IN THE SUPREME COURT OF NEW ZEALAND SC 68/2014

[2015] NZSC Trans 8

RHYS MICHAEL CULLEN

Appellant

v

THE QUEEN

Respondent

Hearing:	10 March 2015
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	N P Chisnall and P J Broad for the Appellant M D Downs and Y Moinfar for the Respondent

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CRIMINAL APPEAL

MR CHISNALL:

If the Court pleases. Counsel's name is Chisnall and I appear along with Mr Broad for the appellant.

ELIAS CJ:

Thank you Mr Chisnall, Mr Broad.

MR DOWNS:

May it please the Court. Downs and Ms Moinfar for the respondent.

ELIAS CJ:

Thank you Mr Downs, Ms Moinfar. Yes Mr Chisnall?

MR CHISNALL:

As the Court pleases. This is a conviction appeal where the appellant says that he's had two trials where a miscarriage has resulted because of judicial misdirections and when re-reading the first error, or the first miscarriage, the Court of Appeal arguably fuelled the miscarriage that we say occurred in the second trial when it made the comment at the end of its decision, after concluding that the appeal should be allowed, that Tamaki ought to be charged as the principal in the indictment. Subsequently the way in which the Crown and the trial Judge sought to follow that directive is, in my submission, what led to the miscarriage that occurred in this case.

The appellant's central submission is that a miscarriage effectively resulted in two ways. First, the Judge's jury directions on the law, in my submission, were inadequate and wrong in terms of the way that we say the law stands. While it was the appellant on trial, Tamaki and the appellant were treated as interchangeable. On one hand the jury was directed that the appellant was Tamaki's directing mind and the control of the company's business. On the other hand it was told that it had to be sure that Tamaki committed the offences charged before going on to decide whether the appellant was guilty as a party to that offending. The jury, in my submission, was directed to decide that he was a party to his own offending. The jury – in my submission it wasn't possible for the jury to logically reconcile the directing mind direction that the Judge provided that direction on the appellant's party liability and then subsequently the tripartite direction on how to approach the appellant's evidence given at trial. In my submission this means that he didn't have a trial according to law.

The second miscarriage we submit occurred resulted from the way the jury was directed on the issue of the timing of possession of recklessness. Obviously this particular issue is identified in this Court's second question in the approved grounds. In my submission that's perhaps this is the most critical aspect where this Court's direction can be provided in a general way about what's required for this offence. In my submission it turns on whether the appellant is right, as we say in our written submissions, that the risk with which the offence of receiving is concerned and already occurred by the time the appellant either did an administrative act in respect

of a vehicle, or as the Crown said, came into control by seeing a vehicle on the yard of Tamaki.

The appellant's case is that the true point at which the act of receipt was complete was when these vehicles came onto Tamaki's yard not, as the Crown presented its case, when he failed to get rid of a car already there. This turns on whether the Crown was entitled to argue that the appellant only took control of a car when he did something in respect of it, or where he saw it. As the Judge put it in his directions to the jury, whether that was a day after it came onto the yard, a week or a month later in time. So my essential submission is that there –

ELIAS CJ:
Aren't the two arguments though necessarily intertwined.

MR CHISNALL:
They are.

ELIAS CJ:
Because if the, I'm struggling to understand why it matters on either point if the Judge made it clear that it was only the actions and knowledge and intent of Mr Cullen, that was to be used as the company. So why does it matter?

MR CHISNALL:
It matters because –

ELIAS CJ:
It may be wrong, conceptually, but why, where's the harm?

MR CHISNALL:
The harm is that the act of receiving itself on the case that was presented really, or the case that the Crown was truly arguing, and what the appellant sought to address was that, of course, these things occurred independently of him and that he had no –

ELIAS CJ:
But that's not the way that the Judge summed up.

MR CHISNALL:

No.

ELIAS CJ:

I'm not sure that it was the way the Crown approached it.

MR CHISNALL:

Well it approached it on that basis that control was taken later in time so on one hand the jury's told he is the directing mind of the company, everything that happens in this business happens with his knowledge, including the acts of those purchasing the cars, but on the other hand later in time he is said to own a company. It's only later in time that he comes into control of the vehicles and the defence, of course, was that –

ELIAS CJ:

Where in the summing up did the Judge say that the offence was completed when the cars came onto the yard?

MR CHISNALL:

Well, no, he didn't.

ELIAS CJ:

No.

MR CHISNALL:

That's the point that I'm making is that that's when it ought to have been presented. That was the way that the Crown case was –

ELIAS CJ:

But then that's an argument that he's, that it's not equivalent, that his state of knowledge is not equivalent to the company, so you're putting forward a different case than was put at trial.

MR CHISNALL:

Well, perhaps if I can go back to the point, that the way it was run at trial was very much responsive to the way that the Crown elected to run it by relying on attribution

and so as you'll see from the Judge's discussions with counsel during the trial process, it wasn't, it was somewhat of a moving feast.

ELIAS CJ:

But even if it's right that attribution to the company had to be shown, even if that is right, where's the harm to Mr Cullen in the way the matter was put to the jury?

MR CHISNALL:

Well the harm first of all is that the jury is left with a direction that he's the man who's in control. Everything that happens on the yard happens because he controls it. But his defence, of course, is that the act of receiving, the possession taken by the business, occurred without his knowledge, and the harm to him is that in fact –

ELIAS CJ:

But that isn't the way it was put. It was put that it was, that the cars were received by the company and by him when he took control of them.

MR CHISNALL:

But I suppose the problem is that the defence here was that the act of receipt happened earlier in time. How the cars came onto the yard in other words was a critical consideration because that's how the receiving charge was made out.

GLAZEBROOK J:

So is the submission that if you take receipt of something not knowing it's stolen, and then later know it's stolen, keep hold of it, but you can't be a receiver –

MR CHISNALL:

That's correct.

GLAZEBROOK J:

– that's the defence. So the defence is that if you take possession without knowing it's stolen –

MR CHISNALL:

Mmm.

GLAZEBROOK J:

Right. And you say that just arises from the wording? It just doesn't seem a very likely – so is there any other offence you can be charged with if you find out it's stolen? I mean because you can be, if you help one dispose of the property you can be held to –

MR CHISNALL:

That's the two forms –

GLAZEBROOK J:

But you have to wait until they've actually tried to dispose of it before in that case they could be guilty of receiving. Even though they're there putting them up for sale in the meantime knowing they're stolen.

MR CHISNALL:

Well that's a valid point Your Honour because in my submission receiving is a mercantile offence obviously that's developed from the common law and it's always served a very specific purpose of seeking to dissuade those who form a market for stolen goods and the section, in my submission, is very precise about when the act of receiving can occur. Either when possession and control is taken along with the thief or jointly with others or, as section 246(3) provides at the other end of the spectrum, where you assist, aid in the disposal of those goods.

GLAZEBROOK J:

Or concealing them.

MR CHISNALL:

Or concealing them. That's right, and so it's what the UK, of course, is handling.

GLAZEBROOK J:

So in the middle, you're perfectly happy.

MR CHISNALL:

Mmm.

GLAZEBROOK J:

You can have them up for sale as much as like so that the act of disposition doesn't include actually having them on the yard for sale?

MR CHISNALL:

Ah…

GLAZEBROOK J:

It would have to be the, that would have to be the submission that –

MR CHISNALL:

It has to be –

GLAZEBROOK J:

– the act of disposition –

MR CHISNALL:

– and it certainly follows from –

GLAZEBROOK J:

– is not having them up for sale?

MR CHISNALL:

It certainly follows from *R v Kennedy* [2001] 1 NZLR 314 but if, but that is, that is right that when it's talking about the two precise points at which the act of receiving takes place then, in my submission, that's right. If I can leave it on the point that…

GLAZEBROOK J:

So disposition can't cover having them up saying, "Price here –

MR CHISNALL:

No.

GLAZEBROOK J:

– this is what it costs"?

MR CHISNALL:

No, it appears to –

GLAZEBROOK J:

It actually just means the –

MR CHISNALL:

– something more.

GLAZEBROOK J:

– just means the actual sale at that stage?

MR CHISNALL:

The actual disposition and so they are quite precise terms and –

GLAZEBROOK J:

Well, aren't you disposing of property by having it up with a price tag on?

MR CHISNALL:

I suppose you're anticipating disposal, but the point that's made in *Kennedy*, which I'll come to later again, is that really it's the opportunity to rid yourself of the property and so it might be if the Crown as they've presented their case have said, "Well, it's the holding onto the goods with the intent of disposing of them, letting them stay on the yard knowing they're stolen," but as I wish to emphasise, perhaps when I come to the factual matters if I need to go into a little more detail, what we're talking here is that, as the Crown says, the risk of the offence here is not that the, as the Crown seem to keep shifting away from, the bringing on of property, although that's the way they put it, rather the risk in this case was the failing to get rid of stolen property. And so I suppose that directly addresses Your Honour's point and there is a certain policy consideration behind that. I suppose the idea that it seems unpalatable of course to say, "Well, why is it an offence on one hand if you intentionally bring on property knowing that it's stolen but on the other if you do nothing and continue to sell it it's not receiving?" but on the facts of this case perhaps they provide a prime example –

GLAZEBROOK J:

Or is it an attempt at that stage? Would that be the argument?

MR CHISNALL:

And I – to be fair, I haven't turned my mind to that. It may be, although the attempt to receive, I'm not aware of any time. It seems to be an offence which is to be made out really a substantive in nature.

O'REGAN J:

It seems a rather glaring whole in the legislation.

MR CHISNALL:

Well…

O'REGAN J:

And, you know, so one has to then ask, "Well, can that really be so?" If so, something which is so obviously criminal is not criminalised, you have to ask why is that.

MR CHISNALL:

Well, it's not that it's not criminalised, in my submission, Sir. It's that it's criminalised by other offences and –

GLAZEBROOK J:

Like what?

O'REGAN J:

Well, I think Justice Glazebrook has pointed out the fallacy of that.

MR CHISNALL:

Well, I suppose, the one I've made a suggestion of is section 219(1)(b) which is where you don't have to take – possession's not the issue. It's whether you – once your mind turns to the status of the goods, it's using them or – and so there's an argument to be made in terms of whether putting them up on the yard for sale –

GLAZEBROOK J:

Have we got that somewhere? Have you got that in your submissions or have we got it somewhere?

MR CHISNALL:

I've referred to it. I haven't provided the full wording. I apologise.

ELIAS CJ:

Perhaps read it out. Your junior is passing it to you.

MR CHISNALL:

I knew I brought the Crimes Act 1961. Always a good place to start. It's section 219(1)(b). "Theft or stealing is the act of dishonestly and without claim of right, using or dealing with any property with intent to deprive any owner permanently of that property or of any interest in that property after obtaining possession of, or control over, the property in whatever manner." And so it's the – it anticipates, in my submission, temporal nexus after possession is taken, however that's come about, so those who come –

O'REGAN J:

So are you saying that's what Mr Cullen should have been charged with here?

