Neutral Citation Number: [2013] EWCA Crim 1151

Case No: 201004854 C5 and 201006918 C5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM LEEDS CROWN COURT
His Honour Judge McCallum
T20080239

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2013

Before :

LORD JUSTICE LEVESON
MR JUSTICE KENNETH PARKER
and
SIR DAVID CLARKE (SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

- -

Between :

(1) STEPHEN TAYLOR **(2) ROBERT WOOD**	**Appellants**
- and -	
THE QUEEN	**Respondent**

- -
- -

Conor Quigley QC and Jeffrey Lamb (instructed by **Boots Starke Goacher**) for the **First Appellant**
Conor Quigley QC and Robin Mairs (instructed by **Smithson, Hinds, Morris Solicitors**) for the **Second Appellant**
Nicholas Paines QC and Andrew Bird (Instructed by the Crown Prosecution Service, Proceeds of Crime Unit) for the **Respondent**

Hearing date : 6 June 2013

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Approved Judgment

Mr Justice Kenneth Parker :

Introduction

1. On 4 November 2008 in the Crown Court at Leeds (HHJ McCallum) Stephen Taylor (now aged 62) pleaded guilty to being knowingly concerned in the fraudulent evasion of duty payable on the import of cigarettes. He was sentenced to 9 monthsô imprisonment suspended for 12 months and ordered to complete 150 hours unpaid work. On 11 August 2010 in confiscation proceedings under section 6 of the Proceeds of Crime Act 2002 (ñPOCAò) he was held to have benefited to the extent of £148,500 from his criminal conduct. A confiscation order was made in that amount to be paid within 6 months with 3 years imprisonment in default. He appeals against the confiscation order by leave of the single judge.

2. On 3 November 2008 Robert Wood (now aged 56) also in the Crown Court at Leeds pleaded guilty to being knowingly concerned in the fraudulent evasion of duty payable on the import of cigarettes. In September 2009 he was sentenced to 36 weeks imprisonment suspended for 12 months and ordered to complete 150 hours unpaid work. On 11 August 2010 in confiscation proceedings under section 6 of POCA he was held to have benefited to the extent of £148,500 from his criminal conduct. A confiscation order was made in the sum of £110,793.97 to be paid within 6 months with 30 monthsô imprisonment in default. He appeals against the confiscation order by leave of the Full Court (Hooper LJ, Stadlen and Sweeney JJ).

3. This appeal first came before the Full Court (then constituted by Hooper LJ, Stadlen J and Sweeney J) on 23 June 2011. HHJ McCallum had found that the appellants had ñobtainedò the imported cigarettes. The Crown on appeal did not seek to uphold that finding and conceded that the benefit should not include a sum of money to reflect their resale value. The Crown, however, submitted that the appellants obtained a pecuniary advantage, namely, the evasion of the excise duty. At this resumed hearing before the Full Court, differently constituted, the appellants have accepted, as they must in the light of *R v Smith (David)* [2002] 1 WLR 54, that they did obtain such a pecuniary advantage if they were liable to pay the duty. On 23 June 2011 the Full Court indicated that as a result of the Crownôs concession the confiscation amount, for each appellant, should in any event be reduced to £95,730 (the amount of the excise duty evaded). The Court on that occasion also gave directions to enable full argument to be heard on the substantive issues of both domestic and EU law that it believed were raised by the appeal.

The Facts

4. In his ruling on confiscation of 11 August 2010 the judge found that a co-defendant of the appellants, Michael Ali (ñAliò), became involved with another co-defendant, Keith Ward, and perhaps other persons who had not appeared before the Court. Ali and others acting together arranged for the purchase of 600,000 counterfeit cigarettes to be delivered from an address in Belgium. The most important part of this enterprise was to ensure the safe and secret transport of the counterfeit cigarettes to the United Kingdom. The illicit cargo had to be hidden. The mechanics of the transportation were as follows.

