

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV2020/0584

BETWEEN:

CECIL TOUSSAINT

Appellant

and

1. TROY LAMONTAGNE DETECTIVE
SERGEANT NO 122
2. THE ATTORNEY GENERAL OF SAINT LUCIA

Respondents

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. David Francis of Counsel for the Appellant

Ms. Kozel Creese with Mr. George K. Charlemagne of Counsel for the
Respondents

2021: June 9;
2023: July 21.

JUDGMENT

[1] **CENAC-PHULGENCE J:** This decision concerns an appeal against the decision of the learned Magistrate granting the forfeiture order and is made pursuant to section 49A(3) of the **Proceeds of Crime Act**¹ ("the POCA"). The appellant, Mr. Cecil Toussaint, ("Mr. Toussaint") filed a fixed date claim on 18th December 2020 as required by Part 60 of the **Civil Procedure Rules 2000** ("CPR").

[2] Consequent on an application for a forfeiture order made by the 1st respondent in these proceedings, Sergeant 122, Troy Lamontagne ("Sergeant Lamontagne") in the Magistrate's Court, the learned Magistrate made a

¹ Cap 3.04 of the Revised Laws of Saint Lucia.

forfeiture order on 17th November 2020 for forfeiture of the sums of XCD\$71,920.00, USD\$4,249.00, EUR\$1,460.00 and CAD\$20 (together referred to as “the sums”). The full judgment in relation to the grant of the forfeiture order is contained in a decision of the Magistrate dated 23rd November 2020. It is important to note that although the application for forfeiture was filed in 2012, it was only heard in 2020 due to legal challenges mounted by Mr. Toussaint and having to await their outcome.

[3] Section 49A(3) of the POCA states:

“Any party to the proceedings in which a forfeiture order is made (other than the applicant) may, before the end of the period of 30 days beginning with the date on which it is made, appeal to the Court.”

[4] Mr. Toussaint seeks an order (a) that the order for forfeiture of the sums seized on 12th February 2012 is set aside; (b) that the sums seized by the said forfeiture order made on 17th November 2020 be released to Mr. Toussaint; (c) for compensation; (d) costs; and (e) interest.

Nature of the proceedings

[5] Section 49A(4) of the POCA provides that **an appeal under section 49A is by way of a hearing de novo** and empowers the court to make such order as it considers appropriate and, in particular, the court may order the release of the cash (or any remaining cash) together with any accrued interest.

[6] A de novo hearing is essentially a hearing as if the matter had not been previously heard and as if no decision had been rendered, except that all testimony, evidence and other material from the court below will form part of the record for the purposes of this ‘appeal’. In a hearing de novo as I understand it, the Court will be deciding the issues without reference to the learned Magistrate’s legal conclusions.

[7] The procedure to be adopted in a hearing de novo is not outlined in the Act or the CPR. This Court in trying to navigate the procedure in relation to this hearing de novo gave directions for the application and affidavits which were before the Magistrate’s Court to be treated as the documents relative to this hearing. It

was directed that the affidavits filed in relation to the application would stand as evidence in chief and the affiants would once there was an intention given to cross-examine have to attend Court. Affidavits were filed by (i) Sergeant Lamontagne on 6th August 2012 and 9th October 2019; (ii) Felix Cools on 6th August 2012 and 9th October 2019 and (iii) Alden Raphael on 9th October 2019. The appellant, Mr. Toussaint took a decision not to file any evidence in the matter and that was maintained in this hearing.

Preliminary Points

- [8] The appellant raised several evidential objections in his skeleton arguments filed on 16th April 2021 which mirror the objections made in the Magistrate's Court which this Court addressed at the commencement of the trial as follows:

Affidavit of Sergeant Lamontagne

Hearsay

Objection No. 1

- [9] Paragraphs 12-15 are hearsay contrary to section 48(1) of the **Evidence Act**² in that the witness is relating what he was told by someone within the financial institution and the Customs Department and he has not produced any statement from that person and no source is given. He has failed to exhibit any report or documentation from the financial institution in question or Customs Department and has not produced an affidavit from any workers from the institutions. This hearsay evidence does not fall within any of the established exceptions to the hearsay rule.

Objection No. 2

Paragraph 19(e)

- [10] This paragraph contains hearsay evidence. The enquiries spoken of would be enquiries from one of the banks and the witness fails to present testimony from the bank and is therefore relaying what he has been told by other persons.

² Cap 4.15, Revised Laws of Saint Lucia.

Objection No. 3

Paragraph 19(k)

- [11] This paragraph contains hearsay evidence. The witness is relaying what has been told to him by a member of the Inland Revenue Department as he is not a person associated with or employed by the Inland Revenue Department.

