNamee, [I have made a decision about that] which is that I have drawn an inference about it

> which to my mind is consistent, to your mind it is not but to my mind it is consistent with what was found before. Now, you may be able to persuade the Court of Appeal otherwise."

This appellant therefore argues that the order based on this finding is unlawful as based on unproved documents and without the appellant having an opportunity to give evidence.

McLaughlin: s 160A Proceeds of Crime Act 2002.

[29] The second principal ground relied on, in effect, by this appellant, enumerated initially as ground 6, was that the Lord Justice's assessment of the available amount for Henry McLaughlin to pay was wrong. Although the written submissions ranged more widely the oral submissions of Mr Knowles concentrated, understandably, on the provisions of Section 160A of the Proceeds of Crime Act 2002, as amended. In his submission Section 160A applied because a property held by the defendant was likely to be realised to satisfy the order and therefore the court was obliged by Section 160A(2) to give an opportunity to any person holding an interest to make representations to it. It is common case that this was not done.

[30] The factual matrix is to be found in the exchange of statements pursuant to the Proceeds of Crime Act 2002 to be found in the papers. At Tab 16 Henry McLaughlin says that he owns "my house at [address], Coalisland, Co Tyrone jointly with my wife and this property is subject to a mortgage". In the prosecutor's statements in response at AB/tab 17 the folio number of the property is given as well as the postal address at Coalisland. At paragraph 6.2 it is stated that the property is valued at £170,000 but subject to a mortgage "in favour of Bank of Scotland Plc Halifax Division of £45,634 as of 9 June 2015". McLaughlin repeats in his statement of 13 August 2015 to be found at tab 18 that he owns his home and another property jointly with his wife Siobhan McLaughlin. At Tab 19, page 350, HMRC in the prosecutor's further statement accepts that and suggests that the defendant's interest in the property is therefore valued at £104,877 as 50% of the total equity in the property.

[31] The appellant therefore submits that the court has been informed that both the wife and the lender had an interest in the property and there was a duty on the court to give them a reasonable opportunity to make representations. As this was not done they submit the decision is fatally flawed. They rely on the decision of this court in *R v Hilton* [2017] NICA 73.

Delay – McLaughlin

[32] Mr Knowles on behalf of Henry McLaughlin made a number of helpful submissions with regard to the issue of whether the Lord Justice was entitled to

make a confiscation order against his client given the lapse of time. He correctly identified that the prosecution did not apply for a fresh confiscation order within 3 months of the determination of the appeal in the Supreme Court on 29 January 2014. It is also correct that the remitted hearing, as appears herein, did not take place until September 2015. He argued that the reference to convictions at Section 164 at sub-section 6 of the Act should be read as applying in this situation also. He submitted that the fact of the confiscation order being made afresh on 30 November 2015 some 20 months after the disposal of the case by the Supreme Court amounted to a strong presumption of unfairness.

Grounds for leave to appeal and appeal of Aidan Grew

Section 160A, Proceeds of Crime Act 2002

[33] Aidan Grew had not relied on the Section 160A point relied on by Henry McLaughlin in his appeal to this court. At the commencement of his submissions, Mr Southey QC for Grew sought leave to do so if his other grounds failed. Such leave was granted without objection from the Crown.

[34] This heading however can be dealt with quite shortly. Mr Southey adopted the submissions that Mr Knowles was to make on this point. However a brief perusal of the facts and the statute show why it was in fact proper for Grew not to take this point initially. The requirement of notice to others with an interest in property under Section 160A (2) arises only in the context of Section 160A (1) i.e. "where it appears to a court making a confiscation order that … there is property held by the defendant that is <u>likely to be realised</u> or otherwise used to satisfy the order …". One must therefore consider whether that was the case with the judge here with regard to Grew. (Emphasis added).