5. Ali contacted the appellant Taylor. Taylor operated through a company, TG Logistics Limited (ñTGò), which was based at Bridge Road Business Park, Haywards Heath, West Sussex. In his dealings through TG Taylor used the false name ñMike Jonesò. At 10.15am on 10 October 2006 Taylor, through TG, instructed Events International Transport Limited (ñEventsò) to collect certain goods from an enterprise in Belgium, C&F Trans bvba at Houthalen (ñC&Fò) for delivery to a customer in the United Kingdom, Brighouse Textiles Ltd (ñBrighouseò), which carried on business at Thornhill Brigg Mill, in Yorkshire. Events was controlled by the appellant Wood, and Wood operated through Events to effect the secret transportation of the counterfeit cigarettes. It appears that Events, based at Wakefield Commercial Park, Wakefield, did carry on legitimate business as a freight forwarder; and the involvement of an otherwise genuine freight forwarding enterprise in the transportation of the cigarettes would give a veneer of legitimacy to the importation, throwing HMRC off the scent as to the true nature of the goods being imported. In the discovered documents relating to the transportation the load is described throughout as 5 euro pallets of non stack textiles weighing 400kg per pallet. The stated intended recipient of the transported goods, Brighouse, carried on a legitimate trade in textiles. Brighouse, however, had no knowledge of the arrangements, and was never intended by the criminal conspirators to be the real recipient of any goods.

6. At 3.15pm on 10 October 2006 ñMike Jonesò of TG (Taylor) sent a fax to Events (Wood) confirming collection of the goods in Belgium on the afternoon of 11 October ñto be delivered back to your [that is, Eventsô] depot awaiting final instructions from our clientò. The final delivery address was stated falsely to be Brighouse.

7. Wood, through Events, then did what he ordinarily would do as a freight forwarder, namely, instruct a road haulier to pick up the goods in Belgium and bring them back to the UK. He instructed a firm of international hauliers, Brian Yeardley Continental Ltd (ñYeardleyò). No one at Yeardley knew the true nature of the goods that Yeardley would be collecting, transporting and delivering to the United Kingdom, and there is nothing to suggest that Yeardley, or anyone working at Yeardley, would have agreed to transport the relevant load if it had known or suspected that it involved a cache of counterfeit cigarettes. Yeardley, therefore, was no more than an innocent agent in the importation of the cigarettes. By an e-mail sent at 5.31pm on 10 October 2006 Yeardley in turn instructed a Dutch firm of road hauliers, Heijboertransport.nl (ñHeijboerò) to collect the goods from Belgium and to deliver them to the UK on 13 October 2006. Heijboer, just like Yeardley, was an innocent agent of the criminal conspirators. On 11 October 2006 ñMike Jonesò (Taylor), through TG, instructed C&F to release the goods to ñour contractors [Events] who are collecting on our behalfò. This instruction again made everything look business-like and helped give a spurious normality and professional touch to the arrangements. With a similar purpose ñMike Jonesò (Taylor), through TG, at 12.26 on 12 October 2006 ñadvisedò Events by fax that ñdue to warehouse closure, the delivery for [Brighouse] should now be delivered toò an address in Castleford. 16 minutes later, at 12.42 Wood, through Events, passed on this instruction to Yeardley.

8. There were then prepared the CMR forms which are required by the Convention on the Contract for the International Carriage of Goods by Road (ñthe Conventionò) (which is incorporated into UK law by a schedule to the Carriage of Goods by Road Act 1965). The CMR forms in this case would appear on their face to have been

carelessly filled in, seriously inaccurate and misleading, which is not surprising given that the underlying transaction ï the importation of 600,000 counterfeit cigarettes ï was fraudulent. The identity of the sender or consignor in box 1 of the CMR remains a mystery, but whatever the identity of that person, he or it (if it existed at all) was very unlikely to have been the sender as meant by the Convention. The sender under the Convention, like the shipper in a contract of carriage by sea, is the person to whom the carrier undertakes the duty of transporting the goods. Ordinarily, he would be the seller or buyer under a contract of sale, a freight forwarder (who may be acting as principal or agent) or any other consignor. For that reason under Article 7 of the Convention the sender is made responsible for all expenses, loss and damage sustained by the carrier by reason of the inaccuracy or inadequacy of, among other matters, the description of the goods being carried and the requisite instructions for Customs and other formalities. In the present case, as the facts show, the principal carrier was Yeardley, and the obligations incurred by Yeardley were owed exclusively to Wood (through Events), who was in turn acting together with Taylor (through TG). There was no credible evidence that Wood or Taylor was acting on behalf of the unknown, possibly non-existent, person in box 1, or on behalf of C&F, who might otherwise have been a possible, but dubious, candidate for the role of sender. In box 5 of the CMR the principal carrier is shown as C&F. However, C&F was simply the point of despatch and had, as far as can be seen, no hand at all in the carriage of the goods. The consignee in box 2 is shown as TG (Taylor). It may be that, under the Convention, Events (Wood) was strictly the consignee (as was correctly shown on the Yeardley invoice), but, as Taylor and Wood were acting together, box 2 unusually and possibly unguardedly tells part at least of the true story. Heijboer is accurately shown on box 6 of the CMR as the delegated carrier.