Objection No. 4

Paragraph 19(f)-lines 3-5

- [12] This contains hearsay in so far as the witness is relaying information which was given to him by a party that is not giving evidence in this matter.
- [13] The appellant contended that the respondent's reliance on section 6(1) of the **Money Laundering (Prevention) Act**³ as the basis for leading the hearsay evidence is misplaced as nothing in that section allows the Authority to lead evidence of the information gathered in a manner which is inconsistent with the **Evidence Act**. He relies on the case of **Myers v DPP**⁴ as establishing the principle that it is for the legislature, not the judiciary, to create new exceptions to the hearsay rule.

Respondent's submissions

- [14] The respondents in answer submitted that sections 5 and 6 of the **Money Laundering (Prevention) Act** ("the MLPA") detail the functions and powers of the Financial Intelligence Authority ("the FIA"). Under section 6(1) (a) and (b) there is no requirement for a court order to obtain information whether through an inspection or by making a request to the relevant financial institution. Section 8(2) of the MLPA allows the FIA to conduct investigations where there are reasonable grounds to believe that a transaction involves the proceeds of criminal conduct.
- [15] The respondents contended that Sergeant Lamontagne obtained the information pursuant to his powers contained under section 6 of the MLPA which he analysed in light of Mr. Toussaint's explanation as it relates to his financial

³ Cap. 12.20, Revised Laws of Saint Lucia.

⁴ [1964] 2 All ER 881.

affairs. The respondents therefore contend that paragraphs 12-15 of Sergeant Lamontagne's affidavit are admissible in the circumstances.

- [16] The respondents rely on **First Caribbean International Bank (Barbados) Limited v Paul Thompson**⁵ where Wilkinson J at paragraphs 38-41 stated that the FIA can enter a financial institution and inspect records or request for information which is considered relevant in discharging its duties under the MLPA.
- [17] They also highlight the fact that Mr. Toussaint himself declared sources of income which were enquired into and conclusions were made by Sergeant Lamontagne which have not been challenged by the appellant.
- [18] The respondents submit that the hearsay rule does not apply in this case as Sergeant Lamontagne was not seeking to tender a document from the financial institution nor was he relying on the information which he requested from the financial institution. In that regard, he gave evidence solely on the basis of the records which he inspected and the information which was requested from the financial institution which was requested by the FIA in accordance with the provisions of the MLPA. They submitted further that the evidence is evidence of fact and does not fall within the hearsay rule.

Analysis

- [19] It is clear that the FIA has several powers under the MLPA. Section 6 empowers the FIA to do a myriad of things in order to carry out its functions. The evidence produced by Sergeant Lamontagne speaks to evidence of his own investigations and what he noted and observed. I agree with the appellant that section 6 does not make evidence which may be hearsay admissible without more. The section merely sets out the powers of the FIA. Section 6 provides the following:

"6. Powers of the Authority

- (1) For purposes of carrying out its function under section 5, the Authority has the power to—

⁵ SLUHCv2013/0515 (delivered 27th July 2018, unreported).

- (a) **enter into the premises of a financial institution or person engaged in other business activity during normal working hours and inspect a transaction record kept by the financial institution or person engaged in other business activity;**
- (b) **require from any person, institution or organization the production of any information that the Authority considers relevant to the fulfillment of its functions;**
- (c) **ask questions relevant to a transaction record inspected under paragraph (a);**
- (d) **make notes or take a copy of part or all of the transaction record inspected under paragraph (a);**
- (e) instruct a financial institution or person engaged in other business activity to take steps as may be appropriate to facilitate an investigation by the Authority;
- (f) issue from time-to-time guidelines to financial institutions or persons engaged in business activity as to compliance with this Act and Regulations made under this Act;
- (g) **interview and take statements from any person in relation to a money laundering offence;**
- (h) inspect and conduct audits of a financial institution or a person engaged in other business activity to ensure compliance with this Act.

[20] I am of the view however that the statements referred to as hearsay are statements of Sergeant Lamontagne detailing his observations from his investigations and so are being put forward as direct evidence. This is clearly contemplated by section 6 of the MLPA. I am therefore of the view that the evidence is not inadmissible on the face of it and is a matter of proof. The appellant would have an opportunity to test the witness's evidence in cross-examination and address the Court on the relevant weight which he thinks the Court should ascribe to it. I agree with the appellant that the **First Caribbean v Paul Thompson** case does not speak to admissibility of evidence but rather it deals with the FIA's power to obtain certain information without a court order. I do believe that the witness here is providing the evidence not simply for the fact that he obtained the information but so that the Court would accept that evidence as being true but I do not think it is inadmissible. It is a question of the weight to be ascribed to Sergeant Lamontagne's evidence as presented in his affidavit.

Opinion Evidence

Objection No. 1

[21] Paragraph 19(c), (d), (g) (h), (i) and (l)-the appellant contended that the opinion evidence which is being led by the witness is expressed in an attempt to prove the fact that there are reasonable grounds for suspecting that the sums were from or for proceeds of crime and is therefore inadmissible. It offends against section 64 of the **Evidence Act**.