[35] In the transcript of the hearing of 10 September 2015 to be found in McLaughlin's appeal book at page 126 ff there are several references to Grew. First of all at page 134 Mr McDowell for the Crown tells the court that he and Mr Southey QC for Grew are in agreement as to "the factual matrix that exists in respect of Grew so there may not be a difficulty here." Subsequently at page 198 he tells the court that he and Mr Southey hope to have figures for His Lordship after lunch. At page 210 the court is told by Mr McDowell that he and Mr Southey have agreed both a benefit figure and a recoverable amount and hope to provide a draft agreed order. There does not appear to be, and Mr Southey did not draw our attention to, any point at which the court was told that property owned by Mr Grew but co-owned by somebody else or mortgaged to a third party would have to be realised to meet the confiscation order. Following receipt of the ruling of Weatherup LJ on 30 November 2015 there was some discussion about time to pay for McLaughlin but there appears to have been no such application on behalf of Grew. Mr Southey QC confirmed to the court at hearing that the Crown were in possession of £510,000 coming from Grew on foot of the earlier confiscation order. He said that the balance of

approximately £90,000 was to come from the sale of two properties jointly owned by Grew and his wife but this aspect of matters never seems to have been put before the judge. It can safely be concluded therefore that the judge was never asked to advert to the likelihood of realisation of jointly owned property in the course of the proceedings before him which have led to this appeal so as to trigger the s 160A(2) requirement. We conclude therefore that the Section 160A (2) issue is of no assistance to the appellant Grew.

[36] For completeness it is to be noted that there was no issue of procedural irregularity with regard to Grew at either the hearing on 10 September 2015 or subsequently.

Grounds 1 and 2 of Grew's Notice of Appeal

[37] The first ground advanced on behalf of Aidan Grew by Mr Southey can be shortly summarised.

[38] Section 156(4) of the Proceeds of Crime Act 2002 provides that the court must proceed to decide whether the defendant has a criminal lifestyle and if, as here, it finds that he has not "it must decide whether he has benefited from his particular criminal conduct".

[39] Section 156(7) states:

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

Mr Southey's submission is that notwithstanding that provision the court must apply the criminal standard of proof beyond reasonable doubt in ascertaining the *underlying* criminal conduct of the defendant before moving on to the other issues under Section 156 which are decided on the balance of probabilities.

[40] This point only needs to be decided if the judge did in fact apply the lower standard of proof to the underlying criminal conduct *and* there is some dispute as to whether that underlying criminal conduct is in doubt.

[41] It is therefore both appropriate and necessary to consider the second ground advanced by this defendant namely:

> "That the learned trial judge erroneously made findings about the defendant's criminal conduct on the basis of inadequate and insufficient evidence."

[42] Mr McDowell drew the court's attention to Section 224(4) of the 2002 Act:

> "A person benefits from conduct if he obtains property as a result of or in connection with the conduct."

[43] Mr Southey relied on the authorities including the dicta of Lord Kerr in *Mackle* and the passages already cited in this judgment.

[44] In his Notice of Appeal Grew acknowledged six relevant items of evidence before the court.

> "(i) Mr Grew was present at the time the cigarettes were seized.
>
> (ii) Mr Grew had had telephone contact with Mr McLaughlin.
>
> (iii) That there existed a single sheet of paper with various brands of cigarettes on it.
>
> (iv) That there was an effort to destroy this piece of paper by Mrs Grew.
>
> (v) That the cigarettes were seized and subsequently destroyed by the Police.
>
> (vi) Mr Grew pleaded guilty to being knowingly concerned in the fraudulent evasion of duty."

[45] Mr Southey stressed repeatedly that the basis of the confiscation order was on the basis of the plea as found by Weatherup J. On that basis his client was neither an importer nor an organiser. He submitted that the judge could not properly have reached the conclusion he did on that evidence and in the light of that plea.

Response of Crown regarding McLaughlin and procedural irregularity.

[46] Mr McDowell responding for the Crown on this point drew attention to the fact that the basis of evidence regarding Grew was agreed. He points out that at page 140 of AB tab14 Mr McNamee did not formally object to Mr McDowell's proposal to rely on the evidence on the face of the papers and then let his client give evidence. He accepted that the judge misunderstood Mr McNamee's position and proceeded to a full ruling on the matter without ever asking Mr McNamee if he wished to call evidence. When pressed by the court he acknowledged that the judge's ruling at 12.30 on 10 September took him by surprise as well as Mr McNamee. He was expecting a direction that they proceed to hearing on these matters.

Response of the Crown regarding Section 160A POCA

[47] I have subsumed the arguments of Mr McDowell on this topic into the conclusions of the court to be found at [55] to [75] below.

