IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

INDICTMENT NOs: 81-84 & 92/2019

REGINA

V.

DANIEL ALBERTO AGUILAR FERIOZZI

FRANCISCO ANTONIO DI VENTURA HERRERA

PEDRO JOSE BENAVIDES NATERA

JUAN CARLOS GONZALEZ INFANTE

KODY DAVID ZANDER

Appearances:	**Mr. James Hines Q.C. with Mr. Garcia Kelly for the Crown**
	Mr. Cairns Nelson Q.C. instructed by Mr. Jonathon Hughes of Samson Law for Defendant Ferriozzi
	Mr. Rupert Wheeler of Samson Law for Defendant Herrera
	Mr. Rossano Scamardella Q.C. instructed by Mrs. Prathna Bodden of Samson Law for Defendant Infante
	Mr. Charles Miskin Q.C. instructed by Mr. Alex Davies of McGrath Tonner for Defendant Zander
Before:	**Justice Cheryll Richards Q.C.**
Jury Trial:	**Commenced 18th November 2019.**

HEADNOTE

Criminal Law – No case submission *- Statutory construction - Section 144 (5A) of the Proceeds of Crime Law 2019 Revision - Proof of criminal property - Whether the principle in the case of R v. Anwoir[2009] 1 W.L.R. 980 applies in the Cayman Islands in light of section 144 (5A)*

NOTE

Trial commenced in November 2019 against the five defendants on the indictment as listed above. Upon the application of his Counsel to come off record, the Third Defendant Natera, was, on the 12th February 2020, prior to the close of the case for the Prosecution, severed from the indictment and is to stand trial separately.

NO CASE TO ANSWER RULING

1. Following the conclusion of the case for the Prosecution, the Defence have made submissions that there is no case to answer on the indictment in respect of each of the four defendants before the Court.

2. The indictment contains three counts.

3. <u>Count 1</u> charges all Defendants with the offence of money laundering contrary to s.133 of the ***Proceeds of Crime Law*** (2019 Revision) ("the POCL") and the particulars of the offence allege that they between the 27th May and 31st May 2019 within the jurisdiction of the Cayman Islands disguised and transferred criminal property, namely a quantity of gold valued at approximately US$4 million.

4. <u>Count 2</u> charges them with Concealing Criminal Property contrary to s.133 of the said Law and the particulars allege that they on or before the 30th day of May 2019 within the jurisdiction of the Cayman Islands concealed criminal property, namely US$135,000 in cash.

5. <u>Count 3</u> charges two of the Defendants with money laundering contrary to s.133 of the said Law and the particulars allege that on or about the 16th day of May 2019, within the jurisdiction of the Cayman Islands, they disguised and transferred criminal property namely a quantity of gold valued at approximately US$2.4 million.

6. The Defence raise two distinct matters on this application. The first is primarily a legal issue as to the statutory requirements for proof of criminal property. The second is a

matter of mixed fact and law relating to the sufficiency of evidence lead by the Prosecution in proof of the elements of the offences.

7. The approach to be taken by a court in considering a no case submission is set out in the well-known case of ***R. v. Galbraith***[1].

> "*How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.*
> *There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.*"

8. Given that the issues in this case relate to circumstantial evidence, Counsel for the Second Defendant also drew the Court's attention to the cases of ***G. F. v. R***[2]. and ***R. v. Khan and others***[3]. In the latter case, the English Court of Appeal cautioned against overanalyzing the test to be applied. The Court stated:-

> "*We too prefer the approach suggested by Elias LJ in Darnley. In our judgment, there is a danger of over analysing the test to be applied. It is essential to focus on the traditional question whether or not there is evidence (taking the prosecution case at its highest) upon which a reasonable jury, properly directed, could infer guilt. If any elaboration is required, about which we have our doubts, the question on the*

[1] [1981] 73 Cr. App. R. 124
[2] [2012] EWCA Crim 1756
[3] [2013] EWCA Crim 1345

facts here would be: taking the prosecution case at its highest, was there evidence upon which a reasonable jury, properly directed, could properly infer a conspiracy to kill and reject a conspiracy to cause grievous bodily harm as a realistic possibility?..."[4]

9. Counsel also referred to the more recent case of ***R. v. Bush***[5] in which the said Court endorsed the approach of the Divisional Court in ***R. (on the application of the Inland Revenue Commissioners) v. Crown Court at Kingston***[6], and stated that it is important that a trial judge in dismissing charges by upholding a submission of no case to answer does not usurp the function of the jury. The Court said:-

> *"In relation to Ground 4 we endorse the approach of the Divisional Court in R (on the application of the Inland Revenue Commissioners) v Crown Court at Kingston . We acknowledge, as the Divisional Court acknowledged, that it is important that a trial judge in dismissing charges or upholding a submission of no case does not usurp the function of the jury. But, where evidence is capable of more than one reasonable interpretation, a trial judge is not obliged to proceed on the basis that every possible adverse inference must be drawn against a defendant, especially where he considers the totality of the evidence points in the opposite direction. There may be a fine balance between withdrawing a case from a jury and thereby usurping their function and leaving a case to the jury where the evidence is barely sufficient. Hence the margin of judgment that this Court allows to a trial judge who has heard the evidence and seen the witnesses."*[7]

10. I note also the decision of the Cayman Islands Court of Appeal in the case of ***Attorney General v. Miller***[8]. In that case the Appellate court referred with approval the decision in ***DPP v. Varlack***[9] in which Lord Carswell stated:-

[4] Paragraph 16
[5] 2019 EWCA Crim 29
[6] [2019] EWCA Crim 29
[7] Paragraph 135
[8] 2009 CILR 162
[9] 2008 UKPC 56

> *"If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence."*

11. I approach this submission of no case with these principles in mind.

12. In relation to the gold, the Prosecution's case is that in the latter half of May 2019, two consignments of gold were transferred into and out of the Cayman Islands on route to Switzerland. Their case is that these transfers through the Cayman Islands had no commercial purpose and were thus designed to obfuscate the origin of the gold. The gold was transported on a private aircraft initially from Venezuela, via the Dominican Republic before arriving in the Cayman Islands.

13. They place reliance on the documentation produced in respect of the gold, which include multiple invoices ostensibly from four different companies said to be operating out of Florida addresses but which addresses were either post boxes or non- commercial addresses. Additionally another set of invoices purported to show that the gold came from *Inversionses Valkaria S.R.L*, a company, at an address in the Dominican Republic which they say appears from the evidence to be a false address. The gold, whether in transit or being exported from the Dominion Republic was not declared as was required by the procedures in that country. It is agreed that the gold in relation to the second transfer was seized in London and remains unclaimed to date.

14. In summary the Prosecution says that the circumstances of the handling of the gold gives rise to the irresistible inference that it is criminal property and that either it constituted criminal property before it arrived in the Dominican Republic from Venezuela or in the alternative it became criminal property on its being taken into and out of the Dominican Republic.

15. On one view of the evidence says the Crown by the non-declaration in the Dominican Republic if it is accepted that there was such non- declaration the gold became contraband and subject to seizure and confiscation after inquiry. The Crown's case further is that the open declaration of the gold in the Cayman Islands was itself accompanied by invoices from entities which were designed to obfuscate the fact that it is criminal property.