MR CHISNALL:

I'm saying that that would more comfortably fit with the way the Crown ended up running its case, and…

ARNOLD J:

So is there still, in *Kennedy* the Court of Appeal talked about using section 220 of the Crimes Act –

MR CHISNALL:

Mmm.

ARNOLD J:

– in this sort of situation. Is that still –

MR CHISNALL:

This is the – section 220 is this section's predecessor.

ARNOLD J:

Right.

ELIAS CJ:
219 is?

MR CHISNALL:
Yes, 219(1)(b), and conversion of goods, and so that's where the Court in *Kennedy* made that point. But perhaps if I can just go back –

GLAZEBROOK J:
Well, has he lost anything by being charged under 246 when he could have been charged under, is it 219(1)(b)?

MR CHISNALL:
He has lost something, in my submission, because the defence remains the same.

GLAZEBROOK J:
But how can the defence remain the same –

MR CHISNALL:
Well –

GLAZEBROOK J:
– if in fact you can have a split between possession and this position, and knowledge?

MR CHISNALL:
It still requires knowledge of the items, what they are.

GLAZEBROOK J:
Well, but that has been required here, hasn't it? So what's he lost? He's lost a defence under 246, but that wouldn't be a defence under 219(1)(b), and so what's he lost? Why couldn't we just then substitute a conviction under 219(1)(b)?

MR CHISNALL:
Well, in my submission he has lost something, because it still has to take into account the assessment of the facts in this case, which is, we're not talking about something that's been in custody and control for a long time, and most of these cars

in fact, there were 15 of them, but only 10 of them actually were brought onto the yard by way of a sale, and it turns out that there were five vehicles that, where there weren't any records, including some that had actually, were stolen on the day of, on the day that they, that police had, they had the yard under supervision, so, under surveillance, sorry, the 17th of June, bearing in mind that the warrant was executed the following day so vehicles, including one, importantly, which actually police didn't see come on, it came on that night, and so the point I'd make is simply that, again, that the issue remains, given the set of circumstances, was it safe to actually conclude that he knew what was there, that he knew that the status.

WILLIAM YOUNG J:
I thought the argument you were making, or primary argument, was that the vehicles came into TML's possession or control when they were acquired –

MR CHISNALL:
Yes.

WILLIAM YOUNG J:
– and that any later recklessness on the part of your client is irrelevant because it's not occurring at the same time as possession or control. So is that the primary?

MR CHISNALL:
That's the primary argument, Sir. But my point, I maintain, is that there still wasn't evidence, sufficient evidence to actually make out that he actually turned his mind to the status of the vehicles later in time, which is, in my submission, a critical –

WILLIAM YOUNG J:
But that's very much a jury issue, isn't it?

MR CHISNALL:
It is. But that's the very reason, in my submission, why it wouldn't be safe to substitute this particular 219 offence for receiving. It still isn't, it's still a different, sufficiently different issue, in my submission, that it's not one where you can simply transfer the facts from this case into that, and push them into that charge.

WILLIAM YOUNG J:

All right. Well, I've sort of got to the point where I think it's, I'm driven to thinking it's necessary to move to another charge. The primary point is the one I've just mentioned, that the vehicles came into TML's possession or control when they were acquired by the employees.

MR CHISNALL:

Yes.

WILLIAM YOUNG J:

But any recklessness on the part of Mr Cullen after the fact is irrelevant because it's not occurring at the same time.

MR CHISNALL:

That's the essential –

WILLIAM YOUNG J:

So in a nutshell what's the next point to…

ELIAS CJ:

Well, hang on, that isn't the way the matter was put to the jury by the Judge, because the Judge took the view that it came into possession of TML when Mr Cullen –

WILLIAM YOUNG J:

Yes, I appreciate that. But what he –

ELIAS CJ:

So I still don't understand what the harm is.

WILLIAM YOUNG J:

I think this –

MR CHISNALL:

Well, the harm is that it didn't allow proper engagement with the defence that –

ELIAS CJ:

Well, but the defence is irrelevant on that basis.

MR CHISNALL:

It's…

ELIAS CJ:

Because nobody is saying that it came into TML's possession when the cars came onto the property.

MR CHISNALL:

The point being though it, on the defence case and the way that the, certainly the Crown, appeared to be intent on running it was that the vehicles came into the business's possession by those employees.

ELIAS CJ:

But that wasn't accepted by the Judge, who decided that it only came into TML's possession if they had come into Mr Cullen's possession.

MR CHISNALL:

My submission on that point, Your Honour, is that that was wrong in law and it, in terms of the way that this case was present –

ELIAS CJ:

But hang on, in law you – leaving aside how it was presented for a moment, you would say that is what is required in law, wouldn't you?

MR CHISNALL:

Yes, it has to focus on his acts and if he took control but in this case, in my submission, what we have is a recognition by the Crown that they had an issue in terms of showing that the possession and control taken by him and recklessness actually occurred at the same point in time and the way, that's a recognition, in my submission, that as they kept saying, he's responsible for bringing the cars onto the yard, for allowing them onto the yard, that's a recognition that, in fact, the point of possession really is there, possession and control and that's the point –

ELIAS CJ:

But there was a lot of evidence about was he standing near the cars, that sort of thing, when they'd come on, the fact that he must have been aware, so all of this was

squarely before the jury. The coincidence of the company, of the TMP and Mr Cullen's taking possession and knowledge.

MR CHISNALL:
It really does turn on whether there was an air or reality to the submission put that he somehow took control independently of those that brought it onto the yard or –

ELIAS CJ:
But that was put to the jury and it was a jury question of fact.

MR CHISNALL:
The issue, as I've said in my submission, is that it does keep coming back to the point though that it didn't allow the jury to consider what we said was the critical time that the vehicles actually came into possession and control.

WILLIAM YOUNG J:
Well can I put what I understand to be your argument in a nutshell. The case was presented on the basis that the principal offender was TML. You say that on that footing it's possible that TML committed the offences, or at the very least took possession and control of the vehicles when they came onto the yard.

MR CHISNALL:
Yes.

WILLIAM YOUNG J:
Right, and you say that later recklessness on the part of Mr Cullen is irrelevant, doesn't make TML an offender if it's only got possession and control. In any event, to the extent to which he's a party, he's come into it after the crime has been committed?

MR CHISNALL:
That's it in a nutshell.

WILLIAM YOUNG J:
Is that the whole of the case, your case?

ELIAS CJ:

It is.

WILLIAM YOUNG J:

I mean you've answered, your submissions are, I mean I suppose understandably, around the questions referred to in the leave judgment, but they don't actually set out in a particularly precise way what the argument is.

MR CHISNALL:

No, I appreciate that, which is why I wish to start off by stating what the two essential propositions and where the trial has gone wrong. Your Honour's summary of our case in terms of the receiving point is right. The, as I say the other issues, the directions and whether it is right that the jury was directed, given the series, in my submission, of conflicting directions.

ELIAS CJ:

Well perhaps you need to take us to that but for my part I think the way it's been put to you by Justice Young is the whole of your case and I am still left and would like your help on where's the harm because the jury, as I understand it, and show me if I'm wrong on this, the jury was told that TML didn't come into possession until Mr Cullen knew and was reckless.

GLAZEBROOK J:

But the argument is that was wrong, wasn't it, the jury should have been told it came in possession –

WILLIAM YOUNG J:

Earlier.

GLAZEBROOK J:

– earlier because the actions of the employees of the company at the time they took the cars onto the yard.

ELIAS CJ:

I understand all of that. I just cannot see that there is any harm because effectively the jury has been told that Mr Cullen needed to have known – to have taken the cars into his possession and been reckless. So where, leave aside all of this business of

attribution and the company, where is the harm in terms of an offence committed by Mr Cullen?

MR CHISNALL:

Well it operates on the basis that the act of receipt, or the recklessness, is failing to get something off the yard, and so the problem with all of this is that it's not a realistic address of the case which was that over two weeks, based on a few records that he would have committed – sorry, that he completed formal records, and him going within proximity of the vehicle he somehow then came into the control of those vehicles that were already there and that he somehow actually had the ability to do something about it, as the way the Crown puts it, by booting the cars off the yard to use the prosecutor's term.

ELIAS CJ:

Well why is that not an available way of looking at it?

MR CHISNALL:

Well the problem with that is that it isn't founded on the facts.

ELIAS CJ:

All right.

MR CHISNALL:

He didn't have any opportunity to, as I say –

ELIAS CJ:

But all of that was put to the jury, wasn't it, that was the defence case?

MR CHISNALL:

Well the defence case, yes, that he wasn't in control.

ELIAS CJ:

Yes.

MR CHISNALL:

But also that more critically that in fact the section is directed at what, how these things came in, the act of receipt, and given that they were saying that these, that he

was the business, it was unnatural to actually consider his acts and state of mind independent of those other people who were actually responsible for buying the cars and bringing them onto the yard.

ELIAS CJ:

All right, except that isn't the way that the case was put, but perhaps you need to take us to the summing up, the question trail, and any facts that you want to draw our attention to.

GLAZEBROOK J:

Can we just clarify, you don't – when I asked you why we couldn't substitute conviction, and I'm also not sure we need to substitute a conviction because I'm not convinced 246 doesn't cover the field, but you're not indicating that there was anything wrong with the – that there wasn't any evidence on which they could say that he knew those vehicles were stolen.

MR CHISNALL:

No, because I appreciate that it would, of course, rely on the same evidence.

GLAZEBROOK J:

And that was a jury question?

MR CHISNALL:

That is a jury question.

GLAZEBROOK J:

And they were specifically directed to consider that issue, weren't they?

MR CHISNALL:

They were. I suppose it really does come back to my submission that receiving itself requires there to be a very precise establishment –

GLAZEBROOK J:

Yes.

MR CHISNALL:

– of when possession occurs and in this case what, and in my submission there'd be more considerable sympathy for the trial Judge because as it comes clear during his discussions with counsel, the Crown itself isn't quite sure what it's presenting, or what it intends to present, and it talks about the fact that possession really falls to be considered once he does something in relation to a vehicle notwithstanding that he's the one that's controlling their actions, on the Crown case. So I suppose it really does come back to this central submission we make which is, was it right to treat Tamaki as the principal, and as the Crown says, Mr Cullen is the substitute principal offender or in reality was the case actually that he, that the actus reus of the offences was committed by these employees and those who brought the cars onto the yard and he was aware of those essential matters and aided and abetted it by allowing that state of affairs to continue. That, in my submission, is more naturally what these types of cases tend to be about.