[22] The appellant contended that section 66 of the **Evidence Act** allows for opinion evidence to be led based on specialised knowledge. The appellant submitted that Sergeant Lamontagne does not possess the specialised knowledge in utilizing accounting, auditing and investigative skills to conduct an examination into the finances of an individual. The particular knowledge would fall within the purview of a forensic accountant and there is nothing before the Court to show that the witness possesses knowledge, skill and training in this area.

Expert Testimony

Objection No. 1

[23] The appellant contended that the witness purports to give expert evidence in his affidavit. He submitted that CPR 32.4 provides guidelines on the presentation of expert reports and the witness has not complied with the requirements of CPR and therefore that evidence should be struck out.

[24] The appellant further submitted that the net worth analysis attached to the witness's affidavit and marked TL8-13 contain hearsay evidence and should not be relied on by the Court.

Respondent's submissions

[25] The respondents submitted that Sergeant Lamontagne is able to offer an opinion in respect of his findings in this matter pursuant to section 66 of the **Evidence Act**. Sergeant Lamontagne, they submitted has properly demonstrated through his evidence that he possesses specialized knowledge based on his training, study and experience which would allow him to offer an opinion in this matter. They further submitted that it is for the Court to decide on

admissibility and whether such evidence can be accepted based on the witness' qualifications. They also submitted that Sergeant Lamontagne is not giving expert evidence but opinion evidence in accordance with section 66 of the **Evidence Act** and was not deemed an expert nor is he preferring expert evidence. The respondents also submitted that the net worth analysis exhibited by Sergeant Lamontagne is based solely on the information obtained by him in his investigations pursuant to the provisions of the MLPA. It is therefore direct evidence and not hearsay.

Analysis

[26] The appellant is asking the Court to assess the witness's qualifications at this stage when it is for the appellant to challenge this in cross-examination if he chooses to. There is no application before this Court to admit Sergeant Lamontagne as an expert witness and so CPR 32 is not engaged but rather he is being submitted as a witness having expertise in an area who is offering an opinion. It is for the Court as the respondents submitted to decide on the admissibility of any opinion evidence or the use of such evidence on the basis of whether or not the witness is qualified to give any opinion on the subject matter.

[27] I refer to the case of **Antonio Gellizeau v The State**⁶ where the Court of Appeal discussed the questions to be asked by a judicial officer in making a determination as to whether to permit expert evidence. Notwithstanding that the case dealt with a criminal matter and as I said earlier there was no application to deem Sergeant Lamontagne an expert witness, I believe the principles enunciated therein provide some guidance. The Court must consider "whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment in the subject matter without the assistance of witnesses possessing special knowledge or experience in the area; and whether the subject matter of the opinion forms part of the body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body

⁶ SVGMCRAP2013/0058, (delivered 5th April 2017, unreported).

of knowledge or experience, a special acquaintance with which the witness would render his opinion of assistance to the Court.

[28] The admissibility of Sergeant Lamontagne's evidence is therefore a matter to be determined by the Court having listened to all the evidence and the appellant having had the benefit of challenging the witness's qualifications. It is ultimately a question of weight to be attached to the evidence.

[29] This is supported by the case of the **State of Trinidad and Tobago v Boyce**⁷. In that case the Board was addressing a situation where the trial judge in criminal proceedings had ruled that a witness who was a medical doctor was not sufficiently qualified to give opinion evidence on causation and had withdrawn the witness' evidence from the jury. The Board was of the view that the judge had concentrated on whether the witness had the qualifications and had ignored the fact that by reason of his knowledge and experience, he may have been able to assist the jury in determining cause of death. From the Board's observations, it was a question of taking both the qualifications and experience into account in estimating the weight of his evidence.

[30] The net worth analysis is not hearsay. Sergeant Lamontagne says he conducted it from the information he obtained, and he analysed that information. This is his analysis based on his findings. It is for the appellant to challenge that evidence if he chooses to. Exhibits TL8-13 are documents which the witness says were prepared by him in the course of his investigations and as such they are not hearsay. It is more a question of weight to be ascribed to the evidence.

Background Facts

[31] As alleged by Sergeant Lamontagne, having received information from confidential sources, they were led to investigate the activities of Mr. Toussaint. Two searches were conducted at Mr. Toussaint's property and the sums were seized on 10th February 2012. This hearing concerns an application for forfeiture of the sums which is being held de novo.

⁷ [2006] UKPC 1.