16. In terms of the nature of the evidence the Crown's case is somewhat similar to ***R. v. K (I)***[10], a case cited by the Defence at Tab 8 of their bundle. Blackstone's Criminal Practice 2019 summarizes this case as Paragraph B 21.6 as follows:

> "*In the latter case, the Court held that it was open to a jury to infer that a large sum concealed in the assets of a business represented criminal property, even though the prosecution could not identify the provenance of the money. This inference was possible because of the elaborate false documentation that had been created in an attempt to disguise its existence and origins. Nobody needs to launder clean money, and one of the purposes of the 2002 Act was to avoid the problems that used to arise where it was clear that property had criminal origins, but unclear whether it derived from drug trafficking or other criminal activity See El Kurd.*"

17. In the case of ***R. v. K.***, the Court concluded that:

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[10] [2007] 1 WLR 2262

"It was open to the jury to infer that the discrepancy of £5.9m was the product of criminal conduct and was therefore criminal property. It is true that the prosecution could not identify the provenance of the money. But the facts to which we have referred, at paras 9 and 10 above, provided ample material from which the jury could make the necessary inference[11]

18. Paragraphs 9 and 10:

"We turn to counts 1 and 2. When the records of KME were analysed following the arrest of SK and MR, it was discovered that, although approximately £60m had been deposited into the KME sterling account, a smaller sum was shown in the daily reconciliation sheets. The existence of a discrepancy of £5.9m was not in dispute. It is the prosecution case that this discrepancy represents the proceeds of criminal conduct and that this is the reason why it was not shown in the records. More than 2,500 false customer receipts were produced. It was an admitted fact in the case that the receipts are false. In addition, false customer lists and statement summaries were produced which purported to show business with a Pakistan-based business called "Wall Street Lahore". The name "Wall Street Lahore" does not appear on any of the reconciliation sheets. It is the prosecution case that SK and IK deliberately and dishonestly concealed £5.9m of large cash transactions and then manufactured false documents which purported to be a true record of KME money transfers.

There was no evidence of the provenance of the £5.9m. The case was put on the basis that the jury could properly infer a criminal source from the dishonest non-recording of the transactions and the subsequent wholesale forging of documents designed to paper over the absence of records of the money laundering. It was said that the cheating of the revenue which was the subject of count 11 and which gave rise to the criminal property which was the subject of count 12 was an example of the type of criminal conduct which might have given rise to the discrepancy which was the subject of counts 1 and 2."[12]

19. In the Privy Council case of ***Asset Recovery Agency (Ex parte Jamaica)***[13] a case cited by the Prosecution, the Board stated that there may often be a plain case of money laundering but it cannot be known what the antecedent offence was or there may be a plain case but a mixture of antecedent offences. The Board gave the following examples:

[11] Paragraph 34

[12] Paragraphs 9 and 10

[13] [2015] UKPC 1

"In the kind of case where the money launderer is someone misusing a business which has a legitimate reason to handle large sums of cash, such as a bureau de change or a casino, it may well happen that what is proved is that there were numerous clandestine receipts of a great deal of cash, perhaps delivered in anonymous places by anonymous couriers, and payments out justified by invoices for consumables which can be proved to be forged documents emanating from non-existent suppliers. The service may well be being provided to a mixture of drug dealers, fraudsters and cigarette smugglers. Exactly which the antecedent offence(s) is or are may be uncertain, but the inference that some antecedent offence(s) were committed may be sufficiently irresistible to amount to proof to the criminal standard. In such circumstances the Board held in Director of Public Prosecutions of Mauritius v Bholah [2011] UKPC 44 that proof of a particular predicate crime is not necessary in order to prove a substantive charge of money laundering to the criminal standard. That decision, which was not brought to the attention of the Court of Appeal in this case, upheld similar decisions to the same effect in the Court of Appeal (Criminal Division) for England and Wales, for example R v Anwoir [2008] EWCA Crim 1354; [2009] 1 WLR 980."

20. It seems clear to me on the basis of the authorities cited by both sides that the general common law position is that the Crown would be able to prove its case by circumstantial evidence in the manner contemplated i.e. without identifying any specific crime and that no issues of unfairness to the Defence such as to require specific identification of a predicate offence would arise.

21. The strength of any such evidence would fall to be considered as a separate issue bearing in mind the criminal standard of proof.

22. Thus unless it can be said that the legislative framework in the Cayman Islands is so different that it does not allow for proof of alleged criminal property by this means and in this manner, the prosecution would be able to prove its case by the means and in the manner contemplated.

23. In respect of the first limb of their argument, the Defence submit that the newly inserted s.144 (5A) of the ***Proceeds of Crime Law*** (2019 Revision) (*"**POCL**")*, imposes a threshold requirement on the Prosecution to identify and prove the nature or type of the criminal conduct from which the alleged criminal property, the gold and the cash was derived.

24. In respect of the second limb of their argument, the Defence argue that no reasonable jury properly directed could find that the case was proved against the Defendants, in that there is either no proof or insufficient proof that the gold and the cash are criminal property.

Section 144(5A) of the Law

25. In respect of the application of s.144 (5A) of the ***POCL***, both sides have referred to the ruling of the Learned Magistrate on the preliminary inquiry into this case. I am mindful that I must bring my own judgement to bear upon the matters raised, having heard detailed submissions from both sides in respect of the evidence which has now been called in this case. Counsel for the Defence submit also that with respect to their submissions on this aspect of the application of s.144 (5A), there is some difference as there is a new focus on the issue of dual criminality.

26. The legislative history of the ***Proceeds of Crime law*** in the Cayman Islands is common ground between the parties and is detailed in the submissions of Leading Counsel Mr. Miskin QC who submitted on behalf of all the Defendants in relation to this aspect of the case.

27. The earlier version of the Law, the ***Proceeds of Criminal Conduct Law*** (PCCL) was first introduced in September 1996. Counsel notes that while it covered all crimes, this was tempered by a requirement for dual criminality. Criminal conduct was therein defined as conduct which constitutes an offence to which this Law applies or would constitute such an offence if it had occurred in the Islands.

28. The PCCL was repealed and replaced by the ***Proceeds of Crime Law*** 2008 (POCL). Given its structure, content and wording it bears strong resemblance to the UK ***Proceeds of Crime Act 2002*** ("POCA"). In some cases the wording is identical.

29. The POCL has been amended and revised on occasion and this has led to the 2019 Revision of the Law under which the Defendants are charged. One of those amendments was made on the 27th November 2017 by which amendment s.144 (5A) was inserted into the Law.

30. Leading Counsel notes that on the said day there was an amendment to the Penal Code by Amending Law 47 of 2017 which amendment proscribed the making of fraudulent statements to the Government relative to the collection of revenue. Counsel submitted that these legislative actions must be linked and that the amendment to s.144 of the POCL was therefore made by deliberate design to ensure that whilst tax evasion was now introduced as a predicate crime, the principle of dual criminality was underlined.

31. Section 144(5) and (5A) of the Law fall under Part V of the Law dealing with money laundering and other criminal conduct - offences. A number of offences and penalties are set out in sections 133 to 143. Section 144 is heading Interpretation: money laundering, and provides interpretation for various provisions.

Interpretation Money Laundering

144. *(1)* *This section applies for the purposes of this Part.*

(2) *Criminal conduct is conduct which -*

(a) *constitutes an offence in any part of the Islands; or*

(b) *would constitute an offence in any part of the Islands if it occurred there.*

(3) *Property is criminal property if -*

(a) *it constitutes a person's benefit from a criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly); and*

(b) *the alleged offender knows or suspects that it constitutes or represents such a benefit,*

and includes terrorist property.

(4) *It is immaterial who carried out the criminal conduct, who benefited from it and whether the conduct occurred before or after the commencement of this Law.*

(5) *A person benefits from criminal conduct if he obtains property as a result of or in connection with the conduct.*

(5A) *Where a person is required to make a determination as to whether property was obtained through criminal conduct under this Law -*

(a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct; and

(b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been criminal conduct.