9. On 16 October 2006 Yeardley completed a sales invoice for the delivery. On the invoice C&F is shown as the shipper and Events, to whom the invoice was sent, is shown as the ñconsigneeò. That description of Events was correct because it was Wood, through Events, that was making the arrangements for transport of the goods. Under the Convention, it is the consignee of the goods that has legal control of the goods in transit. In any event Wood, through Events, had de facto control of the consignment and gave instructions to Yeardley. In turn, Taylor, through TG, was giving instructions in respect of the consignment to the consignee, Wood.

10. The co-defendant Ward was an associate of Ali. On 23 September 2006 (that is, just before the importation) Ward and the appellant Wood had met at the Red Beck café in Wakefield. They discussed importation of cigarettes generally and specifically ñthe Belgian oneò, referring to the imminent delivery of the counterfeit cigarettes. The appellant Taylor did not meet in person either Ali or Ward. But, as the judge observed, it is a common feature in illegal importations of this nature that the keeping separate of the principal conspirators is a subterfuge to make detection more difficult. When Aliôs home address was searched, items were found that linked Ali to Ward, Taylor and Wood, and placed Ali in Belgium as the load travelled to the UK.

11. On 13 October 2006 Heijboer did deliver the load, as instructed, to A1 Storage, Flass Lane, Castleford, a yard recently rented by Ward. HMRC officers were soon at the scene. The pallets of boxes were examined. The top four boxes in each pallet contained textiles. Beneath these boxes there were further boxes containing cartons of ñSuperkingò blue cigarettes, comprising in total 600,000 cigarettes.

12. Ali, Ward, Taylor and Wood were all instrumental in bringing in the cigarettes from Belgium, and each of them knew what was hidden in the load. Ward was an organiser and distributor. The appellant Wood provided expertise, advice and transportation, using his experience to achieve an efficient delivery and distancing Events, his legitimate freight forwarding enterprise, from the illegal importation by using Yeardley and, initially, Brighouse. The appellant Taylor provided similar experience and expertise, together with Wood, in arranging the transport and importation, taking the precaution of using a false name to conceal his personal participation, and ensuring that there was no incriminating computer record or file.

13. In evidence before the judge, the appellant Taylor said that ñhe would get an earnerò from his contribution to the illegal importation, without disclosing the actual expected amount of the remuneration. Wood had been offered a sizeable sum of money for helping to arrange the illegal transportation. He said in evidence to the judge that the sum was £1,000, but the judge was plainly sceptical about the honesty of that assertion.

14. In the confiscation proceedings in the Crown Court both appellants argued that because they had not come into physical possession of the illegally imported cigarettes, and had not received any remuneration for the parts in the conspiracy that they played, they had not obtained any property within the meaning of POCA. The judge rejected that argument, held that both appellants had benefited from their particular criminal conduct, and assessed the amount of benefit as earlier set out.

Legislative Framework

POCA

15. Sections 76(1) and (2) of POCA define ñcriminal conductò and ñparticular criminal conductò. Sections 76(4) and (5) then provide:

> ñ(4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.
>
> (5) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.ò

16. In *R v May* [2008] 1 AC 1028 Lord Bingham of Cornhill, giving the opinion of their Lordships, stated in an endnote to the judgment that a defendant ordinarily obtains a pecuniary advantage:

> ñé if (among other things) he evades a liability to which he is personally subject. Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to have obtained that property.ò

17. Whatever else might be in dispute, it cannot seriously be suggested that the appellants in this case were ñmere couriers or custodians or other very minor contributorsò to the

illegal importation. As the facts show, they were principal conspirators who played a pivotal role in arranging the delivery of the counterfeit cigarettes from Belgium to the UK. The ultimate issue in the appeals, therefore, is whether either or both evaded a liability to which he was personally subject.

Liability to Excise Duty under Domestic Law

18. Section 1(1) of The Finance (No2) Act 1992 (ñthe Finance Actò) confers power on the Commissioners of Revenue and Customs (ñHMRCò) to fix an ñexcise duty pointò. It is common ground in these appeals that the excise duty point was when the counterfeit cigarettes entered the United Kingdom port. Section 1(4) then confers power on the Commissioners to make provision.