Response of Crown on delay regarding McLaughlin

[48] The court had the benefit of cogent and extensive argument from Mr McDowell on the topic of delay. He drew our attention to Section 164(11) of POCA in Part 4 relating to Northern Ireland which provides as follows:

> "A confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement."

He referred the court to the leading authorities in this matter including R v Soneji [2006] 1 AC 340 and R v Guraj [2017] 1 WLR 37.

[49] The requirement in Section 164(6) that the postponement of the confiscation order cannot be more than 2 years from conviction does not apply, submits the Crown, to a case where the proceedings have been remitted to the Crown Court after an appeal. The Crown point out, without dissent, that no objection was taken on an issue of time on any occasion on behalf of the McLaughlin save in a skeleton argument served on 28 August 2015.

Submissions on behalf of the Crown on Grounds 1 and 2 of Grew's appeal

[50] Mr McDowell pointed out that although it was acknowledged that Grew was neither an importer nor an organiser it was part of the basis of the plea that Mr Grew had telephone contact with the co-accused and was directing the lorry, per Mr McCollum QC, who then led Mr McDowell, Grew's appeal book tab 7 page 501. Furthermore at page 507 Mr Orlando Pownall QC, who then appeared for Mr Grew said the following:

> "He was not the organiser or the manager or the importer. He was at worst a facilitator to a limited extent in respect of the contents of the lorry."

[51] It is perhaps of interest to note that Mr Pownall in addressing the issue of the plea was also addressing making of a payment. It is perhaps a little surprising that pursuant to the statute the court is enjoined not to take into account what might be paid under a confiscation order when considering the proper sentence to be imposed for the offence. It runs against the longstanding approach of the courts that the

making of reparations by an offender for his offence is a relevant factor to take into account in mitigation.

[52] Mr McDowell drew the court's attention, inter alia to the decision of the Supreme Court in *R v Ahmad* [2015] AC 299 at paragraphs [41] to [47].

Conclusion of Court on McLaughlin and procedural irregularity.

[53] As set out in the body of this judgment it was the duty of the court in exercising powers for confiscation to have sufficient evidence that McLaughlin had benefited from this particular criminal conduct to permit an order to be made. In part due to confusion with the co-accused Grew and in part, perhaps, due to a lack of clarity and firmness at the hearing on 10 September in the submissions made to him, the judge proceeded to make a finding that not only Grew but McLaughlin had obtained such a benefit. He did so without receiving any actual evidence against McLaughlin to justify such a finding, other than his own admission of receiving £5,000. The documents which the Crown wished to rely on were not proved by them in evidence. They clearly were never agreed by McLaughlin. He was given no opportunity to give evidence himself. He did not receive a fair hearing on this issue.

[54] The judge returned to the topic in his written judgment of 30 November. But we accept that this could not repair the flaws identified above. Indeed, the applicant points out that the lorry did not come to this appellant's premises, as set out in the judgment at [36]. The ruling clearly cannot stand and the confiscation order must be quashed on that ground alone. We will return in due course as to whether in the light of that and in the light of the elapse of time that has occurred, it is proper to remit that to a judge in the Crown Court, Weatherup LJ having retired.

Conclusions on McLaughlin and s. 160A POCA

[55] The statutory provisions under the Proceeds of Crime Act 2002 relating to the imposition of confiscation orders were amended in a number of respects by the Serious Crime Act 2015. Of particular relevance to this appeal is Section 160A. This provision came into force on 1 June 2015 by SR 2015/190, reg 3(1)(a). It is common case that it was therefore in force at the time of the confiscation orders made with respect to Messrs Grew and McLaughlin.

[56] It is appropriate to set out the relevant provision in extenso:

> "**S160A Determination of extent of defendant's interest in property**
>
> (1) Where it appears to a court making a confiscation order that –

(a) there is property held by the defendant that is likely to be realised or otherwise used to satisfy the order, and

(b) a person other than the defendant holds, or may hold, an interest in the property,

the court may, if it thinks it appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant's interest in the property.

(2) The court must not exercise the power conferred by sub-section (1) unless it gives to anyone who the court thinks is or may be a person holding an interest in the property a reasonable opportunity to make representations to it.