(6) *If a person obtains a pecuniary advantage as a result of or in connection with a criminal conduct, he shall be considered to obtain as a result of or in connection with the criminal conduct a sum of money equal to the value of the pecuniary advantage.*

(7) *References to property or a pecuniary advantage obtained in connection with a criminal conduct include references to property or a pecuniary advantage obtained in both that connection and some other.*

(8) *If a person benefits from conduct his benefit is the property obtained as a result of or in connection with the act.*

(9) *The following rules apply in relation to property -*

(a) *property is obtained by a person if he obtains an interest in it;*

(b) *references to an interest, in relation to land in the Islands, are to any legal estate or equitable interest or power;*

(c) *references to an interest, in relation to property other than land, include references to a right (including a right to possession).*

(10) *Money laundering is an act which -*

(a) *constitutes an offence under section 133, 134 or 135;*

> (b) *constitutes an attempt, conspiracy or incitement to commit an offence specified in paragraph (a);*
>
> (c) *constitutes aiding, abetting, counselling or procuring the commission of an offence specified in paragraph (a); or*
>
> (d) *would constitute an offence specified in paragraph (a), (b) or (c) if done in the Islands.*

32. As I understand it, the Defence submission in summary is inter alia that the amendment of the POCL to insert s.144 (5A) raises questions as to its meaning and application for three principal reasons:

    i. Similar wording has been included in the sections of the Law dealing with civil recovery proceedings from the inception of the Law. That is the position in the United Kingdom. That wording has been analysed in various case as imposing a threshold requirement on the Prosecution in seeking to prove that property is derived from unlawful conduct.

    ii. There is no similar wording included in the part of the Law in the UK dealing with criminal offences. The relevant and equivalent interpretation of the UK Act – s.328 on which the principle in the leading case of case of ***R. v. Anwoir***[14] is based does not include similar wording as s.144 (5A).

    iii. The conclusions in the cases referenced above including in ***R v. Anwoir*** apply in the context of criminal proceedings but only in the absence of a similar legislative provision.

[14] [2009] 1 WLR 980

33. The Defence submit that as a matter of statutory construction, s.144 (5A), should be given its plain meaning. Recourse to interpretative aids such as background and context do not assist to alter that meaning where the background itself is unclear and that Parliament could have chosen to follow other countries such as Mauritius and New Zealand to enact clear words but did not.

34. Thus it is argued by the Defence that the insertion of s.144 (5A) therefore creates a seismic shift in the burden upon the Crown in seeking to prove the criminal conduct from which property is derived. This new section in the Cayman Law serves to qualify the Law in a way which restricts the application of the ***Anwoir*** principle, thus a higher degree of specificity is required here than in the United Kingdom.

35. It is said that read in context, s. 144(5A) is designed to ensure inter alia that the alleged dual criminality principle was not infringed where the alleged criminal conduct took place outside of the Islands. It is said that it imposes a threshold requirement on the Prosecution to identify and prove within certain parameters the nature and type of criminal conduct from which the alleged criminal property derived.

36. The Defence submit that the Prosecutions' contention that the ***Anwoir*** principle relieves them of the need to identify any particular criminal conduct which criminalized the gold and enables them to rely on circumstantial inference is incorrect.

37. The Prosecution in response argues *inter alia* that it is inconceivable that in the context of international best practice as it relates to money laundering, the Cayman Islands legislature would seek to make it more difficult for the Prosecution to prove a case of

money laundering and oust well known common law principles which have been in place for so many years before and after the passage of the POCL. The case for the Prosecution was opened on the basis that the jury did not have to be satisfied as to a specific crime fromr which the gold was derived, provided that they are satisfied that it arose from crime generally. Counsel for the Crown indicated that the gold may have been obtained from one of a number of illegal sources, including, gold smuggling, and illegal mining.

38. In support of their contention, the Defence refer to the legislative history in the UK before the Proceeds of Crime Act 2002, where there were dichotomous laws relating to the proceeds of drug crime and the proceeds of other crime. This lead to difficulties with the identification of predicate offending whether this was from drug crime or other crime. One example of this is in ***R v. El Kurd***[15]. Thereafter issues arose as to the obligations of the Prosecution in respect of civil recovery and criminal prosecutions. The Defence rely on a series of cases which they say support the principle of identification of the predicate crime, i.e. the Prosecution is duty bound to identify at least the class of crime in question and as a matter of fairness to a defendant. These begin with ***R v Gabriel***[16] which was distinguished in the previously cited case of ***R v. K*** and in the context of civil proceedings, the cases of :

- ***Director of ARA v. Green***[17]

- ***Director of ARA v. Szepietowski and others***[18]

[15] 2001 Crim L.R. 234
[16] 2007 1 WLR 2272
[17] 2005 EWHC 3168
[18] 2007 EWCA Civ. 766

- ***Director of ARA v. Olupitan***[19]

And the case of:

- ***R. v. W (N) and Others***[20]

39. It is submitted that in ***Anwoir*** the Court found that the issue was one of mixed fact and law and that the finding therein resulted partly from an interpretation of s.340 of the POCA and partly from the nature of that case. It is a relevant feature of that case say the Defence that the circumstances gave rise to the *irresistible* inference that the property derived from crime and they highlight the fact that the circumstances in that case were very strong.

Civil Recovery Analogy

40. Part IV of the POCL deals with Civil Recovery of the Proceeds of Unlawful Conduct. Under this heading are Sections 78 and 79 which provide as follows:

> "78. (1) *Conduct occurring in any part of the Islands is unlawful conduct if it is unlawful under the criminal laws of the Islands*
>
> (2) *Conduct which -*
> (a) *occurs in a country outside the Islands and is unlawful under the criminal law of that country; and*
> (b) *if it occurred in the Islands, would be unlawful under the criminal law of the Islands,*
>
> *is also unlawful conduct.*

[19] 2008 EWCA Civ. 104
[20] 2008 EWCA Crim 2

(3) *The court shall decide on a balance of probabilities whether it is proved -*

(a) *that any matters alleged to constitute unlawful conduct have occurred; or*

(b) *that any person intended to use any cash in unlawful conduct.*

79. (1) *A person obtains property through unlawful conduct whether his own conduct or another's if he obtains property by or in return for the conduct.*

(2) *In deciding whether any property was obtained through unlawful conduct -*

(a) *it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct; and*

(b) *it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct."*

41. Section 144 (5A) is in near identical terms to s.79 (2). The Defence contend that nearly identical words to both have been the subject of close analysis in the context of civil recovery in the UK. In the UK, s.242 of the Proceeds of Crime Act is in the following terms:-

> *"A person obtains property through unlawful conduct (whether his own conduct o another's) if he obtains property by or in return for the conduct.*
>
> *In deciding whether any property was obtained through unlawful conduct—*
>
> *It is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct,"*
>
> *It is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct."*

42. While submitting that a similar interpretation is warranted, the Defence nevertheless note that cannons of construction do not ordinarily allow for the interpretation of one

section in one statutory scheme to be necessarily followed in another, particularly where the statute governs the laws in separate countries. But it is said that, given the similarities, it would be utterly implausible if Cayman were to resolve the matter in any other way. The Defence say that the meaning and purport of these words have long since been authoritatively decided in the cases of ***Green, Szepietowski*** and ***Olupitan*** and that to the extent that the case ***of Cecil Walsh and the Director of the Assets Recovery agency***[21] resolves the matter in a contrary way the later English Authorities must be preferred. While acknowledging that the criminal structure is different, it is said that there is a limit to the way in which identical sentences can be construed if they arise in the same statute.

43. I turn to an analysis of the series of cases.

44. In ***Director of ARA v. Green***, Sullivan J, stated that the Director of the ARA was required to give the respondent and the Court at least some particulars of what that conduct was said to be. The requirement that fraud or illegality should be specifically pleaded, the learned Judge stated, is not simply a procedural nicety. It reflects the requirements of elementary fairness.