> ñ(a) specifying the person or persons on whom the liability to pay duty is to fall at the excise duty point (being the person or persons having the prescribed connection with the goods at that point or at such other time, falling no earlier than when the goods become chargeable with the duty, as may be prescribed).ò

19. By Section 1(7), ñprescribedò means prescribed by Regulations made under the section.

20. Under Section 1(4)(a) of the Finance Act ñthe prescribed connectionò must be with the goods at the excise duty point, or the other time identified. That provision is plainly intelligible because, by Section 1(1), goods become chargeable to duty only at the excise duty point. In other words, the language of section 1(4)(a) is sensibly made to accord with that in section 1(1). However, it does not follow, as a simple matter of logic, that the prescribed connection, as at the excise duty point, may not refer to a past event. The excise duty point dictates the time when the connection must be ascertained; it does not logically limit the nature of the connection at that time. Nor does the purpose of the Finance Act suggest that such a limitation would be appropriate. It is unclear in terms of the policy of the legislation why Parliament would wish to exempt from liability to pay duty all those persons who had had any past involvement, however close, with the goods, but who had ceased to have such involvement at the excise duty point. That would, for example, exempt a person who had sold the goods to the importer, and had parted with possession of them, even if he knew, and planned at the time of the sale and delivery, that the importer would fraudulently seek to avoid payment of the duty. It may be that some past connections (such as being the inventor, designer or advertiser of the goods) would be regarded as simply too remote, and so challengeable as being connections outside the scope of what the legislature could have contemplated as a fair and reasonable justification for imposing the relevant liability. However, the invalidity for that reason of a particular past link with the goods is very different from invalidating any link that relates to an act in the past.

21. A closely analogous question arose in *Greenalls Management Ltd v Customs and Excise Commissioners* [2005] UKHL 34 [2005] 1 WLR 1754. That case concerned excise goods held under duty suspension arrangements, that is, goods in a bonded warehouse with duty not yet paid. The excise duty point for the excise goods in question was the time when the goods had been made available for (domestic)

consumption. In that event, under the applicable regulation, the authorised warehouse keeper who had released the excise goods from the bonded warehouse (thinking that they would be exported) became liable to pay the duty, even if the goods had fraudulently become available for consumption after he had released them from the warehouse. Plainly at the excise duty point (availability for consumption) the warehouse keeper had no longer any involvement with the goods, his release of the goods having occurred well in the past. In the Court of Appeal Carnwath LJ, as he then was, held that the applicable regulation could not validly impose liability on a person who at the excise duty point no longer had any involvement with the goods; liability could validly be imposed only on a person who had involvement at the excise duty point. There was, therefore, no connection which could validly be prescribed to make the warehouse keeper liable in the circumstances of the case. Lord Hoffmann, with whom Lord Nicholls of Birkenhead, Lord Steyn and Lord Hope agreed, rejected that interpretation of the legislation as follows:

> ñ**30**. I do not understand this objection. The 1992 Act does not limit the commissioners to prescribing a *contemporaneous* connection with the goods. On the contrary, it says expressly (Section 1(4)(a)) that the connection may be at ñsuch other time é as may be prescribedò. The only limit is that it must not be earlier than when the goods became chargeable to duty. In this case the goods become *chargeable* to duty when they were made. Thereafter, the liability was suspended. In my opinion a warehouse keeper has a connection with goods which leave his warehouse under movement suspension arrangements. The fact that this connection lies in the past when the goods are diverted does not mean that it cannot be prescribed as a ground for liability.ò (Emphasis added)

22. The core reasoning of Lord Hoffmann, as emphasised, applies equally to the relevant point of interpretation in this case.

23. In *R v White* [2010] EWCA Crim 978, the Crown submitted that the relevant connection had to continue until the excise duty point, implying that if a person had ceased to have involvement with the goods before that point he could not be chargeable to excise duty. However, as set out above, that interpretation is supported by neither logic nor policy, and it is inconsistent with the core reasoning of Lord Hoffmann in *Greenalls*. Although the Court accepted the Crownôs submission, it was in circumstances where the point was not contested and where there appears to have been no reference to *Greenalls*. The correct interpretation of Regulation 13(1) on this point should be regarded as set out in this judgment.

24. At the time material to the illegal importation in this case the relevant provision under the Finance Act was made by Regulation 13 (person liable to pay the duty) of the Tobacco Products Regulations 2001 (ñthe Regulationsò), which provided so far as is material:

> ñ**13. – Person liable to pay the duty**
>
> (1) The person liable to pay the duty is the person holding the tobacco products at the excise duty point.