(3) A determination under this Section is conclusive in relation to any question as to the extent of the defendant's interest in the property that arises in connection with –

(a) the realisation of the property, or the transfer of an interest in the property, with a view to satisfying the confiscation order, or

(b) any action or proceedings taken for the purposes of any such realisation or transfer.

(4) …

(5) In this part, the "extent" of the defendant's interest in the property means the proportion that the value of the defendant's interest in it bears the value of the property itself."

[57] As set out above it was clearly the intention of the prosecution, as judged by the statement submitted, that a substantial confiscation order could be made against McLaughlin based partly, and indeed principally, on his possession of the house in which he lived at Coalisland, Co Tyrone. The statements show that apart from about £5,000 other monies found in McLaughlin's house had been returned to him, apparently on the basis that he was holding them for others, presumably lawfully. He had an interest in another property of little value, jointly with his wife. He had no other significant assets. Mr McDowell for the prosecution sought to argue before us that Section 160A (1) (a) was not engaged because the property at Coalisland was

not "likely to be realised". We do not accept that submission. Not only is this clear from the exchange of statements between the parties but it is clear from the reasoned judgment of Weatherup LJ delivered on 30 November 2015. At [52] one finds the following:

> "In relation to the right to respect for private and family life and home the applicant refers to the property at [address] as the family home which will have to be sold to realise the available amount for the purposes of the confiscation order. This property is home to McLaughlin and his wife and their 6 year old grandchild …"
> (Emphasis added).

[58] The applicant is the prosecution. It is clear therefore that the judge did consider that the property was likely to be sold to realise and meet the order he was being asked to make and did make. This is reinforced by the references at paragraphs 42 and 43 of the judgment.

[59] It is most regrettable that the judge was not referred to this new provision, Section 160A at any time.

[60] It can be seen from the brief quotation from his judgment, and other passages therein, that he was alert to the Article 8 issues relevant to the imposition of the confiscation order but he was not informed of the statutory provision.

[61] It is clear from the exchange of statements above and the hearing that the court must also have been aware of the interests of Mrs McLaughlin and of the Bank of Scotland Plc in the property. In the light of that one turns to Section 160A (2):

> "The court must not exercise the power conferred by sub-section 1 unless it gives to anyone who the court thinks is or may be a person holding an interest in the property a reasonable opportunity to make representations to it."
> (Emphasis added)

[62] It is clear that the judge was exercising a power under s.160A (1). It was therefore mandatory on him to give a reasonable opportunity to both Mrs McLaughlin and the mortgagee. The traditional word used to indicate a mandatory requirement rather than a discretionary one was "shall" as opposed to "may". It is true that this has been the subject of close examination on occasions. But where the legislator has chosen to use the imperative "must" there can be no debate as to the mandatory nature of the provision. To ignore such a clear

expression would be to ignore the clear intention in the legislation. For a court to do so would indeed seem to be unconstitutional.

[63] This issue has been considered already by this court in *Regina v Bernadette Hilton* op cit. By the doctrine of precedent that decision is binding on this court. That apart this court is happy to follow that decision.

[64] As I said therein this is in any event a sensible provision to allow the court to be apprised of any developments since the title had been commenced which were not yet reflected on the title of the property. A legal co-owner of the property may in fact argue that for equitable reasons they are entitled to a greater share than 50%. A mortgagee, which clearly has an interest in the property, will be able to inform the court of the current state of the mortgage which may or may not have been accurately represented to the court by the defendant in the POCA statement. It would appear from the statements in this case that HMRC had consulted the lender to ascertain the state of the mortgage. It is not therefore, in any way onerous to inform them of the confiscation hearing and the application of the prosecution and provide them with a reasonable opportunity to make representations. That could and should be directed by a court at a directions or preliminary hearing or in chambers.

[65] It is clear from the phrase "a reasonable opportunity to make representations" that there is no obligation on either a co-owner or a lender to attend at the court hearing. A simple letter setting out their position or indeed silence in response to being given such an opportunity may be perfectly proper.

[66] In considering the authorities it is important to note the significant change that came with the introduction of Section 160A. Reliance on authorities before that change is liable to mislead.

[67] The use of the "must" is a strong indication of what Parliament intended. This is reinforced by the provision in Section 160A (3) making the judge's finding at this stage "conclusive".

