so the point was not addressed on the merits. With the benefit of a transcript of the handwritten summary of reasons for the allegedly inconsistent decision, Lord Carnwath was able to explain that there was in fact no inconsistency (at [32]–[39]).

More importantly, Lord Carnwath underscored the importance of the distinction between law and fact. In fact, he quoted from an extra-judicial article of his, to the effect that the distinction "is not purely objective", but must take account of a number of factors, including the relative competencies in that field of the tribunal of fact on the one hand, and the appellate court on the other". Moreover, even on questions of law, the view of the first-instance tribunal "must still be given weight" by a reviewing court ("Tribunal Justice, A New Start" [2009] P.L. 48, 63–64).

Lord Carnwath's speech prompts two comments. First, if courts are using the formal law/fact distinction – or, for that matter, other distinctions, such as jurisdictional/non-jurisdictional error, law/policy, or law/discretion – to achieve substantive ends, they ought to be clear about what those substantive ends are. Clearly, the Supreme Court thought it was appropriate to defer widely to the First-tier and Upper Tribunals. The Court should have been clear about why it considered this to be the appropriate approach. Masking substantive ends with formal references to "law" and "fact" was unhelpful.

Secondly, it must be recognised that Lord Carnwath's comments have implications far beyond the confines of the First-tier and Upper Tribunals. Legislative choice to vest decision-making authority in these bodies, according to their expertise, the complexity of the problems with which they deal and the ability of interested parties to participate in their proceedings, justifies a deferential approach to judicial review of their decisions. But these reasons apply with equal – and sometimes greater – force to other bodies empowered by Parliament to deal with matters of policy. The "relative competencies" of these bodies and reviewing courts may not always point, for example, to automatic correction of errors of law by the superior courts. If these implications are recognized, this case will certainly prove to have marked Lord Carnwath's "new start".

PAUL DALY

ENCOURAGING OR ASSISTING CLARITY?

SECTION 4 of the Misuse of Drugs Act 1971 prohibits the supply of controlled drugs. Schedule 4 of that Act explains that maximum sentences differ depending on the class of drug supplied (life imprisonment

for class A; 14 years' imprisonment for classes B and C). Given these different maxima, section 4 in fact creates two distinct offences: supply of class A drugs and supply of class B/C drugs (see *Courtie* [1984] A.C. 463). This had important implications for the activities of Omar Sadique, whose case has now troubled the Court of Appeal twice.

Sadique's distribution company supplied chemicals that could be (mis)used to dilute both class A and class B drugs prior to their supply. Nobody denied that his actions could assist in the supply of class A and class B drugs. The difficulty was that it was unclear whether Sadique believed that he would assist in the supply of both class A and class B drugs. This led the Crown to rely on the offence in section 46 of the Serious Crime Act 2007 ("SCA 2007"), which covers situations where the defendant: (i) "does an act capable of encouraging or assisting the commission of one or more of a number of offences"; (ii) believes that "one or more of those offences will be committed (but has no belief as to which)"; and (iii) believes "that his act will encourage or assist the commission of one or more of [the offences]".

On the facts, it seems quite clear that Sadique was guilty even if he did not have any beliefs about which class of drug would, in fact, be produced. It was enough that he believed one of them would be. However, when Sadique's case first came before the Court of Appeal after a pre-trial hearing (*Sadique (No 1)* [2011] EWCA Crim 2872, [2012] 1 W.L.R. 1700), Hooper L.J. suggested an amendment of the indictment to include *two* counts of the section 46 offence, which spoke to the defendant's specific beliefs about class A and class B drugs. He suggested that "D cannot be convicted on count 1 [supply of class A drugs] (the other ingredients being satisfied) unless at the time of doing the act: (a) either (i) D believes that [the offence] will be committed; or (ii) D believes that one or more of the offences specified in the indictment … will be committed but has no belief as to which; and (b) D believes that his act will encourage or assist the commission of [the offence]; and (c) D believes that [the offence] will be committed with the necessary fault" (at [49] and [87]). The same would apply to count 2 (the class B drugs).