So if I move on to the facts. My submission is that the word "to receive" assumes a transaction. Something passing from one person to another, be it possession or control. It's therefore critical, in my submission, to identify precisely when the defendant first took possession or control and in my submission the circumstances in which that control is taken are critical to determine whether there was recklessness at that point in time and the central point I wish to make is that the section in my submission is really focused on those who elect whether to run the risk of taking possession or not, either from the thief or along with, or of disposing of property, and so it's for that reason that, in my submission, the central error here was that when the Judge told the jury that it was irrelevant how the cars came to be on the yard. So, before I move on from that point, can I just say that in my submission the offence of receiving itself has its limitations. It doesn't fit every situation when stolen goods are found on premises. It explains why other types of offences not so concerned with possession have developed. The obvious example we've already talked about section 219, but use of a document under section 228 would be another example, and participation in an organised criminal group as well. And so, in my submission, given the way that the Crown articulated its concerns about when possession was given and taken and when the risk was run, in my submission this didn't fit, this set of circumstances, certainly the way it was presented, didn't fit the offence of receiving, and really what's happened here is that it's been given a strained interpretation to match the facts and –

ARNOLD J:

Sorry, can I just understand, if the employees received the cars, having no idea at all that they were stolen, so from the employees' perspective the receipt was innocent and at a later point the proprietor of the business –

MR CHISNALL:

Became aware of that.

ARNOLD J:

– becomes aware of it, how does it work in that situation?

MR CHISNALL:

Well, I suppose in that situation, to look at what *Kennedy* says, it's not receiving because you need to be given a reasonable opportunity to rid yourself of the goods, and we of course say that that wasn't present in this case, but it's at that stage that you'd consider something else and whether they – I suppose that the point is giving it a strained interpretation might come about because of the fact that they're concerned that there is some lacuna in the statutory framework, and we're simply saying that receiving needs to be given its natural meaning.

GLAZEBROOK J:

But it includes disposing, so it doesn't have a natural meaning in the statute itself, and it including concealing, which doesn't given it a natural meaning.

MR CHISNALL:

But those are alternatives, I suppose, and they weren't the way that the Crown really argued its case, they've argued it on the basis of possession, so.

WILLIAM YOUNG J:

Do you dispute the approach taken by the Court of Appeal on the first decision that it wouldn't have been open to treat Mr Cullen as a principal?

MR CHISNALL:

I do dispute it.

WILLIAM YOUNG J:

I think the Crown does too.

MR CHISNALL:

In a slightly more circumspect way perhaps than we have in our submissions. But the way I've put it, and maybe I can make it a little bit more precise, is that really everything that's gone wrong was because of that error in many ways.

Can I – well, I was going to address this later, but perhaps if I can just pick up the point now that what I was going to say about it, the Secondhand Dealers and Pawnbrokers Act 2004 really, in my submission, was somewhat of a distraction and a red herring. It obviously formed part, as you'll see from my learned friend's materials where he provides a copy of Her Honour Judge Johns' summing up from the first trial, the Crown placed quite a significant weight on, at the first trial, on who had licences and therefore who might arguably be responsible for various parts of that legislation's framework. But in my submission really the proposition that attribution can occur because of who holds the licence or at least who – sorry, the principal offender is determined by who holds a licence, just as a natural, it doesn't, it just simply doesn't address who needs to be considered by a jury, and certainly there's, it seems to be a belief that permeates the decisions, that an employee can't be responsible for receiving because he or she works for the company.

WILLIAM YOUNG J:

Well, in this case there would have been nothing to stop a prosecution against the employees as receivers, if mens rea could be established, just because they were acting as agents for the company.

MR CHISNALL:

That's true, and obviously liable in their personal capacity for doing that. And in fact if I, just to clarify, at the first trial one of the buyers did stand trial charged with Mr Cullen jointly with receiving, and he was section –

GLAZEBROOK J:

One of the employees did you say?

WILLIAM YOUNG J:

Yes, Mr Rogers.

MR CHISNALL:

Mr Rogers, yes. You'll notice he doesn't appear in the second trial in terms of the evidence, but he was – and I apologise, there isn't, I understand it, a decision that's been transcribed, but I understand from my learned colleague who was trial counsel, going back some time now, but Mr Rogers was discharged effectively on the basis the Judge concluded that he couldn't be responsible because he was an employee. So that kind of reasoning seems to permeate the subsequent decisions to a degree. I suppose –

ELIAS CJ:

Mr Chisnall, can I just, come to it when it suits you, but I would like you to tell me if there is anything in the representation of the Crown and defence cases in the Judge's summing up that you say is wrong. Because I don't see anything in there about when the cars came onto the yards being the time of receipt.

MR CHISNALL:

No. Well I'll go through that in terms of – it's more in the way that the Crown opened its case and then it's the way it cross-examined the appellant.

ELIAS CJ:

And why does that necessarily matter if it's put on the correct basis at the end?

MR CHISNALL:

Well I suppose that's the critical point. Really that point does turn on whether it's accepted that it was not appropriate to leave possession and recklessness at that later point in time, and so really the complaints about the summing up and the way that the Crown presented its case naturally have to fall away, if the Court concludes that was acceptable, but –

ELIAS CJ:

Oh, I see, yes.

MR CHISNALL:

So I'm not saying that when read in isolation –

ELIAS CJ:

You say that you're not taking issue with the summing up?

MR CHISNALL:

No.

ELIAS CJ:

You just say that it should not have been put on that basis?

MR CHISNALL:

That's it. That's' right Your Honour.

ELIAS CJ:

Well that would have to mean that you need to convince us that the Judge wasn't entitled to treat the evidence as permitting him to sum up on this basis in other words, and the indictment, well the indictment is sloppy on that, isn't it?

MR CHISNALL:

Well there's two problems really. One, the Crown itself, the way it opens, and I'll take you to that in a moment –

ELIAS CJ:

Yes.

MR CHISNALL:

– sets the case out in a way that I would suggest actually says that he's guilty for bringing the cars, for allowing them onto the yard. So that's what I'm saying, it's somewhat of a moving feast or a shift in terms of in possession.

ELIAS CJ:

But you can shift in a trial.

MR CHISNALL:

You can when it's done on the basis that the evidence doesn't –

ELIAS CJ:

Yes, the evidence supports the –

MR CHISNALL:

But the evidence was settled in this case and it more, in my submission, arose because of two reasons. One, because the Crown was left with this conceptual difficulty about attribution and how to – why – I mean obviously the Crown chose to, elected to use that but –

WILLIAM YOUNG J:

It didn't have any choice after the first Court of Appeal judgment.

MR CHISNALL:

Well I suppose, I might come back to that. I suggest maybe that's not necessarily right.

ELIAS CJ:

But here attribution was whole equivalence. It wasn't only, it wasn't attribution from different sources, it was just Mr Cullen.

MR CHISNALL:

And that's right but of course the problem is that by telling the jury as a question of law I can tell you that he is the controlling mind –

ELIAS CJ:

He's the company.

MR CHISNALL:

– he is the company.

ELIAS CJ:

Yes.

MR CHISNALL:

It really strips away the defence argument which is that these employees are the ones who are actually taking the risk and he wasn't aware of it. So I suppose it's the effect that it has.

ELIAS CJ:

Well, but that defence is still there because the defence was that he didn't know that they were on the yard.

MR CHISNALL:

Yes, it is right, but how – remember the jury were told how they got onto the yard is irrelevant. What shapes his recklessness –

ELIAS CJ:

But that's wholly consistent with saying that it's only when he takes control that the cars are received by the company.

MR CHISNALL:

It is but it also, whether he's taken, whether he's reckless or whether he's taken control is probably a question of application, but whether he's reckless very much turns on what he knew and what he knew is formed by what happened before and the –

WILLIAM YOUNG J:

And what's happening at the time.

MR CHISNALL:

But obviously informed by what his role is versus the others that he says that he's delegated the responsibility too.

ELIAS CJ:

But all of that is before the jury and rejected.

MR CHISNALL:

Well the problem is though, as I keep really coming back to, is the, what effect did it have on the jury being told, look I can tell you as a settled question of law that he is the company, fine provided it takes you somewhere, but more fundamentally –

ELIAS CJ:

Well that means the company's not liable unless he knew.

MR CHISNALL:

Yes.

ELIAS CJ:

And took control.

MR CHISNALL:

But I suppose it's the effect of that direction, where he says to them, well look, you don't have to worry about how a case came on then. What other people did is irrelevant.

ELIAS CJ:

Because when they came on is not the point of receipt as the Judge summed it up.

MR CHISNALL:

But like I say it really does turn on that. So there's two factors –

ELIAS CJ:

Well I think you really need to show us because it sounds to me as if really you're saying that it was unfair because the – you're not taking issue with the summing up.

MR CHISNALL:

No in a sense that – I'm taking issue with the direction about, question of law direction about whether he's the company because as I say I think that, in my submission, does certainly colour what the jury would have made of the defence and what it would have considered in terms of the point in time the possession and recklessness is formed. But I don't take exception to the – the directions themselves appear to be relatively orthodox except for the fact, as you see in the written directions, they're not precise. They don't precisely set it out when the act of receiving is said to have occurred.

They appear to be relatively orthodox except for the fact, as you see in the written directions, they're not precise. They don't precisely set it out when the act of receiving is said to have occurred.

WILLIAM YOUNG J:

Well that says the act of receiving is when he becomes aware of and takes control of the vehicles.

MR CHISNALL:

Yes, yes, it doesn't – it doesn't state the Crown case so obviously there's the written directions that do, but it also, again it has that circularity because at the end of it after, they're asked to decide has the company committed this offence as the principal. After being told and interchangeably using Tamaki and his name, and then they're told, and has he aided and abetted that? Well, I mean that begs the question, what's he aiding and abetting?

WILLIAM YOUNG J:

Well once you've got to that point the answer is yes because –

ELIAS CJ:

Yes, he's already –

WILLIAM YOUNG J:

Yes, the actions and the state of mind of Mr Cullen are what makes the company guilty and because they're his he must also be guilty too.

ELIAS CJ:

And it's also forced on the Judge by the earlier Court of Appeal decision but even if that is – even if it's a sort of a fifth wheel of the coach or something like that, there's still a question of why it matters. If there's no, if the jury can't be under any misapprehension that they have to find the receiving at the time Mr Cullen became aware and that he had to be reckless at that time.

WILLIAM YOUNG J:

Can I ask you this about what the Chief Justice has said. Would it have been possible for the Crown to present a case based on receiving on the basis that Mr Cullen's the principal, he took possession and control of the vehicles at the time he became aware that they were on the yard, and they were in his control, and at that time he was reckless?

MR CHISNALL:
That's probably the million dollar question.

WILLIAM YOUNG J:
It's an awkward question from your point of view because –

MR CHISNALL:
It is an awkward question and it's one I have to confess to having gone around and I appreciate that there seems to be a bit of a circularity in my reasoning.