> (2) Any person (not being the person specified in paragraph (1) above) who is described in paragraph (3) below is jointly and severally liable to pay the duty with the person specified in paragraph (1) above.
>
> (3) Paragraph (2) above applies to ï
>
> > (a) the occupier of the registered premises in which the tobacco products were last situated before the excise duty point;
> >
> > (b) any REDS [registered excise dealer and shipper who is authorised, in the course of his business, to import without payment of excise duty goods from other member states, but who is not authorised to hold or consign those goods without first paying that duty] to whom the tobacco products were consigned.
> >
> > (c) any person who arranged for a REDS to account for the duty on the tobacco products;
> >
> > (d) any person approved as an occasional importer under regulation 15 of the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992 to whom the tobacco products were consigned;
> >
> > (e) any person who caused the tobacco products to reach an excise duty point.ò

EU Law

25. The relevant law was contained in Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products ñthe Directiveò).

26. Article 7 of the Directive dealt specifically with the case, as here, where products subject to excise duty and already released for consumption in one Member State were then held for commercial purposes in another Member State. Article 7(1) provides that in that case excise duty became leviable in the Member State where the products were ñheldò. Article 7 then continued:

> ñ2. To that end, without prejudice to Article 6, where products already released for consumption as defined in Article 6 in one Member State are delivered or intended for delivery in another Member State or used in another Member State for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law, excise duty shall become chargeable in that other Member State.
>
> 3. Depending on all the circumstances, the duty shall be due from the person making the delivery or holding the products

> intended for delivery or from the person receiving the products for use in a Member State other than the one where the products have already been released for consumption, or from the relevant trader or body governed by public law.ò

The Issues in These Appeals

27. The following issues arise in respect of each appellant:

    i) Was the appellant a person ñliable to pay the dutyò under Regulation 13 of the Regulations? If the answer were no, the appeal must succeed, because the appellant would not have evaded liability to pay duty and would have obtained no pecuniary advantage under POCA.

    ii) If the answer to (i) were yes, was the putative basis of liability to pay duty under Regulation 13 compatible with any of the bases of liability set out in Article 7(3) of the Directive? If the answer were also yes, that would be the end of the appeal because the EU challenge would fall away.

    iii) If the answer to (ii) were no, may the United Kingdom nonetheless impose liability to pay excise duty, in the circumstances of this case, on a basis that does not correspond with any basis of liability in Article 7(3)? If the answer were no, the appeal must again be allowed because the EU challenge would have succeeded.

    iv) If the appellant obtained a pecuniary advantage by evading excise duty on the imported cigarettes, would a confiscation order in the amount of the excise duty evaded be disproportionate?

The First Issue

28. Regulation 13(1) of the Regulations imposes the primary liability to pay the duty on the person ñholding the tobacco products at the excise duty pointò.

29. ñHoldingò is not defined in the Finance Act or in the Regulations, and there appears to be no authority on its meaning. It is plain that it denotes some concept of possession of the goods. Possession is incapable of precise definition; its meaning varies according to the nature of the issue in which the question of possession is raised (a good example being *Re Atlantic Computer Systems plc* [1990] BCC 899, CA). But it can broadly be described as control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporarily or permanently: see, for example, *Goode on Commercial Law, Fourth Edition, p 46*. In a case of bailment, the bailee has actual, or physical, possession and the bailor constructive possession. In other words, if the bailee holds possession not for any interest of his own but exclusively as bailee at will, legal possession will be shared by bailor and bailee.

30. In this case Heijboer had physical possession of the cigarettes at the excise duty point, but Heijboer was acting as no more than the agent of the primary carrier, Yeardley. Yeardley was, therefore, in law the bailee of the cigarettes at the excise duty point and, not apparently having any interest of its own in the goods, shared legal

possession with the person having the right to exercise control over the goods, as explained above. If Yeardley had known, or perhaps even ought to have known, that it had physical possession of the cigarettes at the excise duty point, its possession might have been sufficient to constitute a ñholdingò of the cigarettes at that point. However, Yeardley had no such knowledge, actual or constructive, and was entirely an innocent agent. That important fact then turns the focus on the person or persons who were exercising control over the cigarettes at the excise duty point. There is no doubt that Wood (through Events) was such a person. Wood, as a matter of fact, under the contract with Yeardley gave instructions throughout the transportation to the carrier. Wood was correctly shown on Yeardleyôs invoice to be Yeardleyôs client and the consignee of the goods that were being transported. Under the Convention, as a matter of law, Wood (through Events) had the legal right of control over the goods. It is also known that Taylor (through TG) was acting together with Wood in exercising control over the cigarettes throughout the transportation. TG was shown on the CMR to be the consignee, a designation which represented accurately, if incompletely, the true state of affairs. There is no good reason to distinguish the position, in this context, of the two appellants.