The difficulty with this approach is that it goes beyond the wording of section 46 and makes what seemed like an easy case decidedly more difficult. The first ingredient of Hooper L.J.'s analysis ((a)(i)) comes from the wording of the separate offence in section 45 of SCA 2007, which covers situations where the defendant *does* have a firm belief about which offence *will* be committed with his assistance/encouragement. It is thus out of place in a discussion of section 46, which was designed to deal with uncertain situations like that mentioned in point (a)(ii). Elements (b) and (c) are also too specific.

The wording of section 46 requires a belief that "one or more" of the offences mentioned in the indictment *will* be encouraged/assisted and committed with the necessary fault. There is no requirement that that belief be related to each and every "reference offence". The Court of Appeal's decision in *Sadique (No 1)* thus rendered section 46 narrower than the legislature ever intended, diluting its practical utility.

This was thought necessary because of concerns about the sentencing of those convicted of the section 46 offence (*Sadique (No 1)* at [50]). Under section 58 of SCA 2007, the maximum penalty for a section 46 offence is anchored to the maximum penalty for the most serious "reference offence". In Sadique's case, this was life imprisonment. It was felt unfair that this sentence could be available even where the jury was convinced only that the defendant believed that the class B drugs *would* be supplied. The more appropriate sentencing range would then stretch only to fourteen years' imprisonment. The approach in *Sadique (No 1)* was thus designed to ensure appropriate sentencing, but it did so at the cost of fidelity to the statutory wording.

When Sadique's case was sent back to the Crown Court, the trial judge encouraged the prosecution to make things even more complicated than Hooper L.J. had suggested. In the end, Sadique was tried on an indictment containing not two but four counts: the first concentrated on the defendant's belief that *both* class A *and* class B drugs would be supplied; the second mentioned only class A drugs; the third count alleged a belief that *either* class A *or* class B drugs would be supplied; and the final count talked only of class B drugs. In the event, Sadique was convicted on count one, and appealed. The Court of Appeal took this opportunity to reject Hooper L.J.'s earlier, obiter analysis of section 46 in *Sadique (No 1)*, and supported the trial judge's approach (*Sadique (No 2)* [2013] EWCA Crim 1150). The ingredients of a section 46 offence, at least as they pertain to the defendant's beliefs, are that "the appellant believed that what he was doing would encourage or assist the commission of one or more of [the reference] offences" and "that [committing one or more of those offences] was the purpose, or one of the purposes" of those he encouraged or assisted (at [34]). In short, the specificity of *Sadique (No 1)* is gone.

The decision in *Sadique (No 2)* returns us to the wording of section 46, broad as it is. This makes things slightly easier, but the point remains that the indictment was unnecessarily complicated, and still involved overlap between sections 45 and 46 of SCA 2007. Count one, on which the defendant was convicted, seems to require that the defendant believed that *both* class A *and* class B drugs *would* be supplied. Is this not really two section 45 offences mixed together?

If so, it: overlaps unnecessarily with counts two and four (which *are* section 45 offences, mentioning beliefs that only *one* offence would be committed); appears to be bad for duplicity (an argument rejected far too quickly in *Sadique (No 2)*); and seems to ignore the "but has no belief as to which" part of section 46. It is only count three (concerning the supply of *either* class A *or* class B drugs) that seems to be a true section 46 offence, given that a conviction for it would be consistent with genuine uncertainty about which of the "reference offences" *would* be committed. This raises the question of why count one was even necessary: counts two, three and four cover the relevant constellations of beliefs. Furthermore, by virtue of section 58 of SCA 2007, the maximum sentence for both counts one and three would be life imprisonment. Count one, on which Sadique was convicted, was superfluous and problematic, and it is unfortunate that it was not recognised as such by the Court of Appeal.