ELIAS CJ:
Well it's not anyone's fault but perhaps the 2012 decision of the Court of Appeal but it still leaves the question of where the harm is.

MR CHISNALL:
I suppose that it, like I say, it really does come back to the cases presented.

ELIAS CJ:
Well I think you need to take us to that probably. Unless there's anything else on the –

MR CHISNALL:
What I was intending to do, and maybe, I take it from the Court's questions that this somewhat of a moot point, but what I was going to do is just quickly address the fact that the Crown obviously is criticising us for shifting the focus of the case somewhat.

GLAZEBROOK J:
Well, I don't think anyone's to be criticised in this case really for…

MR CHISNALL:
No. I suppose, I just need to make the point of course that I've address that first question obviously where we're disagreeing with the underlying assumption that it was necessary to go to attribution at all, but obviously also reaching a fairly tentative conclusion, you know, that's aligned with the Crown's, that really in terms of the attribution principal and the various principals we discussed it's, the Judge wasn't wrong necessarily to say, "Here's the company," but that of course the more

fundamental issues, miscarriage and whether it went wrong because of the way that attribution was brought into the trial, and that's really where my central point is. So I just certainly resist any suggestion that there's been an opportunistic reformulation of the case on our part, very much a case which had to answer the shifting approach from the Crown, as you say, Your Honour, also, from really the, which, and in turn came from the Court of Appeal in 2012.

Perhaps I can – I just, if I can go back to a question Your Honour Justice Young before, is it right, could it be the principal? In my submission it's more that the case that the Crown was really making was that this was happening with his encouragement, and on the case presented, in my submission, it wouldn't have been appropriate to do it. There is some suggestion that a person who comes in – well, obviously, if he came into possession and control independently and found things on a yard then perhaps, and was aware of their status, I suppose it is technically possible that he might be guilty of receiving as a principal. But the issue is whether there's been an act of receipt, there's a –

WILLIAM YOUNG J:
But do we really have to, for the purpose of the criminal law, have regard to the capacity in which he does particular actions? I mean, that's a slightly foreign notion to me.

MR CHISNALL:
Well, it – no, I agree, it's not about capacity, but it's about knowledge, and it comes back, it might be that there is a factual basis in a case that would allow that that particular way of charging it. But the issue here is that it doesn't really address what it is that the Crown was saying happened, which is that these cars came onto the yard because of his –

ELIAS CJ:
But the evidence didn't fit that, presumably, and if it had it probably would have been worse for your client because there wouldn't have been the defence that, well, how was he to know that they were there? If it had been accepted that he was party to the actions of the employee, with knowledge, purchasing stolen cars, it would have been a, you know, that the…

MR CHISNALL:

Lay down misere at that stage, yes.

ELIAS CJ:

Yes.

MR CHISNALL:

But, I mean, my central point is that that is receiving in the classic sense, and if that was the case then –

ELIAS CJ:

So you're really making the submission that knowledge and recklessness at the time he becomes aware the cars are on the yard doesn't constitute him a receiver?

MR CHISNALL:

That's right, in the context of this case, because –

ELIAS CJ:

Well, why do you say in the context of this case? Because it would have to be in any case.

MR CHISNALL:

Yes, but when you saying that it happens that you've encouraged something to happen, which is the direction really, the secondary liability direction that he's aided and abetted this to happen, and appreciate that it's himself as the company. But it does go back to the way that the Crown presented its case.

ARNOLD J:

But if you look at the definition of "receiving", it says it is complete as soon as the offender, "Exclusively or jointly with any other person has possession or control or helps concealing or disposing of it." Now, on your argument, if I receive something knowing it's stolen and I've got possession and control over it, so I've committed the act of receiving, now somebody subsequently helps me dispose of that property knowing it's stolen, do they also commit the offence of receiving?

MR CHISNALL:

Yes, they do, but that's on the alternative basis: they're not in possession and control necessarily but they're assisting to, at the other end of the transaction.

ARNOLD J:

So you're just saying in this case the Crown never presented that alternative?

MR CHISNALL:

No, that's right, Sir.

ARNOLD J:

Right.

MR CHISNALL:

And that's part of the problem is that it has focused on possession.

WILLIAM YOUNG J:

But why couldn't he be regarded as having come into possession jointly with Tamaki Metals once he becomes aware of each individual vehicle?

MR CHISNALL:

Well, it's just inconsistent with the way that the Crown presented its case.

WILLIAM YOUNG J:

Yes, I know, but what's the practical difference?

MR CHISNALL:

Well, there isn't…

WILLIAM YOUNG J:

I don't think there is, is there?

MR CHISNALL:

No, there may not be, but it does come back to the case as presented, which was, I appreciate I do, there's, like I say, a degree of circularity, but getting to the issue is really how realistic was the way that the Crown presented its case, how realistic was it to suggest that he somehow independently of the people who bought the cars or

brought the cars onto the yard, even though he is the company on the Crown case, came into possession and control of those vehicles independently?

WILLIAM YOUNG J:
Did the employees give evidence? I take it they…

MR CHISNALL:
Yes, there were three who gave evidence, two for the Crown and one for the defence – two for the Crown and the, Mr McPherson, who was the, was the first witness, he was one of the purchasers. There was a Mr Gounder who was the person responsible for dismantling vehicles, and then Mr Leha gave evidence for the defence, and he was one of the more senior members of the organisation, he was a purchaser but he was also a sort of on-site supervisor, and so he gave evidence about the fact that he'd often, about how the sale process worked and…

WILLIAM YOUNG J:
You mean purchase process, or sale process?

MR CHISNALL:
Sorry, purchase process, yes.

WILLIAM YOUNG J:
And so were there only three that were involved in the purchase of cars?

MR CHISNALL:
Yes.

WILLIAM YOUNG J:
That's Messrs Leha, Rogers and McPherson?

MR CHISNALL:
Yes, well, the – there were licences held by two others, certificates, sorry, but they were, the evidence was that they were the ones who purchased. But, like I say, only 10 of the cars were purchased. According to the records the others simply were on the yard very late in the piece on the day prior to the police – so came on the day that police were undertaking the surveillance and then obviously police executed the warrant the following day.

Perhaps if I can address the background briefly, just, it may assist, since we were talking about who gave evidence. Perhaps just if I can start with a general point. Often, of course, secondhand businesses receive police scrutiny because they sail close to the wind when purchasing goods and so really, I suppose, the classic example is the car receiving ring, the scrap metal dealership. And, in my submission, that's what the Crown actually was alleging here when it used the term "a production line of cars", that was in essence the allegation. But, in my submission, it's important to take account of the fact that this wasn't really a typical scrap metal yard operation. The appellant was not an experienced dealer in secondhand goods or scrap metal, and this give credence, in my submission, to what he told police when first interviewed and he was spoken to on the 18th of June 2009 immediately after police executed the warrant and was told that there were stolen vehicles there and said he wasn't aware of that. What he said in the statement and what he gave in his evidence is essentially the same of course, and that is that he relied upon the more experience people in the business who had years of experience, he relied on their expertise when buying cars. Now, as I've said in my written submissions, paragraph 5, where I've set out the background to the company's existence, it was an incorporated company that –

GLAZEBROOK J:

Is that relevant though because you've accepted that was a jury question so he was entitled to say that he was disbelieved by the jury and they found he did have knowledge.

MR CHISNALL:

I suppose that the issue is that again it comes back to the proposition about the point of receipt, the act of receipt. If the Court concludes that the way that it was left to the jury was right, then obviously this argument, this background stuff falls away. But in my submission it is relevant because it also provides context in which the cars were purchased and the nature of the business. What I was going to say is that the, he was the sole director of Tamaki's shareholder as I've said, and I'm sure the Court's aware, Tamaki Rugby League Inc which is the shareholder which is a registered charity, so this is a slightly unusual situation where Mr Cullen stepped in, in late 2008. He wasn't a scrap metal dealer but rather affiliated with the rugby league side of it, and he stepped in because things were going wrong with the business –

ELIAS CJ:

Sorry, but what's the relevance?

MR CHISNALL:

It's relevant because it really addresses the point about the miscarriage of whether the, it comes back to when the act of receipt occurred, it's important to know what it is, in fact, that he was saying about what happened and what his role was. I will make it short.

ELIAS CJ:

But are you – I had understood you to be taking issue with the Judge's direction that he was the mind and whatever of the company, the attribution point, but are you taking issue with the facts behind that?

MR CHISNALL:

Ah –

ELIAS CJ:

If there does have to be someone who is the mind and whatever it is, what's the expression, there's no one else, is there?

MR CHISNALL:

Well the, I suppose the issue is, as I said in my submissions, is whether you can go further down the chain and look at people who were responsible for a business's particular –

ELIAS CJ:

But the authorities you cite are in a very different context.

MR CHISNALL:

They are.

ELIAS CJ:

They're really about property rights of the company or, you know, regulatory liabilities or something like that. It's not about…

MR CHISNALL:

Well the decision of the English Court of Appeal in *R v St Regis Paper Co Ltd* [2011] EWCA Crim 2527 probably is the closest in that it was dealing with dishonesty offending by an individual and whether that –

WILLIAM YOUNG J:

Well absent an express authorisation from Mr Cullen to the purchasers that they were to take stolen cars, it would be difficult to see how their actions could be sufficiently attributed to the company to warrant a charge of receiving against the company.

MR CHISNALL:

I agree and it is, I suppose it shows the conceptually difficulty with the company being the principal and in fact it more direct route was simply to consider whether they were undertaking these purchases and these acts of bringing cars on without his knowledge and that's the essence of it. So the State, in other words on the defence case the danger in which the section is directed had already passed by the point in time that he is said by the Crown to have taken possession and been reckless.

I'll make this brief if I can. I wanted to emphasis the point that there was some –it wasn't the usual type of case where he was operating this business as an experienced hand. He wasn't, obviously, the one on the clipboard actually buying the cars and passing them through the gate. He was somebody who in late 2008 came into the business to give these people an opportunity to continue to work, people involved in rugby league, and very much as he said in his evidence deferred to those more experienced hands he put in steps.

ELIAS CJ:

But all of that was evidence before the jury and was made much of by counsel for the defence.

MR CHISNALL:

Yes, I agree, but I suppose the risk I'm attempting to identify is that if the Court accepts my submission about the act of receipt, then there really is, in my submission, a suggestion in this case that what he's been convicted of is more his accepted poor business practices, rather than because he's actually been in a position where he has committed the offence of receiving and to a degree that's

reflected in the fact that the way that the Crown presented its case by putting it after the point of purchase was really saying, well, what you're, what you've done wrong is not picking it up sooner. There's that risk and that's my central submission on this.