- [32] Mr. Toussaint opposes the application. His position is that section 49A of the POCA has not been satisfied and that the applicant has failed to prove the case on the required civil standard, a balance of probabilities, as the sums were Mr. Toussaint's legitimate monies being his earnings from his business primarily as a cobbler over a period of approximately twenty (20) years.
- [33] The evidence in support of the application for forfeiture was given by Sergeant Lamontagne, an Accredited Financial Investigator having attended financial investigative courses with the Caribbean Anti-Money Laundering Programme ("CALP") and the Caribbean Regional Drug Law Enforcement Training Center ("REDTRAC"). He also received training regionally in financial investigation and received certificates of completion. Sergeant Lamontagne acts under the authority of the Commissioner of Police in relation to the POCA.
- [34] In amplification of his evidence, Sergeant Lamontagne provided further evidence of the courses undertaken by him with CALP and REDTRAC. In March 2002, he attended a two-week training course, the content of which involved topics including introduction and background to financial investigation, dealing with searches and documentary exhibits obtained through investigative interviewing and receiving statements from suspects, guidance on how to deal with informants and persons giving information, methods of presenting that information.
- [35] In August 2004, Sergeant Lamontagne explained that he attended a CALP Advance Financial Investigative Course which included topics such as analysis of business documents and accounting, methods of proof in particular the indirect method which includes net worth analysis, financial crimes, forensic accounting, review of witness and suspect statements, methods of dealing with informants and intelligence, special investigative techniques.
- [36] From 20th January to 27th February 2006, Sergeant Lamontagne indicated that he did an attachment with the FIA in Saint Lucia, the purpose of which was for mentoring and gaining hands on experience in pursuing actual financial investigation.

- [37] Sergeant Lamontagne also said that he attended a two-week training course with REDTRAC in November 2006 which focused on topics including financial investigation, identification of definition of financial crimes, familiarisation with money laundering schemes, analysis of sources of information and financial records, practice in conducting financial interviews. He would also have done an advanced training course in interviewing suspects in financial investigations in 2011.
- [38] According to Sergeant Lamontagne, as an accredited financial investigator his duties included liaising with police investigators and operations officers of the police, Customs & Excise and Inland Revenue departments, interviewing and obtaining statements from potential witnesses, inspecting and obtaining financial records from financial institutions, requesting other records from other institutions, analysis of documents to determine concealed income from criminal conduct, applying for search warrants, interviewing suspects, drawing conclusions from information obtained via records and interviews, participation in covert surveillance activities, preparation of affidavits, giving evidence in court and training of the enforcement officers.
- [39] In cross-examination, Mr. David Francis ("Mr. Francis"), Counsel for Mr. Toussaint sought to question Sergeant Lamontagne about the net worth analysis which he said he had conducted. In particular, Mr. Francis questioned the use of the last five years and suggested that this only showed a snapshot of Mr. Toussaint's entire working life. Sergeant Lamontagne explained that financial intelligence does not seek to identify all a person's income, expenditure and liabilities beyond five years prior to the recovery of the cash.
- [40] According to Sergeant Lamontagne's evidence the sums were seized from Mr. Toussaint on 10th February 2012 at the Central Police Station Custody Suite in Castries. Applications were made for the continued detention of the sums and extension orders were granted on 13th February 2012 and 8th May 2012 respectively. Those sums were subsequently deposited in an interest-bearing account.

- [41] Sergeant Lamontagne says he conducted enquiries at the financial institutions in Saint Lucia and the records of the financial institutions revealed that Mr. Toussaint had one active bank account and no loans with financial institutions in Saint Lucia. The second bank account maintained an average balance of about EC\$10.00 over the past five years and had not been operated during that period.
- [42] Sergeant Lamontagne's evidence was that the active account was opened on 18th May 2009 with a cash deposit of \$500.00 and after three years without any withdrawals the balance was EC\$68,964.10 as at 13th February 2012. As a result, Sergeant Lamontagne said in his opinion the bank accounts did not generate the sums which had been seized.
- [43] Sergeant Lamontagne says he also conducted enquiries at the Customs and Excise Department in Saint Lucia and their records reflected that Mr. Toussaint had never imported any items into Saint Lucia.
- [44] On 26th June 2012, Mr. Toussaint was re-interviewed under caution on suspicion of money laundering in relation to the sums in the presence of his then attorney. During that interview, according to Sergeant Lamontagne's evidence, Mr. Toussaint stated that one Matthew Rosemond was the one who ordered the items for him which he sells. Sergeant Lamontagne says he used information provided by Mr. Toussaint to tabulate his net income and derived his concealed income which he refers to as the Financial Analysis.

Sergeant of Police [Ag.] Felix Cools ("Sergeant Cools")

- [45] Sergeant Cools' evidence is contained in his affidavit filed on 6th August 2012. His evidence is that on 9th February 2012 having received information that controlled drugs were concealed on Mr. Toussaint's premises at Fond Assau, Babonneau, he obtained a search warrant and proceeded to the residence of Mr. Toussaint. He was accompanied by other police officers of the Drug Squad. It was clarified in a supplemental affidavit filed on 9th October 2019 by Sergeant Cools that he did not himself apply for the search warrant but was handed the warrant by his Department to proceed to the residence, it having been obtained

by Police Constable 604 Alden Raphael. Contrary to what was suggested in cross-examination by Counsel, Mr. Francis, the evidence did show that PC Raphael did obtain a search warrant to conduct the search of Mr. Toussaint's residence.