[68] The court should not make a confiscation order in ignorance of the representations of the co-owner or lender as such an order may well be flawed and ineffective. It can be remedied to a degree at the enforcement stage but it remains an order of the court until and unless that is done. In face of such a court order a wife or partner co-owner might acquiesce in the sale of the family home and the loss of the proceeds of sale without realising that she had a right to oppose such a grave step. The making of such an order should therefore be done with great care which in this case, as the legislature has provided, involves giving those with an interest in the property a reasonable opportunity to make representations.

[69] These views are not inconsistent with the decision of the House of Lords in *R v Knights* [2005] UKHL 50 relating to postponement of a confiscation hearing. The House held that statutory provisions ought no longer to be classified as either mandatory or directory but rather that attention should focus on what parliament intended to be the consequences of failure to comply with them.

[70] It is important further to take into account that it is the order that is quashed by the Court of Appeal. It does not therefore inevitably mean that the prosecution's attempt to recover assets from the offender is at an end. The court can substitute an order of its own, if appropriate, or as in the *Hilton* case, it may remit the matter to the judge to consider his decision in the light of any representations received by the interested parties.

[71] In *R v Guraj* [2017] 1 WLR 22 [2016] UKSC 65, the Supreme Court was considering an appeal by the Crown from a decision of the Court of Appeal allowing a defendant's appeal against a judge's confiscation order made despite prosecution delays. It is clear from the judgment of the court, per Lord Hughes JSC, that the court took into account and gave weight to the express provision at Section 14(11) of POCA as amended.

> "(11) A confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement."

[72] That is highly relevant to the issue of delay to which I will turn in a moment. Regarding the breach of Section 160A it is however to be noted that there is no equivalent provision. The natural inference might be that a confiscation order *could* be quashed only on the grounds of a breach of Section 160A.

[73] It is important to note that in discussing the decision of the lower court in *Guraj* Lord Hughes at paragraph 27 said this:

> "However, that may be, section 14(11) does contain a prohibition: it says that the court *must not* quash a confiscation order only on the grounds of procedural defect or omission connected with postponement."

The emphasis is that of Lord Hughes, consonant with our earlier observations.

[74] This court is mindful of the conclusions of the House of Lords in *Soneji* [2006] 1 AC 340 and of the Supreme Court in *Guraj* at paragraphs 31-34. But those latter passages are dealing with the issue of procedural delay to which this court will turn. They are not dealing with the Section 160A point. The prohibition, to use Lord Hughes' word, is based on the statutory injunction to the court that it must not

make a confiscation order without giving interested parties a reasonable opportunity to make representations. Such an order is not concerned solely with fairness or unfairness to the defendant. It involves the interests of third parties. They may be presented with a confiscation order, which they will be told is enforceable by law requiring a co-owner to find a sum of money which he can only do by selling the house or else serve a significant period of imprisonment. The wife with that in mind may well acquiesce in such an order to the prejudice of equitable rights she may have. It seems to me therefore that this court in *Hilton* was correct in concluding that a breach of Section 160A (2) will ordinarily be fatal to the particular order. It does not mean that it is fatal to the attempt to recover assets from an offender.

[75] In the case of Henry McLaughlin therefore he has established a second ground for quashing the order of Weatherup LJ with regard to him.

Conclusion on delay regarding McLaughlin

[76] We have considered the competing submissions of the appellant and the respondent with regard to this issue. We prefer the submissions on behalf of the Crown. It is not necessary, however, for us to deal with this at length because of the view we have formed.

[77] The position with regard to the consequences of procedural delay have now been authoritatively dealt with by the Supreme Court in *R v Guraj* op cit at paragraph 31:

> "What, then, is the answer to the question: "If section 14(11) is unavailable, when does a procedural error prevent the making of a confiscation order, or invalidate such an order if it is made?" Consistently with *Soneji* and with the dominant purpose of POCA that confiscation is the duty of the court, to which a significant priority is to be given, the answer is not that every procedural defect does so. The correct analysis is not that a procedural defect deprives the court of jurisdiction, which would indeed mean that every defect had the same consequence. Rather, it is that a failure to honour the procedure set down by the statute raises the very real possibility that it will be unfair to make an order, although the jurisdiction to do so remains, and that unless the court is satisfied that no substantial unfairness will ensue, an order ought not to be made. This is not to deprive section 14(12) of effect; it remains effective to remove the peremptory bar of section 14(11) upon quashing confiscation orders on grounds only of procedural