45. It was concluded that as a matter of statutory construction of sections 240 to 243 of POCA which deal with civil recovery, those sections falling under Part 5 of the Act place the Director of the Asset Recovery Agency when seeking to recover property obtained through unlawful conduct in the same position as any other claimant seeking to recover property in civil proceedings. The provision which corresponds to s.144 (5A) was not to

[21] [2005] NICA 6

be considered in isolation but in the context of sections 240 and 241, in particular s.241 (3).

46. The Court thought that it would be surprising if a claimant in civil proceedings was not required to give the respondent and the Courts at least some particulars of what that conduct was said to be. The Court accepted that it was not necessary to allege a specific criminal offence and stated:

> *"Any litigant in civil proceedings seeking to recover property upon the basis that it had been obtained by unlawful conduct would be expected to identify (a) the property, and (b) the conduct that was said to be unlawful. The former is an obvious requirement. As far as the latter is concerned, it has long been the position that fraud and illegality must be specifically pleaded. The requirement is now to be found in CPR 16, para 8.2. Subsection (3) in section 243 recognizes the practical difficulties which the Director may face in specifying the property which has been obtained through unlawful conduct and enables the Director to describe the property "in general terms". There is no similar relaxation of the normal rules of pleading in respect of the necessary allegation of unlawful conduct. There does not need to be, since sections 240 to 242 have made it plain that the Director need not allege a specific criminal offence or offences and need only describe (alleged matters which constitute) a particular kind or kinds of unlawful conduct."*[22]

47. The cases of ***Szepieliski*** and ***Oliputan*** followed the reasoning in ***Green***.

48. In ***WN and others***, the Court was concerned with the Crown's appeal against the dismissal of a case of money laundering against the defendants. The basis for the prosecution was that the transfer of certain funds must have emanated from criminal conduct where the defendants had no visible means of support.

49. The Court referred to the case of ***Green*** and to the series of cases and in dismissing the appeal stated:-

[22] Paragraph 23

"We did not understand the defendants to submit that there could never be a case in which the Crown might properly invite the jury to infer from the available facts that criminal activity was the only reasonable and non-fanciful explanation for the presence of the relevant property in the hands of the defendants, even though there was nothing to show what class of crime was involved. We would in any event reject so general and unqualified a proposition. Everything, of course, depends on the particular facts. The protection for defendants is that such an inference can only properly be drawn if it meets the criminal standard of proof, and the jury must of course be so directed.

Accordingly there may be cases (whether or not this is one) in which guilt under POCA section 327 or 328 could be inferred, applying the criminal standard, without proof of the class of crime in question. Whether a prosecution in such a case is lawfully and properly brought depends in our judgment on the correctness or otherwise of the defendants' second argument, namely that on the correct construction of POCA section 340 the Crown are required to prove at least the type or class of crime in question, to which we will come in due course.

However the defendants' first argument, that allowing such convictions would sanction an illegitimate reversal of the burden of proof, is in our view without substance."[23]

50. The Court concluded that the position was settled with respect to civil proceedings and identified the question as being whether the conclusion has to be read across to the differently worded provisions made in Part 7 of POCA by s.340. The Court said, in reference to ***Green***, that it was clear that it could not be submitted that Green was wrongly decided.

51. In ***Cecil Walsh and the Director of the Assets Recovery Agency***, the Court of Appeal in Northern Ireland considered the issue of whether proceedings for a civil recovery order under Part 5 of POCA were civil or criminal in nature. In the course of the judgment, the Court said this:

[23] Paragraphs 16 and 17

"*Moreover, we do not accept that it is in any way inevitable that the recovery proceedings will be confined to an examination of specific offences committed by the appellant. We consider that it would be open to the agency to adduce evidence that the appellant had no legal means of obtaining the assets without necessarily linking the claim to particular crimes*."

52. In ***Anwoir***, the English Court of Appeal reviewed the line of cases including, ***Gabriel, K, Green*** and ***W(N)*** and concluded:-

"*We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown can prove the property derives from crime, a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime. This in our judgment gives proper effect to the decision in Green, and is consistent with the decisions of this court in Gabriel [2007] 2 CAR 11, IK [2007] 2 CAR 10 and, of course, Craig. We consider that it is also consistent with the approach of this court in R v El Kurd (unreported CA 26th July 2000).*"

53. There appear to be some points of note with respect to the line of case cited:

i. The construction placed on the wording was in the context of civil proceedings. Consideration was given to the requirement in those proceedings for specific pleadings in civil matters.

ii. Despite the wording, the Court in the case of ***Walsh*** was of the view that there was no requirement to specify a predicate crime.

iii. It was submitted in some cases that the requirement in civil cases should apply across the board to criminal provisions.

iv. The Court in ***Anwoir*** considered the line of cases of ***Green*** and others in the criminal context and concluded that the two limbed test of proof was in accord or consistent with those cases.

54. On close analysis it appears that the suggestion that the wording in the civil recovery provisions, allowed for two distinct and separate approaches and thus that the inclusion of such wording in the criminal offence provisions would create a seismic shift is not correct. The conclusion in ***Anwoir*** was said to be consistent with the decisions in ***Green, Gabriel*** and in ***Craig***[24]. It appears that the Court was saying that the requirement identified in the civil arena was satisfied by the two limbed test with respect to criminal cases.

55. I conclude that it is by no means clear that the inclusion of the wording in s. 144(5A) would on the basis of the interpretation ascribed to those words in the civil context have the effect of changing the common law position. Not only is there a difference in approach in the cases, there does not appear to be a proper basis to simply ignore ***Walsh*** and in any event the test in ***Anwoir*** was said to be consistent with ***Green***.

56. I conclude that the inclusion of those words does not create a seismic shift such as to require the Prosecution to prove a specific predicate crime.

57. Furthermore the context is different and care must be taken before importing a meaning ascribed in a different context.

[24] See para 51 of this Ruling

The Statutory Construction

58. The Defence submit that there is nothing complex in what the words in s. 144 (5A) say. That the words are plain and unambiguous and there is no suggested alternative meaning. The words are deliberately targeted at fact finders. It is said that to conclude that they are permissive and not mandatory is impractical and renders them meaningless, which cannot have been the case.

59. I have been referred by the Defence to certain key principles from ***Bennion on Statutory Interpretation.*** These include that the primary indication of legislative intention is the legislative text read in context[25]. Further that the context is meant in its widest sense, to include the context of the act as a whole, and its legal, social and historical context.[26] With respect to context it is therein stated:

> *"The current editors think that the requirement to consider the context is justified primarily by the fact that one cannot construe a legal text (or indeed any other text) without regard to its context. Further any new legal regime created by a particular piece of legislation needs to work as harmoniously as possible with the surrounding law and practice, and the principles underlying the common law. Also this points to the desirability of interpreters taking the context into account, when construing the legislative text."*

60. Counsel submits that the first question should be what the words mean. Context and mischief are factors but there are aids to interpretation which may include internal aids. Other assistance may come from other words in the statute or the background and legislative history. Purpose may be obtained in considering the provisions of the Law, its preamble and any admissible external aids.

[25] section 9.1 - page 283
[26] Section 9.2 – page 287

61. It is submitted that there is no ambiguity or obscurity as to the meaning of the section such as would lead to the invocation of the rule in the case of ***Pepper and Hart***[27] i.e. that a provision is ambiguous or obscure such as to lead to an absurdity. Additionally it is submitted that a provision must be genuinely open to two possible constructions and that the presumption against absurdity is most unlikely to be relied on where there is an otherwise cogent statutory scheme as in this case.