- [46] Upon arrival at Mr. Toussaint's home, he was the only one there. Sergeant Cools identified himself and other officers of the Drug Unit and proceeded to search Mr. Toussaint's house. Whilst searching the top drawer of a wardrobe in the bedroom, Sergeant Cools recovered a quantity of cash in bundles of rubber bands, concealed in a plastic bag. He asked Mr. Toussaint whether the cash belonged to him and where he had got it from. Mr. Toussaint responded in the affirmative and said he had a bus and the cash was his savings.
- [47] The search continued and under the bottom draw of the wardrobe, Sergeant Cools discovered a false compartment from where he recovered two sets of cash bundled in rubber bands in separate plastic bags.
- [48] Again, Mr. Toussaint was asked whether the cash was his and he answered in the affirmative and said he had two buses on the road. Nothing else was recovered from Mr. Toussaint's residence. Sergeant Cools took possession of the cash and invited Mr. Toussaint to accompany him to the Central Police Station Custody Suites where the cash was counted in Mr. Toussaint's presence. Mr. Toussaint was given a receipt for the cash and told that it was being taken possession of for the purposes of investigation. On 10th February 2012, Sergeant Cools met Sergeant Lamontagne, Mr. Toussaint and his then attorney at the Central Police Station Custody Suites. Sergeant Cools related what had transpired during the search and Sergeant Lamontagne then indicated to Mr. Toussaint that he had reason to believe that the cash was the proceeds of criminal conduct or intended to be used for criminal conduct and he seized the sums.

[49] Sergeant Lamontagne then informed Mr. Toussaint that he was in possession of a warrant to search his premises for documents evidencing his income and expenditure and ownership of property. Upon arrival at the residence, a copy of the search warrant was handed to Mr. Toussaint and he unlocked the door.

[50] A search was conducted and with the exception of a few utility bills no documents were found evidencing Mr. Toussaint's ownership of property or his income. Mr. Toussaint was then taken back to Central Police Station Custody Suite where Sergeant Lamontagne informed him that he was being arrested on suspicion of money laundering.

Discussion and Analysis

Sergeant Lamontagne's evidence

[51] Mr. Francis in his closing submissions invited the Court to find that Sergeant Lamontagne did not possess the required skills and expertise based on the limited training he had received and suggested that even a professional would have had difficulties tracing Mr. Toussaint's income in these circumstances. He suggested that as he had produced no documents to substantiate his findings, little weight should be ascribed to them.

[52] Mr. Francis admitted that he had not presented a forensic accountant to determine whether Sergeant Lamontagne's financial analysis was accurate but yet he concluded that the opinions expressed by Sergeant Lamontagne are opinions which this Court could come to absent Sergeant Lamontagne as a witness. The Court he submitted can make a determination that Mr. Toussaint's income was not sufficient for him to have acquired the assets that he had acquired.

[53] In response, Counsel for the respondents, Ms. Kozel Creese ("Ms. Creese") submitted that Sergeant Lamontagne conducted his duties as a financial investigator and his training would have sufficiently equipped him with the necessary skills required for such. She further submitted that there was no evidence before the Court to suggest that a certain number of years training is

necessary in order to be competent to execute the duties which Sergeant Lamontagne undertook.

Discussion and Conclusion

[54] As determined during the preliminary rulings, Sergeant Lamontagne was not presented to the Court as an expert witness. He was presented as an officer who has been trained in various aspects of financial intelligence and in that regard, he offers his findings and financial analysis and provides his opinion and interpretation on his findings. The appellant has produced no evidence to support his contention that Sergeant Lamontagne's training is insufficient to allow him to opine on or conduct the financial analysis in relation to Mr. Toussaint.

[55] From Sergeant Lamontagne's evidence his training has been specifically related to the area of money laundering and in the absence of cogent evidence, the Court is in no position to find that he does not possess the requisite training and skills necessary to conduct the tasks which he undertook including the net worth analysis. The appellant has made bald statements but has not furnished the Court with any evidence to suggest that in order to present the evidence which Sergeant Lamontagne did, he required certain and specific qualifications, years of study etcetera. The Court therefore accepts the evidence of Sergeant Lamontagne as it relates to the net worth analysis which he conducted, in light of the specific training which he obtained and also his experience over nine years working and training in the specific field of financial crimes and money laundering.