> defect connected with postponement. Where section 14(11) applies, no such defect can alone justify quashing. Resulting unfairness, on the other hand, may, but such unfairness cannot be inferred merely from the procedural breach. Where section 14(11) does not apply, a procedural defect, not limited to postponement, will have the effect of making it wrong to make a confiscation order if unfairness to the defendant would thereby ensue. If, however, the defect gives rise to no unfairness, or to none that cannot be cured, there can be no obstacle to the making of the order, and this is what the duty of the court under POCA requires. The present case is one where no unfairness can be or is suggested; cure does not arise. If it were to arise, in another case, it is possible that there might be ways in which a potential unfairness could be cured. They might include, for example, determining in accordance with *R v Waya* [2012] UKSC 51; [2013] 1 AC 294, that the confiscation order must be adjusted to achieve proportionality. In a few instances, it might be possible to vary an inadvertently imposed sentence within the 56 days permitted by section 155 of the Powers of Criminal Courts (Sentencing) Act 2000. In others, the correct outcome may be that it is the forfeiture order which ought to be quashed, by way of appeal, rather than the confiscation order; priority for the latter is after all built into POCA. Each case, however, must depend on its own facts."

[78] We must consider the unfairness, if any, of the order actually made in regard to McLaughlin on 30 November 2015 and the unfairness, if any, of making an order now.

[79] We have reached the conclusion we must quash the order of 30 November 2015 regarding McLaughlin because of both procedural irregularity and breach of Section 160A. That leaves open to the court the option, availed of in *Hilton*, of remitting the matter to the court of first instance to reassess. We consider that to expose McLaughlin again to the risk of an order which would compel the sale of his dwelling house and that of his wife and grandchild, nine years after his plea, would amount to unfairness. To comply with Section 160A both the wife and the lender would have to be given an opportunity to make representations. Time would have to be allowed for that. By the time a hearing and decision was made it would be nearly 10 years from the original plea of guilty here. We have concluded that the proper course to take is not to remit the matter but, as discussed ex arguendo, to

substitute a confiscation order in the sum of £5,000 – the sum which McLaughlin admitted to have received for his involvement in the handling of cigarettes.

[80] For the avoidance of doubt we consider that if that order had been made in November 2015 it would not have been unfair. It would not have been in breach of Section 160A as it will not lead to the sale of the home. The procedural error would fall away because that amount had been admitted by the defendant and it would not have been necessary for the Crown, therefore, to prove the other materials on which it wished to rely. Therefore, the order should be made in the sum of £5,000 to be payable in 3 months with the same period of 6 months' imprisonment in default.

Conclusions on Grounds 1 and 2 of Aidan Grew's appeal

[81] As indicated above the first ground advanced by Mr Southey regarding the standard of proof is dependent on there being some doubt as to the underlying criminal conduct of Aidan Grew which the judge relied on.

[82] In addressing this issue the judge referred to the judgment in *Ahmad* at [2014] UKSC 36. It is helpful to set out the matters from the joint judgment of Lords Neuberger, Hughes and Toulson to be found at paragraphs [45] to [48] of that judgment:

> "45. The basic point made by Lord Bingham, and discussed in paras 41-42 above, therefore appears to us to be, to put it at its lowest, sustainable, given the statutory language, which is not concerned with ownership but with obtaining. As just demonstrated, it is perfectly acceptable, as a matter of ordinary language, to describe the people involved in a criminal joint enterprise which results in the obtaining of a chattel, cash, a credit balance or land, as having jointly obtained the item concerned, in the sense of having obtained it between them. The fact that the item may have been physically taken or acquired by, or held in the name of, one of them does not undermine the conclusion that they jointly obtained it. The word 'obtain' should be given a broad, normal meaning, and the non-statutory word 'joint', referred to by Lord Bingham in *May*, paras 17 and 27-34, should be understood in the same nontechnical way.
>
> 46. Accordingly, where property is obtained as a result of a joint criminal enterprise, it will often be appropriate for a court to hold that each of the conspirators 'obtained' the whole of that property.