ELIAS CJ:

Do you mean that the Judge's direction that he was the mind of and actor for the company, meant that the factual submission that he didn't have that much to do with it, was chopped off at the knees?

MR CHISNALL:

That is exactly right, yes.

ELIAS CJ:

Yes, I hadn't thought…

MR CHISNALL:

No, that's, sorry. I apologise if I'm not making this clear. It undermined the defence because it's, like I said before, it took out of play the circumstances in which, that formed the backdrop for the cars being on the yard, and so if you're told on one hand he's the person responsible for everything, which is what the Judge, and that obviously had the imprimatur of the Judge. He is the person who is the company. He is the person who is responsible for overseeing this stuff. He is the one responsible for the records.

WILLIAM YOUNG J:

But is that an issue?

MR CHISNALL:

Well it is in my submission because it then turns on what the defence was which is, well no, he didn't actually know what was going on, he relied on the others.

WILLIAM YOUNG J:

But that's a different thing, isn't it. In terms of who was the guiding mind and hand of the company was there any real issue that it was him?

MR CHISNALL:

No, no, there isn't, but as I've said in my, later in the submissions when talking about *St Regis* there is an issue whether that ought to have been dealt with as a question of law direction to the Judge –

ELIAS CJ:

Well there's a difference isn't there?

MR CHISNALL:

There is.

ELIAS CJ:

Between the control of the company and control of the business and the defence was directed at what degree of control over the business did he, in fact, have, but I would have thought, and you will need to take us to this Judge's summing up, but I would have thought that all of those issues were sufficiently put to the jury. That he didn't really know, that he was not hands on, all of that sort of thing.

MR CHISNALL:

I suppose it really, it comes down to whether the jury was actually given an opportunity to consider the defence on the right basis and that's why – it's the various directions within there that, in my submission, create, they just don't sit side by side properly. The first is he is the company that, and I'll just take Your Honours to them now, I should have – maybe that would be an appropriate time to do it, since Your Honour has been asking me to do it for the last 15 minutes. In the case on appeal, page 146, I apologise, I'm looking for the direction on –

ELIAS CJ:

Is it on the intention to exercise control that you need to start with.

MR CHISNALL:

Mmm. I'm just looking for the one on –

ARNOLD J:

Company mind?

MR CHISNALL:

Yes, company mind.

ARNOLD J:

Para 34 at page 140 I think.

MR CHISNALL:

Thank you Sir. Yes. So if you start at that, right up front when dealing with knowledge, the essential point is that, he says, "It's for me to decide who those people are, who the people are, would be effectively the controlling mind and body of the company, and I direct you as a matter of law that that is the accused, Mr Cullen, so that is not a question you have to decide." So the important point is that he's the only person in a position to be the controlling mind of the company. Perhaps so, no taking issue with that line by itself, and likewise he's the sole director and chief executive officer. But it's the next bit, where he says, "He controlled and was responsible for the company's employees, and that included the people who were doing the buying, Mr Leha, Tavake Leha, Ron McPherson, Clayton Rogers." So, in other words, none of those people would qualify as directly minding the company. So, that may be so, but of course the point is that –

ELIAS CJ:

No, but then the next paragraph is, that they have to be sure that he knew that each vehicle was in the yard.

MR CHISNALL:

But that then has to be read with paragraph 53, which is page 147. "So whatever was going on at the front line and the buying of the cars, you do not have to resolve that, you do not have to work out exactly how it was, how it was working. You do not have to work it out why or –

ELIAS CJ:

And the point at which –

GLAZEBROOK J:

Sorry, where are we?

MR CHISNALL:

Sorry…

ELIAS CJ:

Para 53.

MR CHISNALL:

53, page 147.

ELIAS CJ:

But this is all at the point at which he knows that the vehicle is on the yard, so it's, you know, the Judge is being quite consistent.

MR CHISNALL:

Yes, but the point of course is what the defence says its case is, paragraph 60, "Recklessness defence case. Mr Cullen did not turn his mind to this issue because he was not buying the cars himself, he was simply completing deal records with information provided by others. So he relied on his staff to do that, he relied on his staff to make the assessment regards the possibility that a particular vehicle might be stolen." So, in my submission, it's when you line those particular directs up and you on one hand have the Judge saying, "How it got there is irrelevant," but on the other the defence saying, "Well, that's the very essence of the case, this –

ELIAS CJ:

No, the defence is saying he didn't know that they were on the property, and he wasn't reckless at the time as to whether they were stolen and he didn't have, and part of the evidence for that is that he didn't have face-to-face dealings with the people bringing them in, but it's nothing to do with when he receives them, when he receives them is squarely put as being at the time when he knows they're on the yard and exercises control.

MR CHISNALL:

Yes, I agree, Your Honour. But the issue I simply, as I submit it, is presented as what the jury's meant to do with that.

ELIAS CJ:

Yes.

MR CHISNALL:

I'm not suggesting that when you look at them in isolation there's anything that's particularly wrong –

ELIAS CJ:

No, no, you've said that, that there's nothing wrong.

MR CHISNALL:

It's just the idea that you tell some – as a question of law, you take, in my submission, by making it a question of law without actually allowing them to consider what his status within the business is. You are, as Her Honour Justice Glazebrook put it before, effectively lopping the defence off at the knees, because it doesn't actually allow them, it's telling the jury that you don't need to worry about these things, you don't need to think about who had responsibility for these things, because that's Mr Cullen. And so, in my submission, that's the real problem here.

GLAZEBROOK J:

But it's only a problem if your submission Is accepted that possession and knowledge have to happen together.

MR CHISNALL:

Yes, and –

GLAZEBROOK J:

Because if, in fact, possession and knowledge don't have to happen together, because you can become later aware, and if you keep possession knowing that you're in difficulty, or you take control knowing that, and that was really the way that the Crown case was put here, I think, wasn't it, because he took control once he knew and started doing records, et cetera?

MR CHISNALL:

That's right, although again it comes back to the point that he's then guilty, they say, of recklessness, because he, of receiving, sorry, because he hasn't done something about the cars, and that's where the –

GLAZEBROOK J:

Well, if he is, on an interpretation of section 246, then nothing has gone wrong. If he isn't, on an interpretation of 246, and we can't substitute, then something's gone wrong.

MR CHISNALL:

That's right.

GLAZEBROOK J:

But I still probably am having some difficulty. One, why he isn't guilty under 246 and, two, why we couldn't substitute if there was a very odd gap in section 246.

MR CHISNALL:

I would suggest it's not so much an odd gap, it's one that's recognised and Parliament's chosen to leave to other offences. And, yes, I –

GLAZEBROOK J:

Yes, I understand that's the submission.

MR CHISNALL:

There's still, in my submission, a residual concern about what impact that type of direction, if it's wrong, to have directed as a question of law, that he is the company, then is it enough to say, well, it wouldn't have affected the way that the jury approached its task if recklessness and possession are right, and in my submission there is, that in itself is a particular concern because the nature of the defence is, of course, these other people are the ones responsible. If it had been left, as I've suggested in my written materials, as a question of fact once the threshold's determined by the trial Judge as a question of law then, as happened in *St Regis*, where it's then left to the jury to conclude whether he is that, has those responsibilities and is that person, and to take into account all of the roles that he has, maybe that would be different, but my point is that in this case effectively the jury's been deprived of that necessity of actually concluding that for itself.

ELIAS CJ:

But still back to my initial question, why does it matter, since the Judge unmistakably tells the jury that it's his knowledge and his possession that is critical in terms of the company's liability?

MR CHISNALL:

Yes, he did tell them that, but then how's the jury to approach it, I suppose, when the risk is that they're not, they don't approach it on that basis. They take this other stuff that the Judge has said about he is the company, he is the person who actually controls the purchasing, he is the one who's responsible for the employees, and actually crosses it over into its consideration of whether he's reckless. And so that's why I come back to the point I made earlier about there's a risk really that what he's, what they concluded he's guilty of is, with the benefit hindsight, sloppy record-keeping and not picking up on things that perhaps should have been picked up on. But that's not the same, in my submission, as control, in terms of what's required by the section.

O'REGAN J:

So what was it the Judge said that could have led the jury to do that?

MR CHISNALL:

The way that it was done in – well, I mean, first of all the attribution point in an ideal world wouldn't have even come into play –

O'REGAN J:

I know that, but what you're saying is that we should be concerned because somehow the directions equating him with the company have led to a position where he's guilty of receiving simply because he didn't keep good records, and what I'm asking is, well, what did the Judge say that could have led to that outcome? Because my reading of the summing up is that the Judge is saying equate, the mental state of the company is his mental state, and if we now say, "Well, we should have been looking at him personally," and the jury found that his mental state was –

MR CHISNALL:

Deficient.

O'REGAN J:

– that when he received the goods he knew – when "he" received the goods, when "he" exercised control over them and knew all was reckless about them being stolen, then why are we concerned about a verdict of receiving?

MR CHISNALL:

Well, again, the concern is that – and I suppose it comes back again to the fundamental argument that the act of receipt's already occurred, just because the fact that the employee's already taken the cars onto the premises for the business. But it does also really fail to address the fact that there is this conveyor-belt approach to it, the cars are actually being destroyed, potentially, before he's even had the opportunity on the Crown case to take the act of getting rid of them. And so that's where the lack of a precision about the timing becomes an issue.

O'REGAN J:

And all of that is, all of those issues were live issues on the way the case was presented, weren't they? Because, I mean, if you say it was wrong that he was charged as a party to the company's offending because the Judge equated him and the company, so he's party to his own offending, but really if the correct position was that he should have been charged personally then all of the findings the jury have made inevitably lead to the conclusion that he personally was guilty of receiving.

MR CHISNALL:

Yes, but against the backdrop of what was said about the company and, as I say, with this artificial idea about when his act of control actually occurred.

O'REGAN J:

Why is it artificial? If he was charged personally the question would be, when did he personally do something that could constitute the act of receiving? And that's exactly what the jury had to decide on the way the case was presented here, because his act was the company's act, on the Judge's direction.

MR CHISNALL:

Yes, but I suppose against the Crown cases originally discussed, which was, and the way it was opened, and I'll, perhaps I'll go to that next –

O'REGAN J:

Perhaps you should, yes.

MR CHISNALL:

– as that might help address the question, but where really it was put on the basis that it was the bringing of the cars onto the yard that was his receiving, that was his

act, allowing it to happen, not – later, in the closing, it's, as the discussions take place, it becomes when he himself has control of it, so that has to be later in time because, as the jury is told, it doesn't matter what, how they got to be on there.

WILLIAM YOUNG J:

But does it really matter if – I mean, because it's my impression of just, I haven't sort of done it line-by-line but my impression of what the closings, how they're structured, is that they were looking at the point in time where he became aware of the cars. So does it really matter if the case became more focused in closing than it was in opening?