62. Against the background of these principles, the Defence make two broad submissions:

i. Legislative intent, as to the specific inclusion of these words as distinct from any other formulation, that they must have been inserted in order to impose a specific burden on the Prosecution of identifying and proving the predicate crime or crimes by all recognised methods of proof.

ii. It is submitted that the Learned Magistrate was incorrect in his finding that ***Anwoir*** remains good law in the Cayman islands, for the following reasons:-

(a) In his identification of the wider context which allowed him to take a purposive approach and of the interpretive aids on which he relied.

(b) The Explanatory Notes and Headings to the POCL Amendment Law 2017 on which he relied were no more than vague statements of intention. They

[27] Pepper (Inspector of Taxes v. Hart [1993] A.C. 593

did not provide an alternative reading for the words and thus could not give guidance as to the legal meaning of the enactment.

(c) The heading of the enactment states that it was to ensure that the Law complies with international best practices and for incidental and connected purposes. However this is a statement of intent in two parts and there is nothing to imply that the first part is devoted to the amendment of the interpretation section.

(d) Further that there is no proof of what these international best practices are. No reliance can be placed on the discussion in ***DPP of Mauritius v Bholah***[28] as to what these are. The statutory framework under consideration in that case permitted the non -specification of any particular crime. Thus Lord Kerr stated therein that dispensing with a requirement to identify and prove a predicate offence is by no means an unusual approach to the problems of proof that money laundering offences can present. Notably say the Defence, the practice varies and where the practice is permitted there are clear legislative words permitting this, as in Australia, New Zealand and Bahamas.

(e) That the Learned Magistrate's reliance on the case of ***BDO Cayman Ltd v. Governor in Cabinet***[29] was misconceived. In that case the Court found that there was a conflict in the language of the Trade and Business Licensing

[28] 2012 1 W.L.R. 1737
[29] 2018 1 CILR 457

Law and that there was no one clear grammatical meaning. As a result of that ambiguity, recourse could be had to the Hansard as a permissible aid to construction. That in the instant case, there is no such ambiguity. The learned Magistrate was therefore wrong to refer to Hansard. The basis on which this was referred to was wrong, not because two sides contend for different interpretations does this necessarily mean that there is an ambiguity.

(f) Finally it is said that the learned Magistrate erred when he found the statute to be permissive not mandatory. While noting that modern views allow for greater flexibility and adopt a more purposive approach to legislation, the Defence urge that there are no grounds for saying that the construction of s. 144(5A) would lead to an absurd result given the variety of approaches in different countries.

63. They submitted additionally, that the Bill, which was published prior to the passage of the Law sets out a Memorandum of Objects and Reasons which is an admissible aid to interpretation and a guide to purposing construction. It states:

> "*Clause 9 of the Bill amends section 144 to stipulate the issues that are to be considered when a determination is to be made as to whether a person is the beneficiary of the proceeds of crime.*"

64. It is said that the word stipulate is a strong word and must be meant to impose a specific requirement.

65. I have considered all of the submissions of all Counsel some of which I have not detailed herein.

66. I turn to an analysis.

67. In ***R. v. Montilla***[30], the House of Lords held that headings and side notes were as much part of the context of an Act of Parliament as explanatory notes which are admissible aids to construction. The Court was considering the meaning of words in legislation which had been introduced to combat money laundering. The Court noted that the offences with which the appellants had been charged had been included in the domestic law in response to international initiatives. This the Court said was an important part of the background. The Court referred to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. (The Vienna Convention).

68. In the case of ***DPP of Mauritius v. Bholah*** the Board was concerned with the interpretation of particular provisions of Mauritius Law. Section 17 (7) of the ***Economic Crime and Ant-Money Laundering Act 2000*** provided *inter alia* that in proceedings for money laundering, it would be sufficient to aver that property is the proceeds of crime, without specifying any particular crime.

69. The Board noted that this approach was in line with international instruments. The Board stated:

> *"Dispensing with a requirement to identify and prove a predicate offence is by no means an unusual approach to the problems of proof that money laundering offences can present. The Council of Europe Convention on Laundering, Search, Seizure and*

[30] 2004 1 WLR 3141

Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005 (Council of Europe Treaty Series, No 198) ("the Warsaw Convention") provides in article 9(6) that each of the parties to the Convention "shall ensure that a conviction for money laundering under this article is possible where it is proved that the property ... originated from a predicate offence, without it being necessary to establish precisely which offence"[31].

70. The Board also noted that countries such as Australia and New Zealand have specific legislative provisions dispensing with the requirement to specify a predicate offence and that in England and Wales, such proof is also not required. At paragraphs 23 to 27 the Board made reference to the series of cases, concluding with ***Anwoir*** before saying this:

> *"If there is a difference of view to be found in these decisions as to whether in England and Wales identification and proof of the species of criminal activity are invariably required for POCA prosecutions or civil recovery purposes, it is not necessary to resolve it here. The principal significance of these decisions for the present appeal is that common to all of them is the determination that proof of a specific offence is not required.* ***And this despite the fact that there is no equivalent provision to section 17(7) of ECAMLA in POCA*** *."*[32] (Emphasis added.)

71. The basis for the conclusion that it is not necessary to prove a specific offence was the combined effect of section 329 and section 340 (3) of POCA. Section 340(3) defines what is criminal property in similar terms to the section in the Cayman provisions.

72. The Board explained that none of the decisions as to the requirements of POCA suggested that the fact that criminal activity had generated property was an element which required identification and proof of a specific crime or crimes. Further that in the case of ***W (N)***, the underlying premise of the decision of the Court was that a specific crime did not need to be proved:

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[31] Paragraph 17

[32] Paragraph 28

"The decision in that case was concerned with the question whether particulars of the type of criminal activity (if that was known) should be supplied, not with whether the Crown had an obligation to identify and prove a particular crime. The decision in R v W (N) [2009] 1 WLR 965 lends no support, therefore, to the Supreme Court's conclusion that "the element of the offence" that the money was the proceeds of a crime required of the prosecution that it should provide a statement as to what that crime consisted of.

....

The decisions in the English cases are informative beyond their firm conclusion that proof of a specific predicate offence is not required, however. They are unanimous, in the Board's view, in suggesting that where it is possible to give particulars of the nature of the criminal activity that has generated the illicit proceeds, this should be done. Some of the cases appear to suggest that this is an indispensable requirement; others that it is merely required where it is feasible. All are agreed, however, that where it is possible to give the accused notice of the type of criminal activity that produced the illegal proceeds, fairness demands that this information should be supplied."[33]

73. Notwithstanding the different legislative context, the decision in ***DPP of Mauritius v. Bholah*** is of assistance to the present application. It provides some assistance as to the context and international background to prosecutions for money laundering and with the fact that a specific legislative provision is not required.

74. The Memorandum of Objects and Reasons to the 2017 Bill states that the Bill amends the Proceeds of Crime Law 2017 Revision to ensure that the Law complies with international best practices and to provide for incidental and connected purposes.

75. The Financial Action Task Force (FATF) recommendations require the criminalisation of money laundering in accordance with the ***United Nations Convention against illicit Traffic In Narcotic Drugs and Psychotropic Substances 1988*** (the Vienna Convention)

[33] Paras 32 and 34

and the ***United Nations Convention against Transnational Organized Crime 2000*** (the Palermo Convention).