Requirements for an order of forfeiture

[56] The relevant section for the purposes of this matter is section 49A as amended of the POCA which states:

"49A. Forfeiture Order for Cash

(1) A court of summary jurisdiction may make an order ordering the forfeiture of any cash which has been seized under section 29A *if satisfied, on an application made by a police officer not below the rank of corporal, or a financial investigator of the Financial Intelligence Authority, while the cash is detained under that section, that the cash directly or indirectly represents any person's proceeds of, or*

benefit from, or is intended by any person for use in, the commission of criminal conduct.

(2) An order may be made under subsection (1) whether or not proceedings are brought against any person for an offence with which the cash in question is connected.

(3) Any party to the proceedings in which a forfeiture order is made (other than the applicant) may, before the end of the period of 30 days beginning with the date on which it is made, appeal to the Court.

(4) An appeal under this section must be by way of a hearing *de novo*, and the Court may make such order as it considers appropriate and, in particular, may order the release of the cash (or any remaining cash) together with any accrued interest. (my emphasis)

[57] It is important to note that this section relates to forfeiture of cash which has been seized pursuant to section 29A of the POCA. The requirements for seizure of cash under section 29A is that the police officer must have reasonable grounds for suspecting that the cash directly represents any person's proceeds of criminal conduct or is intended by any person for use in any criminal conduct.

[58] Under section 49A of POCA, the Court must be satisfied on application made by an authorised officer, that the cash seized under section 29A directly or indirectly represents any person's proceeds of, or benefit from, or is intended by any person for use in, the commission of criminal conduct.

[59] It is to be noted that the cash has already been seized which means that the threshold under section 29A would presumably have been met. This Court is not to determine whether there were reasonable grounds on the part of the seizing officer to ground the seizure of the sums. The test under section 29A is whether the police officer carrying out the seizure of the cash had reasonable grounds for suspecting that the cash directly represents any person's proceeds of criminal conduct or is intended by any person for use in any criminal conduct.

[60] The test under section 49A is whether the Court is satisfied that the cash seized directly or indirectly represents any person's proceeds of, or benefit from, or is intended by any person for use in, the commission of criminal conduct.

[61] The POCA is silent on the procedure that should be followed in respect of forfeiture. However, what is known is that the purpose of the forfeiture hearing is to determine whether the cash directly or indirectly represents any person's proceeds of or benefit from or is intended by any person for use in the commission of criminal conduct. If the court is so satisfied it may order the forfeiture of the cash.

[62] Section 2 of POCA defines criminal conduct as drug trafficking or any relevant offence. "Relevant offence" means:

- (a) (i) any indictable offence or an offence triable both summarily or on indictment in Saint Lucia;
- (ii) an offence listed in the Schedule;
- (b) ...

The standard of proof

[63] Section 62 of POCA provides that proceedings under section 49A, forfeiture proceedings, are considered civil, not criminal and the standard of proof required is on a balance of probabilities.⁸ Once the applicant has satisfied the Court to the required standard, it is for the defendant to show, also on the balance of probabilities, that the suggestion advanced by the applicant is incorrect.

Has the applicant, being Sergeant 122 Lamontagne satisfied the burden of proof?

[64] In his cross-examination of Sergeant Cools, Mr. Francis sought to question the procedure adopted in the search of Mr. Toussaint's residence and what information led him to have reasonable grounds for suspecting that Mr. Toussaint had drugs concealed at his residence. Mr. Francis suggested that Sergeant Cools had not provided any evidence of any surveillance prior to the visit to Mr. Toussaint's residence to which Sergeant Cools indicated that this information was confidential. Sergeant Cools also in re-examination indicated that there was no duty to put such surveillance information in his affidavit

⁸ SI No. 14 of 2013 Proceeds of Crime (Amendment) Act.

considering informant protection which he suggested should be done at all costs.

[65] I am of the view that there was no need to give details of the surveillance information received. In his affidavit, Sergeant Cools did say that the search of Mr. Toussaint's house was based on information received that drugs were being concealed at Mr. Toussaint's residence. A search warrant was issued for search of Mr. Toussaint's residence and it must be presumed that the Magistrate was satisfied that the information presented to him or her showed that there were reasonable grounds to suspect that Mr. Toussaint had committed an offence. I cannot see that it is necessary to provide details of the surveillance information which Sergeant Cools possessed in the affidavit. It is necessary to show that he acted on some information from a credible source.

[66] It is clear that the purpose of Sergeant Cool's evidence is to show how the money was recovered. From the cross-examination it was clear to me that Sergeant Cools was involved in the investigation of the criminal aspect of the matter and not the money laundering. Counsel, Mr. Francis appeared to have thought that Sergeant Cools' task was to determine the link between the money and the crime but Sergeant Cools was very clear about his role.

[68] In the cross-examination of Sergeant Lamontagne, the focus of Counsel, Mr. Francis' questions was to show that there was no evidence (i) to show a link between the cash and drugs, (ii) that Mr. Toussaint was involved in drugs, (iii) of Mr. Toussaint's criminal record, (iv) of any criminal conduct on the part of Mr. Toussaint, (v) of the details of the drug investigation, or (vi) that Mr. Toussaint committed any of the offences of drug trafficking or money laundering. To these questions Sergeant Lamontagne responded by saying that the matter is about the cash and not the criminal conduct of Mr. Toussaint.