That is the view expressed in *May*, para 48(6), first sentence (although the word 'owns' is probably inappropriate), in *Green*, para 15, and in *Allpress*, para 31 (as quoted and approved in *Mackle*, para 65). However, that will by no means be the correct conclusion in every such case.

47. As was said in *Sivaraman*, para 12 (6) and in *Allpress*, paras 30-31 (and approved in *Mackle*, paras 64-65), when a defendant has been convicted of an offence which involved several conspirators, and resulted in the obtaining of property, the court has to decide on the basis of the evidence, often relying on common sense inferences, whether the defendant in question obtained the property in the sense of assuming the rights of an owner over it, either because he received it or because he was to have some sort of share in it or its proceeds, and, in that connection, 'the role of a particular conspirator may be relevant as a matter of fact, but that is a purely evidential matter'.

48. In some cases, one or more of the conspirators may be able to show that he was only involved to a limited extent, so that he did not in any way obtain the property which was obtained as a result of the crime. Examples include acting as a paid hand in the enterprise – eg an intermediary, a courier or a drugs 'mule' (as considered in *May*, paras 15 and 17, and in *Allpress*, paras 80-82) or a latecomer to a conspiracy in which nothing was obtained after his arrival (as discussed in *May*, para 19)."

[83] At [26] Weatherup LJ said the following:

"Thus 'benefit' is a fact sensitive issue. Lord Kerr in *Mackle* stated that there were two assumptions that must be guarded against. First, it is not to be assumed that because one has handled contraband one has had possession of it in the manner necessary to meet the requirements of the relevant legislation. Secondly, participation in a criminal conspiracy does not establish that one has obtained the benefit – as Toulson LJ said (in *R v Allpress* [2009] EWCA Crim. 8) this is to confuse criminal liability with resultant benefit (paragraph [66])."

This quotation suffices to dispose of part of the argument on behalf of this appellant i.e. that the judge's conclusion was made on an assumption on the basis of handling. He was clearly alert to that not being the proper approach. He went on to address the nature of the benefit that these appellants received by way of their pecuniary advantages in obtaining lower price cigarettes, in not paying duty and VAT, in physically having the cigarettes in their possession and potentially obtaining monetary payment for them and, in the case of McLaughlin, receiving an actual payment.

[84] The judge went on, as Mr Southey properly acknowledged, to deal with Grew's case in the following paragraphs.

> "[33] Grew was sentenced on the basis that, while he was present at the time the contraband was recovered, he was not an organiser or a professional smuggler but at worst a facilitator, to a limited extent, in respect of the contents of the lorry.
>
> [34] Grew admitted being concerned in the evasion of duty payable on the cigarettes. He was present, facilitating the movement of the cigarettes. In his home were records of brands of cigarettes and numbers which his wife thought appropriate to attempt to destroy. A defendant may obtain the cigarettes in the sense of assuming the rights of an owner over them, either because he received the cigarettes or because he was to have some sort of share in them or the proceeds.
>
> [35] I am satisfied on the balance of probabilities from Grew's presence with the cigarettes and the lorry in the yard and from the particulars of cigarettes recovered in the search of his home that he was engaged with others in the distribution of the cigarettes so as to have the necessary possession and control of the cigarettes. I am satisfied that this conclusion is consistent with the basis of plea and sentencing that he was not concerned with the importation and was not an organiser and was not a professional smuggler."

[85] It can be seen that this part of the judgment was fairly summarised in the appellant's Notice of Appeal. It can also be seen that the underlying criminal conduct is not in fact in any doubt. There is no doubt that Mr Grew was present

close to the lorry with the driver when the lorry and its contents and the cigarettes in the premises were seized. There is no doubt that he pleaded guilty to evasion of duty payable on the cigarettes. It is not in dispute that a document was found in his home indicating not only brands but numbers of cigarettes, for which no explanation was given by him. It is not in dispute that his wife attempted to destroy this document. It is not in dispute that he was in telephone contact with McLaughlin who also pleaded guilty and with the driver of the vehicle.

[86] This court is satisfied that the underlying criminal conduct of Aidan Grew was plain beyond a reasonable doubt. The issue of the precise standard of proof to be applied to underlying criminal conduct does not therefore arise as the higher standard was met.