31. There is nothing, furthermore, in this interpretation and application of Regulation 13(1) to the facts of this case that would be inimical to the purposes of the Finance Act. To seek to impose liability to pay duty on either Heijboer or Yeardley, who, as bailees, had actual possession of the cigarettes at the excise duty point but who were no more than innocent agents, would raise serious questions of compatibility with the objectives of the legislation. Imposing liability on the appellants raises no such questions, because they were the persons who, at the excise duty point, were exercising de facto and legal control over the cigarettes. In short, responsibility for the goods carries responsibility for paying the duty.

32. In the written skeleton argument on behalf of the Crown, submitted by Melanie Hall QC and Andrew Bird on 30 September 2011, it was accepted that ñneither of the appellants ever held the products intended for deliveryò. However, there is no relevant analysis of Regulation 13(1) or of its application to the circumstances of the present case, and it is, therefore, unclear on what basis the acceptance was made. In the written Addendum to the Crownôs skeleton submitted on 2 March 2012 by Nicholas Paines QC and Andrew Bird, who appeared at the hearing of the appeals, there is no comment on this question. However, at the hearing, Mr Paines QC, following probing from the Court, said that he could not support the acceptance previously made on behalf of the Crown, and submitted that, on a proper interpretation and application of Regulation 13(1), both appellants were ñholdingò the cigarettes at the duty excise point. Mr Conor Quigley QC, who led on behalf of both appellants, and who throughout presented his case with force, candour and lucidity, took no objection to the change of position in this respect by the Crown, a principled reaction that the Court commends and for which it is grateful. The Court has decided in any event that it is right that it should resolve this issue on the facts before it, notwithstanding the initial concession, and for the reasons given, has no hesitation in concluding that both appellants ñheldò the cigarettes at the duty excise point within the meaning of Regulation 13(1).

33. The appellants both also fall within Regulation 13(3)(e) as persons ñwho caused the tobacco products to reach an excise duty pointò. As already explained, Taylor,

through TG, and Wood, through Events, were the persons who, acting together, made the crucial arrangements for the transportation of the cigarettes from Belgium to the UK, and deliberately employed a modus operandi that was intended to cover the fraudulent importation with a veneer of normality and professionalism, and to throw HMRC off the scent of detection. It would not have mattered if their involvement with the goods had ceased by the time that the cigarettes had reached the excise duty point (see paragraphs 19-21 above). In fact their connection had not ceased by that time; they continued to exercise control, de facto and in law, at the excise duty point, and beyond.

34. This conclusion is entirely consistent with *Revenue and Customs Prosecutions Office v Mitchell* [2009] EWCA Crim 214 [2009] 2 Cr App R (S) 66 where Toulson LJ, as he then was, observed that the choice of language in Regulation 13(3) was likely to have been chosen to make clear that attention is ñbeing directed to the person who may not be physically making the delivery but is the person who is truly responsible for it being madeò (paragraph 31); and that Regulation 13(3) ñis directed at that person or body who had real and immediate responsibility for causing the product to reach that point, which will typically and ordinarily be the consignorò (paragraph 32).

35. Both appellants rely upon the fact that Ali was the principal conspirator and was the mastermind of the illegal importation. The cigarettes were always the ñpropertyò of Ali, meaning that he owned them. The appellant Taylor had no interest, financial, beneficial or otherwise, in the cigarettes themselves. The role of the appellants was to provide a smokescreen to make the importation appear legitimate. However, none of this avails the appellants. In a case of this kind it is necessary to examine the precise and individual conduct of each person to see whether that conduct brings him within the terms of Regulation 13. In this case, for the reasons given, the answer is plain in respect of both appellants.

The Second Issue

36. Mr Quigley QC properly accepted, under the well known principle of *Marleasing* (Case C-106/89) [1990] ECR 1 - 4135, that if the basis of liability under the Regulations (whether as a result of ñholdingò the cigarettes or ñcausing them to reach a duty excise pointò) was consistent with a basis of liability under Article 7(3) of the Directive, the imposition of liability to pay the duty could not be impugned under EU law.