[69] In their submissions, the respondents correctly point out that the nature of proceedings under section 29A and 49A of the POCA are in rem proceedings, in that the proceedings are against the cash and not the person and as such no

penalty attached to the person for having been found with cash that meets the criteria set out in section 49A of the POCA.

- [70] The respondents refer to the case of **Attorney General of Ontario v \$2,023.00 Canadian Currency (in rem) and Omar Rashid Ghader**⁹ where the Court said:

“Proceedings which deal with proceeds of unlawful activity and with instruments of unlawful activity are in rem proceedings, as against the property, rather than in personam proceeds, as against the person.”

- [71] At paragraph 18 of the judgment, the Court relied on a statement by Crane J in **Ontario (Attorney General v Chow)**¹⁰ where he had said that the legislation did not require the Attorney General to show that any particular person named or not named had these intentions or did these acts but simply required that the Attorney General show that the subject monies were obtained by, or intended to be used for, drug transactions. The legislation it was stated did not require finding of fault, either criminal or civil against a person.

- [72] In the case of **Antonio Gellizeau**, the court stated very clearly:

“...it shall be sufficient for the prosecution to aver that the property is, in whole or in part directly or indirectly the proceeds of crime, without specifying any particular crime, and the court, having regard to all of the circumstantial evidence, may reasonably infer that the proceeds were in whole or in part directly or indirectly the proceeds of crime.”

- [73] The respondents contend that the evidence of Sergeant Lamontagne shows all the circumstantial evidence which supports the inference that the sums seized were directly or indirectly proceeds of criminal conduct. The respondents therefore contend that the sums should be forfeited to the Crown.

- [74] I wish to highlight some of the cross-examination of Sergeant Lamontagne which I believe reflects the principles which are clearly set out in case law, some of which I have referred to. Counsel, Mr. Francis asked Sergeant Lamontagne whether his financial investigation led him to conclude that the money was from or for proceeds of crime to which he responded, “it led me to the conclusion that

⁹ 2006 Canlii 36954 (ON SC).

¹⁰ [2003] O.J. No. 537.

it is highly likely from proceeds of crime". Mr. Francis also questioned Sergeant Lamontagne about the fact that he conducted an investigation with respect to money laundering but did not charge Mr. Toussaint. He agreed and said further that if the evidence had revealed a criminal case against Mr. Toussaint he would have preferred such a charge.

[75] Sergeant Lamontagne admitted that he had confirmed that Mr. Toussaint was a cobbler as he had said and that he had visited his place of operation and saw him plying his trade at that location, and also that Mr. Toussaint had provided documentation to support ownership of the bus. Sergeant Lamontagne also indicated in cross-examination that he had verified Mr. Toussaint's ownership of one bus with the Department of Transport and not two as he had said when the search was conducted at his residence. Counsel, Mr. Francis asked Sergeant Lamontagne why this inconsistency was never brought to Mr. Toussaint's attention and he responded saying that he had already verified the information so there was no need.

[76] It is a well-known principle that to establish that the cash is the proceeds of or intended for use in a specified offence there is no need to prove specific criminal conduct. It is sufficient to show that property was most likely than not obtained through a kind of offence or offences specified in the POCA. Where the criminal conduct relied on is money laundering, it appears to be sufficient, applying the case of **R v Anwoir**,¹¹ that how the cash was handled gives rise to the irresistible inference that it can only be derived from crime.

[77] The evidence in support of an application may include evidence that the cash has been hidden and untruthful or inconsistent explanation(s) offered for its possession. In **Commissioners of Customs and Excise v Shah**¹² the court received evidence of the absence of a compelling reason, legitimate, commercial or otherwise, for avoiding the banking system and for carrying a sum of £304,000 in cash, with the attendant risks of theft and loss.

¹¹ [2008] EWCA Crim 1354.

¹² 18th June, 1999 (unreported).

[78] In **United States v \$42,500 in US Currency**¹³ the US Court of Appeals held that possession of a large amount of cash was 'strong evidence that the money was furnished or intended to be furnished in return for drugs.' Nevertheless, in **United States v \$506,231 in US Currency**¹⁴ the Court observed that no US court had yet held that the presence of a large sum of cash was sufficient, standing alone, to establish probable cause for forfeiture. It stated that the government may not seize money, even half a million dollars, based on the bare assumption that most people do not have huge sums of money 'lying about', and if they do, they must be involved in narcotics trafficking or some other sinister activity. Additional evidence is required from which inferences may be drawn if forfeiture is to be granted.