[87] Is the appellant correct in his second ground of appeal that there was insufficient evidence on which Weatherup LJ could conclude that he had obtained benefit from his criminal conduct? I addressed the approach of this court to such an issue in *Declan Arthurs v News Group Newspapers Ltd* [2017] NICA 70.

> [21] The role of an appellate court in dealing with appeals from the court at first instance has been the subject of consideration in the Supreme Court in several recent cases. We note the judgment of Lord Reed delivering the judgment of the court in *Henderson v Foxworth Investments Limited and Another* [2014] 1 WLR 2600; [2014] UKSC 41; at paras [66] and [67]:
>
> > '66. These dicta are couched in different language, but they are to the same general effect, and assist in understanding what Lord Macmillan is likely to have intended when he said that the trial judge might be shown "otherwise to have gone plainly wrong". Consistently with the approach adopted by Lord Thankerton in particular, the phrase can be understood as signifying that the decision of the trial judge cannot reasonably be explained or justified.
> >
> > 67. It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the

> making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."
>
> [22] This dictum was cited with approval in *Carlisle v Royal Bank of Scotland* [2015] UKSC 13 at paras [21] and [22] and by Gillen LJ in this court in *H v H* [2015] NICA 77. See also *DB v Chief Constable of PSNI* [2017] UKSC 7 at paras [78] to [80].

[88] In fact in this case the court does not require to show restraint in examining the judgment of the lower court. The view of this court is that the underlying criminal conduct here of Aidan Grew was sufficient to establish, on the balance of probabilities, that he had obtained benefit, jointly or otherwise, from that conduct at the time of his arrest with these smuggled cigarettes. The factors set out above at [44] were in our view amply sufficient to justify the finding of the learned trial judge : his presence when the cigarettes were seized, his plea of guilty, his telephone contact with his co-accused who also pleaded, the incriminating document which his wife tried to destroy and his admitted role as a facilitator rather than a mere paid hand.

[89] In those circumstances no question of delay arises and nor in fairness to Mr Southey was this pressed upon us. No issue was taken about delay in September 2015. Given that we have found that the order of the judge in his written judgment of 30 November 2015 was lawful and justified no issue of delay can arise now. Grew was already in a different position from the appellant McLaughlin in that he had not successfully appealed the decision of this court to the Supreme Court at the earlier stage. He is, now, in a different position again in as much as no issue of remitting this case to the Crown Court arises. His appeal therefore fails.

Summary

[90] The appellant Henry Patrick McLaughlin succeeds in his challenge to the order of the lower court on the ground that the court in 2015 took into account material against him which had not been proven in evidence and to which he had not agreed. Furthermore he had not been given an opportunity to give evidence himself. See paragraphs [21] – [28], [46] & [53] – [54] above.

[91] McLaughlin also succeeds on the ground that the order of the lower court should be quashed because of the failure to comply with the duty under Section 160A (2) of the Proceeds of Crime Act 2002 to give "a person holding an interest in the property a reasonable opportunity to make representations" to the court before a confiscation order is made when the property is likely to be realised to satisfy the order: paragraphs [55] - [75] above.

[92] The court will not in the light of the passage of time and other factors remit the case to the Crown Court but will substitute a confiscation order in the sum of £5,000 payable within three months with six months' imprisonment in default of payment, pursuant to Section 10(3) & (3A) Criminal Appeal (Northern Ireland) Act 1980.

[93] With regard to the appellant Aidan Grew s.160A(2) does not assist him as the available and relevant amounts were agreed at the hearing before Weatherup LJ without the court having to form a view on whether it was likely that property was being realised : [33] – [36] above.

[94] Grew's ground of appeal that the learned trial judge was obliged to apply the criminal standard of proof in assessing his underlying criminal conduct prior to deciding the benefit issue does not arise as the evidence of his underlying criminal conduct was not in doubt but was proved to the criminal standard : [37] – [40] & [81] – [86] above.

[95] His further ground of appeal that the judge had insufficient evidence on which to properly reach the conclusion which he did reach also fails as the underlying criminal conduct amply justified a finding of obtaining benefit in the light of the facts and the relevant authorities: [41] – [45], [50] – [52] & [87] – [89] above. Aidan Grew's appeal fails.