37. Article 7(3) of the Directive has, as one basis of liability, ñholdingò the products intended for delivery. There is again no definition of ñholdingò in the Directive, and there appears to be no interpretation of this concept found in the Directive in the jurisprudence of the Court of Justice. The question was explored in *White and Others v R* [2010] EWCA Crim 978, where counsel for the Crown submitted that ñholdingò meant possession or control, relying upon *United Antwerp Maritime Agencies NV and another v Belgium* Case C-140/04, [2004] ECR 1 ï 8633. Some caution needs to be exercised in respect of that case in the present context. It concerned the effect of Article 184(1) of the Implementing Regulation made to implement the Customs Code, under which ñany person who holds goods after they have been unloaded in order to move or store them shall become responsible for complianceò with the obligation of re-presenting the goods in question wherever the customs authorities so require. When goods had been unloaded, the person (such as the consignor or consignee) who

had signed the summary customs declaration temporarily lost physical control of them and could not, if directed, re-present them to the customs authorities. Only the person who had physical possession or control could as a practical matter re-present the goods in that scenario.

38. It was, therefore, in the judgment of the Court of Justice, only that person who was required under the fourth indent of Article 203(3) of the Customs Code to fulfil the obligations arising from temporary storage of the goods, and who was hence liable to pay the customs debt when the goods were in the event stolen and could not, on request, be re-presented to the customs authorities. Article 7(3) of the Directive is set in a quite different context, where actual physical possession or control of the goods is neither necessary or, in certain cases, sufficient for liability.

39. For the same reasons that have already been elaborated in interpreting Regulation 13(1) of the Regulations, both the language and purpose of Article 7(3) strongly support the conclusion that a person who has de facto and legal control of the goods at the excise duty point should be liable to pay the duty. That conclusion is all the more compelling where the person in actual physical possession does not know, and has no reason to know, the (hidden) nature of the goods being transported as part of a fraudulent enterprise to which he is not a party. To seek to impose liability on entirely innocent agents such as Heijboer or Yeardley, rather than upon the appellants, would no more promote the objectives of the Directive than those of the Regulations.

40. The same considerations apply to the further basis of liability, namely, ñdeliveryò of the goods. It was Heijboer, as agent of Yeardley, who actually carried the goods. However, Wood, through Events, and Taylor, through TG, made all the arrangements necessary for delivery and controlled the delivery throughout the carriage. Neither Heijboer nor Yeardley knew the true nature of what was being delivered, and were no more than innocent agents. It was the appellants exploiting such innocent agents who in reality effected delivery within the meaning of Article 7(3) of the Directive. The basis of liability under domestic law (causing the goods to reach the excise duty point) rests ultimately on the real and substantial responsibility of the appellants for delivery of the goods to the excise duty point, and that basis corresponds entirely with the alternative basis of liability under EU law.

The Third Issue

41. In the light of the foregoing conclusions the third issue does not arise. The Court heard interesting and powerful submissions from Mr Quigley QC that Article 7 of the Directive determined exclusively the person who could be made liable to pay the duty, whether or not the importation was lawful or fraudulent. It was not open to the Member State, he contended, to provide further bases of liability. If the Court had had to decide that question, it might have invited further submissions as to whether it was appropriate to seek guidance from the Court of Justice. But that prospect no longer arises.

The Fourth Issue

42. The appellants contend that any confiscation orders would be disproportionate in the circumstances of this case. They rely upon *R v Waya* [2012] UKSC 51 [2013] 1 AC 294 (ñ*Waya"*).

43. Most of the propositions that the appellants seek to extract from *Waya* are uncontroversial. Article 1 of the First Protocol to the Convention (ñA1P1ò) imports, via the rule of fair balance, the requirement that there must be a reasonable relationship of proportionality between the means employed by the state in, inter alia, the deprivation of property as a form of penalty, and the legitimate aim which is sought to be realised by the deprivation (*Waya*, paragraph 12). Section 6(5)(b) of POCA can be read subject to the qualification ñexcept insofar as such an order would be disproportionate and thus a breachò of A1P1. The judge should, if confronted by an application for an order which would be disproportionate, refuse to make it but accede only to an application for such sum as would be proportionate (*Waya*, paragraph 16). A legitimate and proportionate confiscation order may require the defendant to pay the whole of a sum which he has obtained jointly with others; or require several defendants each to pay a sum which has been obtained, successively, by each of them; or require a defendant to pay the whole of a sum which he has obtained by crime without enabling him to set off expenses of the crime. Although these propositions involve the possibility of removing from the defendant by way of confiscation order a sum larger than may in fact represent his net proceeds of crime, they are consistent with the statuteôs objective and represent proportionate means of achieving it (*Waya*, paragraph 27).