76. The Defence have provided a copy of the March 2019, Cayman Islands Mutual Evaluation Report to the Caribbean Financial Action Task Force. Paragraphs 28 and 31, of that Report referred to s.144 and specifically to prosecuting cases in line with the case of ***R. v. Anwoir*** stating *inter alia*:

> *"Additionally the Cayman islands indicated that case law is well developed to confirm that a conviction for a predicate offence is not necessary to establish that property is the proceeds of crime."*

77. What is to be made of the indication of the Cayman Islands issued subsequent to the passage of the Amending Law which seeks to suggest that the application of ***R. v. Anwoir*** remains in place in the Cayman Islands?

78. In the case of ***BDO Cayman Ltd et al v. Governor in Cabinet***, Mangatal J. stated that, while the grammatical or literal meaning is the starting point, the Court must construe the enactment in its wider context in order to determine the intention of the legislator which is the paramount criterion. Only then can the Court identify the legal meaning of an enactment.

79. The Defence say that there is no indication as to what international best practices are but it is plain that international best practices require such prosecutions to be undertaken.

Further it hardly seems that such practices would support making it more rather than less difficult to prosecute money laundering.

80. The Learned Magistrate in his ruling on the preliminary inquiry, considered as I do the long title of the Law and the reference to international best practices, as part of the context in which the amending law was passed. I too conclude as he did that:

> *"There can be no doubt regarding the meaning of "international best practices and the legislative intent behind the POCL(Amendment) Law 2017- our jurisdiction, through its legislature, aims to be part of the international effort to combat money laundering which at the very least, means that "unrealistic barriers" to proof should not be erected in money laundering prosecutions."*

81. Having considered the submissions made in this case, I adopt in its entirety the reasoning of the Learned Magistrate on this point as set out at pages 10 to 16 of his ruling and the references to the cases of ***R (Quintaivlle) v. Secretary of State for Health***[34] and ***R. v. Montilla***, and his conclusion at page 16 which is that :

> *"It is inconceivable, that the legislature intended to make it more difficult to prosecute money laundering offences. Sub- section 5A must be read as permissive, not mandatory, the second limb of Anwoir remains available to the prosecution."*

82. I would add that it is my view that s.144 (5A) must be given a purposive construction and read in light of the mischief against which the legislation is aimed and the background context of international best practice.

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[34] 2003 2 AC 687

Absurdity of the Result?

83. The secondary submission of the Crown is that the proper approach to interpretation of Section 144 (5A) does not impact on the application of ***R. v. Anwoir***. This is because the proper approach is governed firstly by the Interpretation Law (1995 Revision) and by the approach to Statutory interpretation in the case of ***BDO v. Cayman Ltd et al v. Governor in Cabinet***, which itself is consistent with the approach ***in R (on the application of Quintaville) v. Secretary of State for Health.***

84. The Crown rely on sections 59 and 12 of the ***Interpretation Law*** (1995 Revision). Section 12 states:

> *"(1) Where expressions are defined in any Law, such expressions shall have the meanings assigned to them, unless there is anything in the subject or context repugnant to, or inconsistent with, such meaning."*

85. It is argued that applying s.12 the Court may find that the expressions assigned to s.144 (5A) are inconsistent with the meaning of criminal property in the context of the POCL.

86. The Prosecution highlights that there is a significant difference between the UK POCA and the Cayman POCL in that there is a definition section in the POCL, which is not included in POCA. By section 2 of the POCL,

> *"Criminal property has the meaning assigned thereto by section 144 (3) of the Law."*

87. The Crown points out that there is no reference in the definition to s.144 (5A). The meaning assigned to it is limited to s.144 (3). This is unlike the position in the UK.

88. Secondly there is the additional definition which states:-

> *"References in this Law to property obtained, or to a pecuniary advantage derived, in connection with the commission of an offence include a reference to property obtained or to a pecuniary advantage derived both in that connection and in some other connection."*

89. The Crown submits that a permissive construction or rectifying construction should be given to section 144 (5A) in light of these definitions in section 2 of the POCL.

90. In my view the presence of these definitions fortifies the conclusions reached above.

Dual Criminality

91. The Defence submit that the Amendment to the POCL deals with a scenario, where the conduct is criminal abroad but not in the Cayman Islands.

92. The overall submission is that it is clear that where a jury has to determine whether or not conduct overseas is criminal under Cayman Law, they must know what the conduct is. The Prosecution must say at least in broad terms what that conduct is and have evidence in support of the statement made.

93. If the Prosecution cannot identify the alleged criminality then the prosecution has to fail for uncertainty. The question is asked: How does a jury determine whether the conduct abroad is criminal in Cayman unless there is some specificity as to what that conduct is alleged to be by the Prosecution. The defendant as a matter of fairness, it is said, ought to know the case that he has to meet.

94. The Prosecution argues that s. 144(2) does not require proof that the conduct is criminal conduct in the country or territory where it occurred. They point out that there is no reference to criminal conduct in the other territory. This is an approach which is consistent with the FATF recommendations which state that countries may provide that the only prerequisite is that the conduct would have constituted a predicate offence, had it occurred domestically.

95. In contrast s.78(2) under the civil framework makes a specific averment as to proof of unlawful conduct being such conduct which is also unlawful under the criminal laws of that other country. In my view that is a significant distinction.

96. There is no such provision in s.144. The Prosecution submit that this difference is important because where there is a double criminality requirement, Parliament makes this clear. As for example in the Penal Code s.321. They say that it would be entirely inconsistent for Parliament to legislate to make money laundering offence extraterritorial without any reference to the criminal law of the other country.

97. The Prosecution relies on the case of ***Norris v. Government of USA***[35], as applied in ***Tappin v. the Government of the USA***[36] in submitting that is not an exercise in comparison between the near equivalent offence in the territory where that conduct occurred. The court does not look at the elements of the foreign offence but to the domestic offence.

[35] [2008] UKHL 16

[36] [2012] EWHC 22 (Admin)

98. This is a submission which is accepted. There is no reference in the section to a criminal offence committed in the other territory. On the plain reading of the section, all that is required is conduct which would constitute an offence in the Cayman Islands if it had occurred here. The focus is on whether the conduct would amount to an offence. In my view this means no more than that the general nature of the conduct alleged, would amount to an offence in the Cayman Islands.

Submissions on the Evidence

99. The central issue is whether the Prosecution is able to prove to the requisite standard that the gold and cash are criminal property. Counsel submit that if there is or may be a possibility that the gold is the product of other, non-criminal conduct then the case must fail and that the Prosecution have led insufficient evidence from which it can properly be inferred that the gold was criminal property within the meaning of the Law, there being no direct evidence and the alleged inferences sought to be drawn have been weakened during the trial process. The Defence say further that there is no independent evidence of the quality or source of the gold. Gold is not cash, so that there is no logical link between gold and classes of crime such as drugs and acquisitive crimes. There is no reliable evidence about the industry and its practices and that existing legitimate property is not automatically transformed into criminal property by virtue of it being smuggled. They submit that if the gold was not declared on import into the Dominican Republic, then on arrival in Cayman it does not become criminal property unless it constitutes a person's benefit from criminal conduct, or it was obtained as a result of that conduct. If the property is only criminal by virtue of unintended smuggling through the Dominican

Republic, this would be very technical in nature. The evidence taken at its highest is insufficient to prove that the gold is the proceeds of crime. There is a reasonable alternative explanation, getting capital out of an economy in chaos whether in order to liquidate it or to avoid interference from the United States. The Defence say that to conclude otherwise would be to invite the jury to speculate.

Smuggling as an Offence

100. The issue of smuggling is a contentious issue between the parties and one with some difficulty. The offence of money laundering requires that there should be a predicate offence which generated some benefit before there can be a laundering offence. In essence the Defence argue that if there was a non-declaration in the Dominican Republic, this could not amount to a benefit as no duty was evaded. Gold which was smuggled does not fit the description of criminal property because it was lawful property prior to being smuggled. The benefit in any such smuggling would be any pecuniary advantage obtained, as for example, the evasion of any duty, not the gold itself which neither constitutes the benefit directly or indirectly of that conduct to wit, the evasion, nor was it obtained as a result of that conduct.