MR CHISNALL:

If it had become more focused because there was a bit of factual uncertainty about it, perhaps so, but it was more that the case shifted because of the issues about attribution and about how to sheet home responsibility to him for the company's acts without taking into account anyone else's actions, so in other worlds really treating it as a discrete transaction. And so, in my submission, that's really perhaps the issue, is that it really has been presented on that very artificial basis, where the employees are taken out of the equation simply because they are concerned with only dealing with his acts, but that isn't actually a natural way or the way that the Crown really opened the case.

ELIAS CJ:

Well, I've just been looking through the opening and, I must say, I don't see that that emphasis comes through. If you look at page 96 at the top, you know, it's all about what he suspected what was going on, there's no question of dealing with the company as having known, as having received the goods when the employees took possession and then attributing the company's knowledge to Mr Cullen, the emphasis throughout, and indeed at page 99 too, makes it clear that his knowledge is absolutely critical, to the company's liability as well. So it's not a sort of a back attribution in which the company has wider knowledge and that is reflected back on Mr Cullen because he's the managing director or, you know, the – whatever.

MR CHISNALL:

No, no, I – but at, perhaps a little later on in the, Your Honour's identified the points I was going to make about the earlier part of the opening address, but page 99 of the

summing up, the middle paragraph, where he says again what the Crown says – this is the third line from the bottom of that middle paragraph –

GLAZEBROOK J:
Sorry, just making sure I'm on the right place, where do you…

MR CHISNALL:
Page 99, Your Honour.

GLAZEBROOK J:
Page 99, and that's the opening address.

MR CHISNALL:
Opening address of the prosecutor.

GLAZEBROOK J:
Sorry, I thought you were saying the summing up, so…

MR CHISNALL:
I apologise, I think I did.

GLAZEBROOK J:
Yes. Okay.

MR CHISNALL:
A verbal slippage, I apologise.

GLAZEBROOK J:
No, that's fine.

MR CHISNALL:
Where the prosecutor says, "You're going to need to consider the company's state of mind," and again what the Crown says is that the company's mind is really that of the accused, he chose to take unreasonable risks, he allowed stolen cars onto his yard by choosing to ignore warning signs that were everywhere. So again that comes back to the point, allowing them on.

ELIAS CJ:

But it's back to "his" knowledge, "his" state of mind.

MR CHISNALL:

Yes, yes, it is.

ELIAS CJ:

It's not a wider knowledge.

MR CHISNALL:

No, but bear in mind that would be fine if that was actually the point in time that the jury had been entitled to consider it. But instead what they're saying – you see, that suggests to me, in my submission, strongly that the Crown case is about when the cars, they're concerned about the bringing of cars onto the yard, the purchase of them, and if the –

GLAZEBROOK J:

Although that's not the way the question trail went, because it was actually done on control. If you look at page 144, it's the intention to exercise control and recklessness at the time of the exercise of control, and the control – at paragraph 45 – the Crown says those vehicles stayed on the yard and if they stayed on the yard they were going to be processed, so the emphasis is on them being on the yard at that time.

MR CHISNALL:

Yes, I agree that that's way that it ultimately ended up being put to the jury, but it's more the way that the Crown started it off.

GLAZEBROOK J:

Well, the Crown that was entitled to say, "You can infer from the fact that he did nothing about these ones that were there, that he knew all along and intended to encourage everyone to do that," but the jury weren't asked to, in fact weren't asked to decide on that. But the Crown was perfectly entitled to say, "Well, there are 15 vehicles that have been found there, there's terribly sloppy record-keeping and, frankly, he intended to do this all along." The jury weren't actually asked to decide on that, but it would have been a perfectly available submission for the Crown.

MR CHISNALL:

Although I suppose it would have gone against the point that was made by the Judge, that it didn't matter how they got on there.

GLAZEBROOK J:

Well, no, that's right, but it wasn't ultimately put like that.

MR CHISNALL:

But – I know.

GLAZEBROOK J:

But in fact the Crown could, the case could have been put on that and jury could have been asked to decide on that. As it happens, they weren't, they were told to decide on it on a much narrower basis –

MR CHISNALL:

And it's just –

GLAZEBROOK J:

– which to a degree was good for your client, rather than a mistake. Or do you say because the Crown put it on a wider basis and the jury weren't asked to decide on that, it could somehow have tainted?

MR CHISNALL:

Yes.

GLAZEBROOK J:

But if the Crown were perfectly entitled to put it on that basis I can't quite see…

MR CHISNALL:

Well, if they're entitled to put it on that that basis then the argument –

GLAZEBROOK J:

Well, they could have done, couldn't they, because they could say, well, here's a control in mind of the company, and he must have given carte blanche to his employees to do this or it was reckless –

MR CHISNALL:

And that was actually the –

GLAZEBROOK J:

– reckless at the time.

MR CHISNALL:

That, in my submission, is the very point, that is actually the case that ought to have been presented in the way that it was responded to, and certainly the way they opened, and the classic receiving case involving this type of business, where the, as you say, the employer gives, the manager gives carte blanche to the employees to continue to do this, and so it's actually the transactional nature of it, it's a continuing state of affairs, and so, and that, in my submission, very much the way that the Crown appeared to be presenting its case, but then he's identified the issue with possession later and struck a position.

ELIAS CJ:

So what's the high-water mark of this submission in terms of the opening address, where they…

MR CHISNALL:

That point I just made about, at 99, that middle paragraph.

O'REGAN J:

The last sentence of the middle paragraph of 99.

MR CHISNALL:

Yes. And that was certainly the way –

O'REGAN J:

"He allowed stolen cars onto the yard by choosing to ignore warning signs." In other words, that implies that he, the receiving happened –

ELIAS CJ:

At the very beginning.

O'REGAN J:

– his receiving happened when the cars first came on the yard, not when he later exercised control over them.

MR CHISNALL:

And that's certainly the way he was cross-examined, the very last question the prosecutor put to him in the evidence, I'll find the page reference, four hundred and – but the very last question that the prosecutor put to Mr Cullen was that, "You allowed this to happen, you allowed the cars onto the yard," and that, "You turned a blind eye to it."

ELIAS CJ:

But it was the fact that they were on the yard that was the – I mean, you're putting an awful lot onto, onto.

MR CHISNALL:

I know, that's always the problem with picking words out of it and trying to give them over – you know, perhaps added weight. But the issue here, in my submission, is really very much the way that it developed when discussing attribution, and I might get to that, I note the time, just…

ELIAS CJ:

Yes, where do you want to take us now? Have you virtually completed your submissions?

MR CHISNALL:

I haven't worked through them in the order I intended to, but I wonder if I can –

ELIAS CJ:

We've read your written submissions so…

MR CHISNALL:

Yes, and obviously I stand by what I've put in writing.

ELIAS CJ:

Perhaps reflect over the break –

MR CHISNALL:

Yes.

ELIAS CJ:

– but I would have thought that you've probably said almost all there is to be said.

GLAZEBROOK J:

I'd still quite like to know why this point makes it a miscarriage, but you can perhaps answer that after the break, because I can't quite understand why, if the Crown puts it on a wide basis and they're asked to decide it on a narrow basis, why there's a miscarriage. But, if you can just answer after the break it would be fine, I think, it's probably a longer answer than two minutes.

MR CHISNALL:

Thank you, Your Honour.

ELIAS CJ:

All right, thank you, we'll take the adjournment now.

COURT ADJOURNS: 11.31 AM
COURT RESUMES: 11.47 AM

MR CHISNALL:

To go back to the question that Your Honour Justice Glazebrook posed, where's the harm, or where's the miscarriage? In my submission what went wrong was that the case wasn't run the way it was run the first time at that first trial, that that was in fact the correct way of running it, which was to recognise the factual scenario, the natural factual scenario, which was that these cars were purchased by employees of the business and that the allegation was that Mr Cullen was the person who encouraged that because he was aware of those purchases occurring and encouraged their continuation by doing acts such as filling out records, and effectively that he was complicit in it.

The issue, in my submission, is that there was no possession on his, by him personally. The idea that he somehow took control of vehicles purchased by the business that he oversaw by, later in time than the purchase, by seeing the, either seeing them on the yard and walking past them or by filling out a record without even

having any correlation with the vehicle that's, what's happening to the car on the yard, is just taking the idea of the act of receipt too far, and that's in essence my submission, that, as I've hopefully made clear in the written materials, we say that the way that this should have been run, the way that in fact the Crown appeared to be heading in the direction of, perhaps waylaid somewhat by what the Court of Appeal said, but nonetheless was, the actus reus of the offence, was performed by employees, the purchasers, but the act of participation was encouragement on his part at that time, and for that reason the way that it was presented left it really as a fait accompli.

GLAZEBROOK J:
So it's really actually the same point as you've been making all along, it's not a separate point.

MR CHISNALL:
No, and perhaps upon reflection over the break, that is right, Your Honour. But it remains, of course, what was the way that it was run was in fact an act of receipt, and perhaps if I can end on that point, and I'd invite the Court to have a look at the discussions that took place between the Judge and among the counsel where – and it's in the case on appeal, volume 2, and this is after the openings occurred and it's in the context of discussing attribution – where the prosecutor said at page 24, "It's pretty plain who the mind of the company is for the purposes of bringing cars on the yard, purchasing cars," and so…

GLAZEBROOK J:
Sorry…

MR CHISNALL:
Sorry, page 24 of case on appeal volume 2.

GLAZEBROOK J:
Yes, I've that, just trying to find it. Oh, I see, about half way down that first paragraph.

MR CHISNALL:
Yes. And so the Court, well, the Judge, quite astutely says, "Well, if the defence is the accused didn't know the cars were there, didn't intend to exercise control, didn't

know they were stolen, how could the company know or intend those things," and so that's where the discussion went about having to identify somebody is in a director-type position, over the page at 25. And so in my submission that's really it, it demonstrates that what they were getting at was what I would describe as a classic receiving case involving a business where the actus reus is committed by an employee, somebody in a subordinate position, but nonetheless it happens with the encouragement of the manager or the business owner, and that's where, in my submission, to come back to the point earlier made about what the harm is, well, one, as Your Honour said, it's the same point but it's the issue about when possession falls to be considered, because of the fact that effectively the Crown's put it on a fairly artificial basis because it doesn't feel that it can take into account how the cars got onto the yard or, as the Judge has said, because of the fact that it's occurred through employees. But on the other hand it really does, in my submission, fatally undermine, well, emasculate the defence, which is that he's not aware of these things because of the fact that these other people have got that responsibility.