44. Furthermore, to make a confiscation order in a defendantôs case when he has restored to the loser any proceeds of crime which he had ever had, is disproportionate. It would not achieve the statutory objective of removing his proceeds of crime but would simply be an additional financial penalty (*Waya*, paragraph 28). That principle above ought to apply equally to other cases where the benefit obtained by the defendant has been wholly restored to the loser (*Waya* paragraph 29).

45. In tax cases, HMRC does not as a matter of practice seek double recovery in the same sum (*R v Edwards* [2004] EWCA Crim 2923). The argument may need to be considered that a disproportionate result should not be left to be achieved by way of Executive discretion but rather should be the responsibility of the court (*Waya*, paragraph 33).

46. In the present case HMRC did not seek to recover the excise duty or VAT which should have been payable on importation from any of the defendants as a debt. The appellants submit that it would have been open to HMRC to have sought recovery of the duty and tax by issuing a tax assessment imposing a tax liability and seeking to recover the debt jointly and severally from the defendants. If it had done so, the maximum amount that HMRC could have recovered from the defendants cumulatively would have been the amount of foregone tax, £95,730. Even though, it is said, the amount collected through the enforcement of confiscation orders is placed in a central fund, rather than being diverted to HMRC specifically ñas a debt write-offò, the public treasury (that is, the State) obtained the funds. The appellants submit that it is wholly disproportionate for the Crown to bypass the normal procedures of seeking payment of taxation in such a way as to impose a separate liability in the full amount on four defendants.

47. The appellantsô submission would, if sound, produce a fairly massive gloss on the confiscation regime. No confiscation order could be made if the Crown could seek to recover lost tax by civil proceedings. Presumably, this gloss would bite only in a case where there was more than one defendant, because the single offender, if he had the

means to pay back his gains, might be largely indifferent as to the precise procedure for recovery. Of course, if the criminal community came to realise that conspiracies and joint enterprises would automatically benefit from more favourable treatment under POCA, by reason of the gloss suggested by the appellants, the incentive to organise in such a way as to reduce the risk of liability under the confiscation regime is obvious.

48. Furthermore, there would be no good reason to distinguish the Crown from any other person who might seek to recover the loss through civil proceedings. It would likewise be argued that it was ñdisproportionateò for the Crown to bring proceedings under POCA, under which the defendants cumulatively could be required to pay a multiple of the actual gain, when the victim of the crime committed by the conspirators or joint offenders was well able to obtain joint and several judgment against them for his loss in the civil court. Such a result would be inconsistent with the legislation: the duty to make a confiscation order is simply converted into a discretionary power, if and only if, the loser whose property represents the proceeds of crime has in fact brought, or proposes in fact to bring, civil proceedings to recover his loss.

49. The fundamental flaw in the appellantsô submission is that it confuses and conflates confiscation under POCA and compensation under the civil law. Confiscation orders are not compensatory. The amounts confiscated are not paid to the victim but into Government central funds. It is fortuitous in this case that the State itself is the victim. Confiscation orders are in an important sense penal, because they aim at depriving defendants of the benefit they have gained from criminal conduct, and also help to make criminal offending, whether as a career or opportunistically, a less attractive choice. The penal nature of the proceedings is reflected in the further fact that the defendantôs liability under POCA is limited by his capacity to pay (the available amount). A civil judgment is not so limited, and default may lead to individual bankruptcy.

50. In short, there is nothing in *Waya*, or in principle or policy that would warrant the gloss that the appellants seek to impose on the applicable legislation. The circumstances of this case are not materially different from those in *R v May* [2009] UKHL 28; [2008] AC 1028. May had been found to have realisable assets exceeding the benefit from the offending, and a confiscation order was made in the full amount. Confiscation orders were also made against others, in respect of the same jointly obtained benefit, to the extent of their realisable assets. The sum which May, jointly with others, was found to have fraudulently obtained from HM Customs and Excise was, in law, as much his as if he had acted alone. The order was held to be entirely consistent with the legitimate objects of the legislation, and involved no injustice or lack of proportionality. The orders in this case, adjusted to reflect the amount of excise duty evaded, are, under both UK and EU law, likewise lawful in all respects.

Conclusion

51. For these reasons both appeals are dismissed.