That doubts can remain over how to set out an indictment in a simple case like Sadique's, where there are only two "reference offences", is troubling. Presumably there will be cases in the future where there are very many more reference offences. How many counts should appear on that indictment? What should they allege? Answers are needed to these questions urgently if section 46 is to avoid becoming a thorn in an overworked Court of Appeal's side.

Earlier this year, the government carried out a "post-legislative scrutiny" exercise on the encouraging or assisting crime offences in SCA 2007. The conclusion of this inquiry is, in essence, that the legislation is awful, but the government should wait and see how it works in practice in the coming years (see House of Commons Justice Committee, *Post-legislative Scrutiny of Part 2 (Encouraging or Assisting Crime) of the Serious Crime Act 2007* (HC 639, 2013)). The sorry *Sadique* affair suggests that SCA 2007 will continue to cause difficulties. First, the wording of the legislation breeds confusion. It is unacceptable that this Act can cause such divergences of opinion amongst the senior judiciary. Secondly, section 46 leaves matters very much at the mercy of prosecutorial discretion: the picking of the "reference offences" is not limited in a meaningful sense. It is hoped that prosecutors will be suitably restrained in their approach in future cases, if only to avoid indictments running over pages. Thirdly, a way of addressing the sentencing issue that exercised Hooper L.J. in *Sadique (No 1)* needs to be thought up to ensure fairness. Here is one suggestion: make the maximum sentence for a section 46 offence (say) ten years' imprisonment or the maximum sentence available for the most serious offence (whichever is lower). This would at least remove the possibility that someone is sentenced to life imprisonment on the basis of beliefs about the commission of other, less serious offences.

An alternative (and possibly preferable) suggestion is for Parliament to repeal Part 2 of SCA 2007 and start all over again.

FINDLAY STARK

REVERSING MISTAKEN VOLUNTARY DISPOSITIONS

IN the cases subject to the joined appeals in *Futter; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26, [2013] 2 W.L.R. 1200, fiduciaries had exercised dispositive powers on the basis of incorrect professional advice, and in a manner that resulted in substantial, unanticipated tax liabilities. Could these transactions be unwound, and the unwanted tax consequences avoided, because of the error that infected the fiduciaries' decision-making processes? Two legal routes to this conclusion were contested: (i) the "rule in *Hastings-Bass*", under which the exercise of the power might be undone because of the decision-maker's failure to take into account relevant considerations that should have been taken into account; and (ii) the equitable jurisdiction to rescind a voluntary transaction for mistake. The Supreme Court had an exceptional opportunity to examine and re-state the principles governing each: only the latter rule had previously been subject to appellate scrutiny, and not since the late 19th century (*Ogilvie v Littleboy* (1897) 13 T.L.R. 399 (CA), *Ogilive v Allen* (1899) 15 T.L.R. 294 (HL)).

In relation to the first ground for relief – the "rule in *Hastings-Bass*" – the Supreme Court essentially agreed with Lloyd L.J.'s analysis in the of Court Appeal of the rule's genesis, the "wrong-turning" taken by lower courts in developing it, and its appropriate re-formulation. First, the "rule" was a "misnomer": *Re Hastings-Bass (deceased)* [1975] Ch. 25 (CA) was not authority for it. The "rule" instead emanated from *Mettoy Pension Trustees Ltd. v Evans* [1990] 1 W.L.R. 1587 (Warner J.), and ensuing first instance decisions. Secondly, there was an important distinction, in relation to legal controls on fiduciary powers, which earlier decisions had overlooked. An exercise of a power beyond its scope – "excessive execution" – would be void. However, the flaw targeted by the "rule in *Hastings-Bass*" – a failure to take into account relevant considerations – was different. An exercise of a power within its scope was at most voidable for "inadequate deliberation", and only if the decision-making process revealed such a substantial flaw as amounted to a breach of duty by the fiduciary decision-maker (see *Abacus Trust Co. (Isle of Man) Ltd. v Barr* [2003] EWHC 114 (Ch), [2003] Ch. 409 (Lightman J.)). Thirdly, many earlier *Hastings-Bass* cases had therefore erred in assuming that the exercise of a