So I just, and I appreciate time is short and my learned friend needs to respond, can I just leave it on this point: in my submission really the facts in this case are on all fours with what occurred in *Kennedy*, and it's, the difference is, I suppose, in the sense that he's, the Crown's trying to say he hadn't, didn't take possession and control until later whereas the person in *Kennedy* actually had the goods, on the Crown at paragraph 4 anyway, on that they were brought there with his encouragement by someone else, but they chose or elected to to argue that possession didn't actually fall until later in time when he moved them from the garage to the house. To a degree that's what we're dealing with here, in my submission, because possession on a straightforward application of the facts clearly occurred at the point in time that he is said to have allowed the cars onto the yard, that's the very, that's the act of receipt. And in my submission addressing the question of when the act of receiving can occur does, of course, have to happen against the backdrop of the section itself, what it's attempting to criminalise. I come back simply to the point I made often earlier about the rationale for criminalising receiving is that receivers create a market for thieves and, in my submission, like I said, it, the section itself criminalises the acts of those who deal with stolen goods at two distinct stages, those – and that's where the harm is said to arise. The first of course is where we say the person takes possession from the thief or with the thief or with others, and the second is the disposal, which wasn't in place in this case. But, in my submission, the idea of possession needs to be informed by the physical element required, the use of

the word “receipt”. Receipt itself, to receive any property, in my submission involves something more than mere possession, it really does suggest an act of passing from one to another, and that's the issue, in my submission, that exists in this case: who is it that Mr Cullen is said to have taken control from, the employees who were in his employment who work according to his instructions, and that, in my submission, is what shows the problem with the case, the artificial nature in which it was presented. And perhaps if I can just provide some support for that argument, in the respondent’s bundle at tab 6, *Card, Cross and Jones: Criminal Law*, at paragraph 11.37 of that bundle –

WILLIAM YOUNG J:
Sorry, this is the respondent’s…

MR CHISNALL:
Respondent’s bundle, Sir, tab 6. The first page in, paragraph 11.37, and I’d rely on that that first paragraph where it says, second line in, “Receiving also involves a receipt from someone else so that a person who finds stolen goods and help themselves to them does not receive them. The point being, really, that there has to be some passing of control or actual possession from one person to another, and in my submission that is what occurred when –

ELIAS CJ:
I’m not sure that I necessarily agree with that statement.

MR CHISNALL:
Obviously it supports my argument.

ELIAS CJ:
Well, it…

WILLIAM YOUNG J:
But receiving is defined in our statute.

ELIAS CJ:
Yes.

MR CHISNALL:

It is, although the definition of receiving, in my submission, isn't different to the way that it's dealt with in the UK, it still comes down to the fact that there is possession and control. And it's, the natural use of the word "receive", in my submission, means that there has to be something more than merely being aware that something's there. And the point here is that simply on a logical reading of the section there has to be some passing, if it's from the thief to the first receiver or from the –

GLAZEBROOK J:

Well, there's passing of possession if you pick it up and put it in your possession, isn't there? Just on a normal…

MR CHISNALL:

Yes, that's –

GLAZEBROOK J:

I mean, if you get possession of it –

MR CHISNALL:

– possession.

GLAZEBROOK J:

– it doesn't matter how you get possession of it, if you pick it off the sidewalk and think, oh, while a thief is running away and it drops out of his pocket and you pick it up, I would have thought you're in possession of it at that stage.

MR CHISNALL:

You are, and I suppose the, yes –

GLAZEBROOK J:

And if you put it in your pocket to conceal it you're concealing it at that stage, and then if you flog it off in the pub later you're disposing of it.

MR CHISNALL:

True, you are, but the point though, in my submission, is that – yes, obviously that would inform the receipt, because you're not taking it actively from one person to another but you're aware of the circumstance when it take it, so I suppose it still

passes from the thief to the receiver because, aware of the item. But in this case my point is that there isn't actually any active receipt, any passing of control or possession, beyond what was already existing.

ARNOLD J:
But I mean both in our definition and in the excerpt you've taken us to at 11.37 the concept of joint possession is accepted, and presumably the relevant possession can occur at different point in time. If there's a concept of joint possession –

MR CHISNALL:
Yes.

ARNOLD J:
– surely it can't be the case that you have to jointly possess at exactly the same moment?

MR CHISNALL:
Well, I suppose you might not possess it but the section may anticipate, if you're in the same standing, that you're coming into control over it at the same time. It certainly seems to be the suggestion in *Kennedy*. It's just whether does the section, does that use of the words "jointly with someone else", either with the thief or others, actually allow it to be an ongoing transaction as they do –

ARNOLD J:
Well, say I possess something and I say to somebody – something that I've received – and I say to somebody else half an hour later, "I've got this, it's stolen, let's do this or that with it…

MR CHISNALL:
Help yourself to it or…

ARNOLD J:
Yes.

MR CHISNALL:
That –

ARNOLD J:

So why can't we both be in possession, although the possession occurs sequentially?

MR CHISNALL:

That may well be the case, that that, when you're talking about individuals that makes, that has logic. But the issue here is that we're talking about a business, and the idea that he's somehow independently taken control or possession of these items, on top of his employees, they've come into joint possession with him if you will, just doesn't actually have any logical ring to it. That's my submission, is that when your case is that everything that happens on these premises happens at his instigation, or at least with his encouragement, so to suggest that actually independently of that he can somehow take possession or control of an item, doesn't really seem particularly sensible and in my submission that's my particular issue with it. So it's simply that in these cases it's not enough to come across something and say, oh well I'm not going to remove it. That's clear from *Kennedy*. That's really in my submission what the Crown case was here and my learned friend says as much in his submissions where he relies upon *R v Cavendish* [1961] 2 All ER 856 and *R v Anderson* HC Wellington AP284/97, 10 October 1997 to say well he's effectively come across these things independently. Knows nothing about it and that's fine, he's somehow taken control by filling out some paper or seeing it. At that point, obviously *Cavendish* says, well you can come into, you can find something and come into possession, but in my submission if you accept what I say about their being a receipt going from one person, and the fact that they are really in the same transactional position, then how can it be that *Cavendish* and *Anderson* are right. So my submission is that those decisions don't really withstand scrutiny and in fact the point that's made –

ELIAS CJ:

Sorry, are you saying that because you say they're inconsistent with *Kennedy*?

MR CHISNALL:

And also inconsistent with what that text says about how possession can come about the act of receipt required. They're talking about as simply finding things or coming across –

WILLIAM YOUNG J:

Kennedy and *Cavendish* are not entirely satisfactory decisions in the result are they? Kennedy knows that stolen goods are being given to him.

MR CHISNALL:

Yes, yes.

WILLIAM YOUNG J:

Yet he's found not guilty because they're given to him before he finds out he's got them.

MR CHISNALL:

On the facts. The way that, in fact, it seems to have been accepted that the offence was made out because if it was accepted that he actually allowed the goods to come on and encourage that, then that would be made out, but it was the, either because the Judge didn't accept it at that point or later on in time concluded that possession happened when the shift of the goods to the house happened. I agree with Your Honour, I'm sure it is unsatisfactory, but the point in *Cavendish* is that –

ELIAS CJ:

Kennedy is unsatisfactory really because it's only dealing with whether possession under the Misuse of Drugs Act 1975 is the same sort of possession. So it's focused on a, you know, it's not really focused on the point in issue here.

MR CHISNALL:

It is in so far as it addresses the issue about the need to be one finite act. I suppose the point here is, when did it happen and so I agree with Your Honour that that issue is slightly different although my point is simply that the way that *Kennedy* appears to have been presented, if not accepted by the Judge, is the way that this case was really – was really what the Crown was getting at, that the items did come in with his acknowledgement or his encouragement. And second, *Cavendish* is the classic example of that, the example it gives of the person who comes into possession of items – I've set it out at 52 of my written submissions. He comes into possession of items because his employees have acted on his instructions and so effectively the goods have been invited on. That's the very nature of the case that the Crown was really running here.

ELIAS CJ:

Well that's –

MR CHISNALL:

Yes, that's the issue.

ELIAS CJ:

I mean that's the nature of the case that slightly oddly you say the Crown should have run?

MR CHISNALL:

Well I'm also saying that's the case that the Crown –

ELIAS CJ:

Opened on –

MR CHISNALL:

– appeared to be –

ELIAS CJ:

– do you say?

MR CHISNALL:

Yes, appeared to be running, and what it was really trying to say, and certainly it's the way that the defence, that was the case that the defence responded to, and I appreciate that of course cases can shift and it depends on the facts but it wasn't about the factual analysis here. It was about how the attribution got taken into account that really shifted things, and onto an unnatural footing in my submission.

So I ill just simply end on the point that the factors that the Crown identifies at paragraph 46 of its written submissions really, in my submission, demonstrate the strain that the section is being put under when they say that those are acts of possession and control and also the very acts of recklessness. They are very much, in my submission, a degree of, there is a degree of repetitiveness to it and it just really comes back to an interpretation of what the act of receiving is.

I end on the point really that it was entirely inconsistent for the Crown to postulate that on one hand the appellant facilitated and encouraged the reckless purchase of cars, and on the other his act of receipt only occurred at the point in time that he might have relinquished control of those items, those cars.

So in summary my submission, the point is that the Court of Appeal really was wrong in its conclusion at paragraph 33 of the judgment, that the appellant was not deprived of the ability to run his defence, that the stolen vehicles, to quote from the judgment, "The stolen vehicles were, in fact, received by Messrs Leha, Rogers and McPherson and not Mr Cullen, who it is said did not know that the vehicles were in the yard." And they were there and received, and therefore I'm unable, sorry, to form the requisite reckless intent at the critical time. The point is the critical time, as we say, was earlier in time and the point had passed by the time that the jury was asked to consider – the point that the jury was asked to consider possession.

So in conclusion, in my submission, this is a trial that went wrong. On a more straightforward interpretation of the Crown case, those employees who purchased stolen vehicles in the course of Tamaki's business should have been identified as the principal offenders because they performed the act of receiving. I simply use the factual example and invite the Court to look at it. The final vehicle, the Nissan Mistral that was in the indictment where, as I said, it came into possession of the business overnight and was there when police executed the warrant the following day. His act of possession and control was seeing it there. How is that taking the risk of not getting rid of it if there's no opportunity to do so and so in my submission that's what demonstrates the real problem with the way that the case was presented.

Unless the Court has any questions those are my submissions.

ELIAS CJ:
No, thank you Mr Chisnall.

MR CHISNALL:
As the Court pleases.

ELIAS CJ:
Yes Mr Downs?

MR DOWNS:

Yes, may it please the Court. Acknowledging the expression that final Courts don't do facts, I wonder if I might nonetheless commence in that fashion?

ELIAS CJ:

It's never been expressed by some members of this Court, probably not all members of this Court. That's a rather old fashioned notion attributable to, well I better not name, they might read our transcripts.

MR DOWNS:

It might be a useful place to start.

ELIAS CJ:

Yes.