101. The Defence argue that the word "*obtain*" in the POCL should be given its ordinary English meaning of "come into possession or enjoyment of, secure or gain as a result of request or effort, to get,"

102. Reliance was placed on the Grand Court case of ***In the matter of Crystal Limited***[37]. The issue in that case was whether the unlawful activity lead to the proceeds of crime. The activity was said to be the re-zoning of property but the earning of monies began before the re-zoning and was not caused by it. Henderson J stated that the Crown must show that the commission of the predicate offence contributed in some material way to its acquisition.

103. In the UK case of ***R v. Smith***[38], the House of Lords held that a defendant who imported cigarettes and evaded payment of the duty thereon derived a pecuniary advantage equal to the duty evaded.

104. In the instant case, the Crown refer to the provisions of the Customs and Border Control Law which create the offences of smuggling and submit that the smuggling offence which is in question under Cayman law is not the offence of Evading Duty contrary to s.58 of the ***Customs and Border Control Law*** 2018, it is the offence contrary to section 55 under which the conduct is the clandestine bringing of goods or the export or import of goods which are not properly declared or the offence contrary to s.57 of that Law where the conduct is being in possession or control of smuggled goods.

105. The Prosecution argues that applying the principle in ***R. v. GH***[39], when the First Defendant took possession of the gold in the Dominican Republic, it had already been smuggled into and out of the Dominican Republic and as such it became criminal

[37] 2002 CILR 497
[38] [2002] 1 WLR 54
[39] 2015 UKSC 24

property under the POCL at that stage if not earlier. Their case is that it is immaterial who was a party to the smuggling or who obtained the gold as a result of or in connection with the criminal conduct (section 144 (3)).

106. Counts 1 and 3 charge the transferring and disguising of criminal property. Disguising is defined by s.133(7) of the POCL as including concealing or disguising the nature, source location or movement or any right with respect to the property.

107. Sections 55 and 57 of the ***Customs and Border Control Law*** are in the following terms:

> *"A person who - clandestinely brings into the jurisdiction prohibited, restricted or any other description of goods (other than goods exempt from the Customs and Border Control process); or exports any goods from the Islands, in respect of which entry is not made within the time or in the form required by Customs and Border Control, or in such manner as to disclose the fact of the import or export of such goods, commits the offence of smuggling such goods into or out of the Islands, as the case may be.*
>
> *A person who (unless without guilty knowledge, the proof of which is upon that person) is found in possession or control of any - smuggled goods; or vessel or thing used for or adapted to be used for smuggling or concealing goods, commits the offence of being engaged in smuggling. (2) Guilty knowledge, for the purpose of subsection (1), will be presumed unless the person in possession or control of any vessel or thing satisfies the court that he or she has exercised every reasonable care and discharged every part of his or her duty with respect to the control or management of such vessel or thing to prevent the use or potential use of the same for any smuggling operation or concealment of goods."*

108. It is submitted by the Crown that the use of the word benefit in the context of s.144 (5) is not in the sense of assessing the level of benefit as one would of in confiscation and forfeiture.

109. Section 144 3(a) defines criminal property as being criminal property if it constitutes a person's benefit from a criminal conduct or it represents such a benefit in whole or in part and whether directly or indirectly. By ss.(5) a person benefits from criminal conduct if that person obtains property as a result of or in connection with the conduct.

110. By ss.(9), property is obtained by a person if he obtains an interest in it including a right of possession.

111. In issue is whether the offence of smuggling if established can give rise to a benefit such as to constitute criminal property where the smuggling did not involve dutiable goods.

112. The Defence argue that in the absence of evasion of duty, there is no benefit or alternatively that this is only a technical breach.

113. The Prosecution rely on the cases of ***R. v. William et al***[40] and ***McDowell and Singh***[41]. In ***William***, the predicate crime was the operation of a business without declaring any revenue to the tax authorities. The Court found that the criminal property was the whole of the undeclared revenue even though only a part of it would be subject to income tax and VAT. In circumstances where the Offender had no other source of income other than the business, all of the income earned was tainted by the cheating of the Revenue. Dyson LJ stated:

[40] 2013 EWCA Crim 1262
[41] 2015 EWCA Crim 173

> "*the reference to in whole or in part is important because it shows that the whole property is treated as criminal property.,, even where only part of it represents benefit from criminal conduct.*"

114. Thus says the Crown the gold in this case as a whole is criminal property, it is smuggled goods which D1 takes possession of. The gold was therefore obtained as a result of or in connection with that conduct.

115. In ***McDowell and Singh***, the underlying criminal conduct was trading while unlicensed and trading while unregistered. Such trading was contrary to the Trade in Goods (Control) Order 2003 and the Scrap Metal Dealers Act 1964 and thereby constituted offences against the said Laws. Each appellant argued that the benefits said to have been obtained by them were acquired not from criminal conduct but from lawful trading so that the Proceeds of Crime Act did not apply at all and no confiscation orders should have been made against them.

116. The issues for the Court included whether property was obtained as a result of or in connection with criminal conduct pursuant to s.76 (4) of the Proceeds of Crime Act 2002. This states that "*a person benefits from conduct if he obtains property as a result o for in connection with the conduc*t."

117. The Court said that a first step in the assessment process is the identification of an offender's criminal conduct, whether general or particular. The Court reviewed the findings of the Court in the case of ***Director of Assets Recovery Agency v. John***[42] on which the appellants relied in support and stated:

[42] [2007] EWHC 360

> "*By contrast this court has held that trading in criminal breach of a prohibition is criminal conduct from which benefit may be derived. In del Basso [2010] EWCA Crim 1119; [2011] 1 Cr App R (S) 41 the appellants created and ran a 'park-and-ride' business on land in contravention of planning restrictions. An enforcement notice was issued that ordered the appellants to cease the activity but they failed to comply. Subsequently, they pleaded guilty to an offence contrary to section 179 of the Town and Country Planning Act 1990 of failing to comply with an enforcement notice. The court held that the business was an illegal operation whose benefits were represented by its turnover. At paragraph 46, Leveson LJ, delivering the judgment of the court, expressly approved the following passage in the judgment of His Honour Judge Michael Baker QC in the Crown Court:*
>
> "*... Those who choose to run operations in disregard of planning enforcement requirements are at risk of having the gross receipts of their illegal businesses confiscated. This may greatly exceed their personal profits. In this respect they are in the same position as thieves, fraudsters and drug dealers.*"[43]

118. The Court said that it followed that the criminal conduct comprised the carrying out of an activity that was prohibited as a result of or in connection with which benefit was obtained.

119. The Court cautioned against treating regulatory offences as offences to which the Proceeds of Crime Act uniformly applied and said that the question whether benefit has been obtained from criminal conduct must first depend on an analysis of the terms of the statute creating the offence and thereby upon an identification of the criminal conduct admitted or proved. The Court further stated:

> "*It may be that, as in Sumal, the wider statutory context of the offence will assist to answer the critical question: what is the conduct made criminal by the statute – is it the activity itself or is it the failure to register, or obtain a licence for, the activity? In our judgment, there is a narrow but critical distinction to be made between an offence that prohibits and makes criminal the very activity admitted by the offender or proved against him (as in del Basso) and an offence comprised in the failure to obtain a licence to carry out an activity otherwise lawful (as in Sumal).*"

[43] Paragraph 32

120. By analogy, the very act prohibited in the instant case is the transfer of goods without declaration to Customs both in the Dominican Republic and in the Cayman Islands. These are goods valued in excess of $10,000.00. In the Dominican Republic, such goods become contraband and subject to seizure after investigation, in the Cayman Islands they become smuggled goods.