MR DOWNS:

Because it perhaps grounds what is otherwise a rather academic, with respect, case. Counts 1 to 8 and 10 to 11 of the indictment all had dealer's records available in relation to them. Now that has some significance because one of the employees, Mr Ronald McPherson, testified, and this is at pages 5 and 6 of the notes of evidence, it's early on in the evidence, testified that every time he entered into a transaction in relation to the sale, I should say the purchase of a motor vehicle, that that was at the direction of the appellant and that the appellant had the final say whether a car was actually purchased. Hence, the Crown relied on the dealer's records in relation to counts 1 to 8 and 10 to 11 which were completed by the appellant contemporaneously with the purchase as perhaps the best evidence of an intention to exercise control by the appellant of those vehicles. So whatever else might –

WILLIAM YOUNG J:

So that's 10 of the 15?

MR DOWNS:

Ten of the 15, two-thirds, if the Court pleases. Now that leaves, of course, five counts. Now counts 9, 12 and 15 all involved vehicles that were seen to arrive by the police on either the 17th or the 18th, so they were, that is the premises were under surveillance at the point that those vehicles arrived and the appellant was

undoubtedly at work. The Crown case was actually that because he was present, and because the cars were received into possession, that he must have authorised at some point their receipt. In other words his presence was circumstantial evidence of his actual receipt of those vehicles. Then counts 13 and 14 involved two vehicles that were present on the yard. They weren't seen to arrive but they were there in plain view and Constable Poe, at pages 168, 178 and 183 of the notes of evidence, said in relation to count 14 that the appellant was actually stood right next to one of the stolen vehicles and so was plainly aware of it and by implication had exercised control over it, otherwise why else hadn't it left the yard.

So again, with respect to the appellant, whilst one could muster a number of potential interesting legal issues in relation to the case, with respect the evidence makes them rather hollow. So too attribution. Now I acknowledge it hasn't featured large in the context of the hearing to date but I observe that the appellant offered three candidates who might have been said to have been the mind of the company. The first, Mr Ronald McPherson, couldn't, on the Crown case, be regarded as such because his evidence was that he had no authority to do anything. Everything was through the appellant. So on the Crown case we could put a line through him. The second was Mr Clayton Rogers who wasn't a witness for either the prosecution or defence. He wasn't strongly pressed by the appellant as someone who might fulfil this role presumably because on the appellant's thesis of the case he didn't sign what was described as the buyer's bible in relation to the handling of vehicles. That left Mr Tavake Leha, who was a defence witness. Now on his testimony he gave himself a greater degree of authority in relation to the purchase of vehicles but materially, and is so often the case, the facts decide the point. He broke his arm and was off work for a number of weeks and the Court may recall that whilst there was variation as to exactly when he was away, the best evidence was that he was away from the yard from the 27th of May onwards for several weeks. That is he was not present at the time that the offending occurred. The last dealer's record completed by him was the 27th of May and we find the relevant references at pages 506 and 519.

Now where does this leave us? Well it may leave us with an issue as to whether *Kennedy* was correctly or incorrectly decided. On the Crown case, as I have described it, it could be an orthodox application of *Kennedy*. That is that the appellant exercised control over the vehicles by virtue of circumstantial evidence available to the Crown, and that when he did so he had the requisite mindset. No difficulty there. The alternative point of view is that *Kennedy* was incorrectly decided

because it may leave a hiatus in the law in relation to a person who assumes control over stolen goods, later becomes aware that they are stolen, and then does nothing about them.

Now we posit this modest proposition. Whilst there is doubt as to whether liability attaches to that particular situation, that is the person who does nothing, literally nothing, about the goods, albeit he or she knows that they're stolen, if the person were then to assume control in the sense of acting contrary to the true owner's possessory rights. Putting the goods in a wardrobe, putting them in for sale, using them himself or herself, it's difficult to see why on any logical application of section 246 that person hasn't at that point assumed custody or control with the requisite mindset. So once again one could readily tailor, if one needed to, the facts of this case to the type of application.

Well that's a hurried presentation but that, in essence, is the respondent's position.

WILLIAM YOUNG J:
So what's your preferred basis as to how the case should have been presented or might best and most simply have been presented?

MR DOWNS:
Well I have to be candid. The most simple presentation of the case would have been to contend that the appellant was a principal offender in his own personal capacity. But of course that construction, or that route, was not available on the decision of the Court of Appeal, the first decision of the Court of Appeal.

WILLIAM YOUNG J:
Reading the judgment it rather suggests the points that were suggested by you.

MR DOWNS:
Well I have done many things wrong in my time but I think I'm innocent of that particular charge. As I recall it the appellant was then acting for himself and he raised the point that there had been a misdirection by Her Honour the trial Judge as to who held the licence and the legal significance of that. We sought to counter with the correct factual position, that both he and the company held a licence and somehow we ended up with a judgment that actually the appellant couldn't be

responsible as a principal. I don't recall any argument at the hearing as to that particular issue but if I'm to blame so be it.

WILLIAM YOUNG J:
I take it that it doesn't matter that the appellant held a licence personally, that's not a – I mean in fact a material part of the case or is it?

MR DOWNS:
Well it was neither here nor there in the end. It was just that his – one of his many contentions to the Court of Appeal when he was first convicted was that that was somehow a relevant consideration. But he accepted in evidence that he held a licence as well, at this particular trial. He said that he got his –

ELIAS CJ:
At this trial –

MR DOWNS:
Yes.

ELIAS CJ:
– or at the earlier trial?

MR DOWNS:
No Your Honour, at this trial.

ELIAS CJ:
I see.

MR DOWNS:
He accepted that he held a licence –

ELIAS CJ:
So the Court of Appeal didn't have evidence that he held a licence?

MR DOWNS:
Well the Crown sought to place that before the Court and it wouldn't receive it.

GLAZEBROOK J:

It does seem a rather odd thing that if you have a licence you can be guilty of receiving but if you receive without a licence somehow you're not guilty of receiving so one would have thought it was irrelevant.

MR DOWNS:

The Secondhand Dealers Act does create an offence of a person who trades –

GLAZEBROOK J:

Yes, yes.

MR DOWNS:

But –

ELIAS CJ:

But we're in the fine seat.

MR DOWNS:

We are and it seemed that the Court of Appeal placed unnecessary reliance on that other legislation in reaching the view that they'd influenced the kind of receiving, and with great respect to that Court we don't endorse that analysis. But what we do say is that there hasn't been a miscarriage of justice. Or put it another way, the error was harmless in the, because the appellant's acts were regarded as the acts of the company and he was then said to have assisted the company. It was, in substance, the very allegation that he was acting as the principal. That's the long way around, we acknowledge, but it's very much the same composition as a matter of fact.

O'REGAN J:

What do you say in response to the point Mr Chisnall made about the Crown opening and the basis on which the Crown put the case in its opening?

MR DOWNS:

Well in a sense all we can offer is mere disagreement. I mean obviously the respondent has reviewed both opening and closing addresses. It doesn't detect any obvious dissonance between the two. To my eye all the prosecutor was saying was, here is an element of circumstantial evidence. Look, all of these cars are on the yard. Look, they've all been received by the appellant. The paperwork is dodgy and so on

and so forth. Again points that were made in closing. But it wasn't, in my respectful submission, to identify the particular modus of liability. And even if it were it's difficult to see how any harm has been caused by that because the Judge identified with clarity the route that the jury had to adopt in order to find the appellant guilty, and as to that, the question trail really couldn't have been more clear. Now I apologise again for the brevity of the respondent's response but as it views the case, as it happens, no issue of general or public importance arises and as to miscarriage, there has been none.

ELIAS CJ:

Well there may be an issue of public importance as to whether matters should have been complicated to the extent that they were, I suppose.

MR DOWNS:

The alternative view is that the issue of *Kennedy* is itself a matter worthy of consideration. But unless there are further questions those are the respondent's submissions if the Court pleases.

WILLIAM YOUNG J:

Just generally, and I think you've alluded to it in part in the submissions, in a case of this sort to what extent is it right just to look through the company and look at what the actual actors do and think and know? Because I would have thought that that is the more common practice in relation to criminal offending where a company features in a case.

MR DOWNS:

Well we can discern no reason in principle why the appellant couldn't and shouldn't have been charged as a principal offender. In other words the issue of corporate liability and corporate attribution are unnecessary in that sense. And we know of no case that suggests the case couldn't have been analysed in that way. The appellant hasn't cited any. Indeed he embraces the proposition that that was the way in which the case should have been prosecuted. As the Court pleases.

ELIAS CJ:

Thank you. Thank you counsel for your submissions we will reserve our decision in this.

GLAZEBROOK J:

He hasn't had a chance to reply.

ELIAS CJ:

I'm sorry. Yes. Mr Chisnall?

MR CHISNALL:

I will make a final point. I just wanted to pick up very briefly on what my learned friend, the example he gave which was where a person finds items and assumes control contrary to the possessor rights of the owner, and he gave the examples where, obviously placing it in a wardrobe or using the item. Perhaps that's really the nub of the issue here. Is it possession when you've all done is walk past a car? Particularly when it's one which is on the yard for such a short period of time. So in my submission the end point is that's where we really do disagree in terms of how it should have been charged on it and obviously respectfully disagree with the Crown that Mr Cullen was the principal. As we say the logical way it should have been charged, and which would have properly taken account of what the employees did, was to make them responsible for the actus reus and him as a party to that.

Unless the Court has any questions, those are my submissions in response.

GLAZEBROOK J:

Why – if the employees took possession without knowing they were stolen, why would you make them the principal offenders, because they're not, in fact, the principal offenders. So I don't quite understand that submission.

MR CHISNALL:

Well, I mean of course you don't have to prove that they are responsible as long as you can identify who the principal is, and there were three people that could be –

GLAZEBROOK J:

But you can't be guilty of being a party if the principal hasn't committed the offence –

MR CHISNALL:

No.

GLAZEBROOK J:

– and if the principal hasn't the mens rea, then the principal hasn't committed the offence have they?

MR CHISNALL:

That's true but there is nothing impeding the Crown from arguing that. I mean that's the logic of it. They didn't have to bring them before the Court to do it. They merely had to satisfy the jury that, in fact, that they would have formed the mens rea –

GLAZEBROOK J:

Well why can't he just be the principal?

MR CHISNALL:

Well, again it comes back to the issue of –

GLAZEBROOK J:

Sorry, I know what you're saying –

MR CHISNALL:

I know we're going in circles –

GLAZEBROOK J:

– it's definitely the same argument.

MR CHISNALL:

– I apologise Your Honour –

GLAZEBROOK J:

All right, I understand.

MR CHISNALL:

– but we do keep coming back to that very point, about when the act of receipt is complete. Unless the Court has any questions, thank you.

ELIAS CJ:

Thank you very much for your submissions and we will reserve our decision in the matter.

COURT ADJOURNS:12.24 PM