121. Had the gold been smuggled through the country as alleged and ultimately successfully reached its intended final destination, where it generated profits for the enterprise, would it not have been said that a benefit had been obtained from or in relation to the act of smuggling which included the whole of the gold and any profits earned.

122. The gold became tainted by the act of smuggling, or put another way, the lawful trading in the gold if it is lawful would have been tainted by the act of smuggling.

123. I therefore accept the Prosecution's arguments on this point as to the alternative way in which they put their case, which as I understand it, is that if the gold was placed on the plane in the Dominican Republic or received in the Dominican Republic as was said by the First Defendant, that if it was not in fact declared as it should have been and that evidence is accepted, it became contraband and constituted another person's benefit from criminal conduct, at least in part. Subject to satisfying the mental element it would be criminal property in the hands of the Defendants who thereafter received it.

Evidence and Inference on Count 2

124. On Count 2, the submission is that there is insufficient evidence such as would allow a reasonable jury properly directed to infer guilt on the part of all of the Defendants.

125. The evidence is that following the arrest of the Defendants, the plane was searched on the 4th June 2019 and under a floor panel was found four separate parcels of cash, one had the DNA of the First Defendant and another the phone number of the Fourth Defendant. This cash had not been declared to Customs.

126. In respect of the First Defendant, the Defence submit that the presence of his DNA on the package cannot be a proper basis for an inference of knowledge of the cash, where it is questionable as to the manner in which his DNA came to be deposited on the package. Leading Counsel, Mr. Nelson Q.C. highlights the fact that the Defendant had been in the small cabin of the plane for a number of hours between the 28th and 30th May, and that the officer who found the package had worn the same gloves throughout the search and would undoubtedly have touched several areas of the plane in the course of this search. It is said that a reasonable jury could not exclude the possibility that the DNA was placed on the package after it was found or as a result of the defendant having come into contact with a bag which was subsequently used by another to wrap the money. The location of the hidden compartment would lead to the strong inference that only a person with knowledge of an airframe and how to open the floor of the aircraft would know of the hidden compartment.

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127. The Prosecution in response point to the evidence of the DNA Expert who explained that DNA which is transferred becomes less and less after repeated transfers.

128. Additionally they point to the following matters:

i. On the journey from the Dominican Republic, the First Defendant sat in the seat directly above the hidden compartment and when the plane was examined, the screws were loose.

ii. The Defendant had taken previous trips on the plane with gold and there is a photograph sent by him to the Second Defendant of gold on the floor, in the area of the hidden compartment.

129. In my view the issue of the possible transfer of DNA is a matter for the consideration of the jury who may consider the totality of the circumstances following the necessary directions. Further that even in the absence of the DNA of the First Defendant on the packaging could a reasonable jury properly directed find on the totality of the circumstances, that four packages of cash, were meant for the four occupants of the plane, one of whom was the First Defendant who had himself declared the gold, taken together with all the other circumstances in the case, the answer must be yes.

130. In respect of the Second Defendant the Defence say that each of the following are explainable by alternative innocent inferences.

- His presence on the aircraft;
- His association with the First Defendant;
- His familiarity with the aircraft; and
- The fact that there were four bundles of cash.

131. Counsel for the Second Defendant, Mr. Wheeler argues that alternative inferences may be drawn from each of the items relied on by the Prosecution in proof of its case. Counsel argues that his presence on the plane and his friendship with the First Defendant cannot serve to establish that he knew that the cash was on the plane. There is no evidence to prove when the cash was concealed on the plane. Further that his alleged familiarity with the aircraft is based in part on one photograph F10 which his phone received on the 21st November 2018. This they say implies that he was not the taker of the photograph and also that he was not present at the time it was taken. As to the inferences to be drawn from the four bundles of cash, there is no evidence that any of the money was due to be paid to the Second Defendant and the theory is undermined by the fact that one of these packages is marked "*for Randolph Moreno*".

132. It is further said, that in contrast, his presence on the flight appears to be the subject of the innocent explanation that he was merely catching a ride to Miami, which plans were only changed on the 28th May 2019.

133. In response the Crown highlight the fact that emails of the Fifth Defendant indicate that the trip was being planned from the 17th May 2019. By 10:30 on the morning of the 27th May, the space had been booked for the gold. On the same day a matter of hours later,

the Second Defendant is informing his partner that he would be travelling in what appears to be a clear reference to the journey of the gold, a matter of hours after the gold is known to be going to the Cayman Islands.

134. In a message in the phone evidence bundle, he says I will do what I have to do and will come back. The Crown say it is a reasonable inference that this is by way of an obligation when taken in conjunction with other evidence. The Defence say that this relates to activities in Miami rather than in Cayman. There are other messages in which the Defendant says we are going to Cayman to meet a guy on the 29th May and also says that "*he is working now.*" On the 31st May 2019, he says that he is not on vacation, he is working.

135. The Crown say that all the circumstances taken together support the proposition of the inference and that the jury could conclude that the cash represents cash for work done re the consignment of gold.

136. I have considered all of the circumstances highlighted on behalf of the Defendant.

137. From the phone evidence, it would be open to a reasonable jury properly directed to conclude that the presence of the Defendant on the plane was not accidental, that it was planned and designed to achieve an objective in the Cayman Islands. The primary activity which took place in the Cayman Islands was the transfer to the Defendant Zander and onward shipment of the gold via British Airways.

138. In tandem with this activity was either the concealment or the continued concealment of four packages of money totaling $135,000.00 under the floor panel of the plane. Four persons were on the plane. The money was not declared. Significantly it was in the form of cash. As in all cases of circumstantial evidence, it is the totality of the circumstances taken together which must be considered by the tribunal of fact.

139. I have considered the detailed submissions of the Defence that each factor relied on by the Crown is capable of an alternative inference. In my view the matters raised by the Defence are matters of weight and inference for the consideration of the jury. Applying the test as approved by the Court of Appeal in ***AG. v. Miller***, it cannot be said that a reasonable mind could not reach a conclusion of guilt to the required standard.

140. In my view this falls squarely within the second limb of ***Galbraith*** where on one view of the facts a reasonable jury properly directed could come to a finding of guilt.

141. On behalf of the Fourth Defendant, it was submitted that a reasonable jury could not on the evidence be satisfied that no declaration had been made on a flight manifest and that Mr. Infante was not responsible for making any such declaration. The obligation rests with the operator of the plane.

142. Taking the evidence from the Dominican Republic at its highest, it is that if the gold was exported from the Dominican Republic, by the company *Inversiones Valkaria, S.R.L.*, the company and or its agents failed to register as an exporter and failed to declare the fact of the export.

143. The case for the Prosecution is that this was a joint enterprise in which different persons played different roles. From the evidence, Mr. Infante was one of the pilots, he had been in charge of maintaining the plane for some months. His phone number was on one of the packages of cash. A jury properly directed would be entitled to look at the whole of the circumstances, four men travelling with the gold with invoices which are alleged to be false, through the Cayman Islands for no apparent commercial purpose, and with four packages concealed in cash in the sum of $135,000.00.

144. Again my view, in respect of Mr. Infante is that applying the test in ***Galbraith*** and ***AG. v. Miller***, the matters raised are matters to be considered by a properly directed tribunal of fact.

Conclusion

145. Having considered the submissions made and the evidence in respect of each Defendant, in my view there is a case to answer in respect of each Defendant on each count.

Dated this the 27th February 2020

Honourable Justice Cheryll Richards Q.C.
Judge of the Grand Court