[79] Undoubtedly, those who carry large amounts of cash on their person or in a vehicle, or store it in their homes, will conceal it so that it is not stolen. However, methods of concealment may in themselves be capable of giving rise to an inference that the purpose of the concealment is more likely to have been used to conceal the cash from the authorities than from thieves.

[80] The financial background of the owner of the cash and of any business he owns will often be critical to an assessment of whether section 49A has been satisfied. Let us examine what Sergeant Lamontagne submitted as the bases to ground his application for a forfeiture order in respect of the sums seized.

[81] Sergeant Lamontagne in his affidavit states that there are reasonable grounds for suspecting that the sums directly or indirectly represented Mr. Toussaint's or any person's proceeds of or benefit from or was intended by Mr. Toussaint or any person for use in the commission of criminal activity. The reasons he gave were as follows:

- (a) that at the time of seizure of the sums Mr. Toussaint was the subject of a drug investigation by the Drug Squad of the Royal Saint Lucia Police Force;
- (b) that at the time of the search, Mr. Toussaint said he had a bus on the road when the first package of cash was recovered and then stated that he had

¹³ 283 F 3d 977 (9th Cir. 2002).

¹⁴ 125 F 3d 442 (7th Cir. 1997).

two buses on the road when the second package of cash was recovered. Mr. Toussaint lied to Sergeant Cools about the source of the sums which gave rise to suspicion that Mr. Toussaint had committed a money laundering offence which was being investigated by the FIA.

- (c) Mr. Toussaint said in the first interview that the sums were his savings over a twenty-year period but he also maintained a bank account with an approximately equivalent high balance which was amassed over a three-year period.
- (d) it is unusual and makes no economic sense for a person to keep such large amounts of cash legitimately earned at their premises rather than depositing in a bank where it could earn interest.
- (e) Mr. Toussaint stated that he had a savings account with approximately \$30,000.00 in it. However, enquiries revealed that he had an account with a balance of EC\$68,964.10. He lied about this.
- (f) Mr. Toussaint in a four-year period was able to build a house costing \$50,000.00 and purchase a minibus costing EC\$80,000.00 cash. There were no withdrawals noted from his bank account and he was still able to save approximately EC\$86,000.00 in cash.
- (g) it is not a usual practice for a person to conduct legitimate business with such large sums of cash;
- (h) it is common practice for drug traffickers and other criminals to transact business with bulk cash, thereby avoiding the financial system that would leave a trail of records enabling the source of funds to be traced;
- (i) Having conducted the net worth analysis and looking at what Mr. Toussaint owned and what he spent, it was clear that Mr. Toussaint's stated income less his living expenses was unable to generate this large amount of cash;
- (j) Mr. Toussaint had a high amount of income which could not be attributable to any legitimate source;
- (k) Mr. Toussaint has never declared any income to the Inland Revenue Department;
- (l) During the period of investigation, Mr. Toussaint never bothered to enquire as to when the sums would be returned to him. This is not the behaviour expected of someone who has a lawful claim to such a large sum of cash

and it is therefore reasonable to infer that the sums were derived from criminal activity;

[82] It is clear that the fact that Mr. Toussaint had that amount of cash in his possession at his residence at one time does not in and of itself satisfy section 49A. It has been known that some persons do not like banks and would rather keep their cash at home and therefore the question is what else the evidence reveals.

[83] Mr. Toussaint was the subject of a drug investigation and while no drugs were found at his residence, a significant amount of cash was found hidden away in his wardrobe clearly for safe-keeping and that is perfectly understandable. However, Mr. Toussaint was not a stranger to the bank as the evidence which has not been challenged shows that he had two bank accounts the larger of the two having an approximate balance of \$69,000.00. That balance appears from the evidence to have been amassed over a three-year period. Yet Mr. Toussaint had almost \$80,000.00 in cash in his possession and he said it was his life's savings which could not be true since he has a bank account which has a significant amount of money in it.

[84] Quite curiously, Mr. Toussaint said his bank account had \$30,000.00 when it had double that amount and that bank account had not been touched in the three-year period. It could be inferred from this that Mr. Toussaint was trying to conceal the true bank balance. There is no way one would have \$69,000.00 and not recall this and say that he has half that amount in his bank account. Based on Sergeant Lamontagne's evidence, no withdrawals had been noted but clearly monies were being deposited into the account based on the increased balances over the three-year period. On my analysis of the evidence, I do not accept that the sums could be accounted for in the manner stated by Mr. Toussaint, that is from his cobbler business, his bus, a one-time Government contract.

- [85] Mr. Toussaint clearly was not a stranger to the bank and the question is why would he have had such a large sum of cash at his residence rather than deposit this money into his bank account/s in his name which like the \$69,000.00 currently in the bank, could earn interest. By not utilising the bank, transactions become a lot harder to trace and it is reasonable to infer that this was Mr. Toussaint's reason for keeping such large sums of money in his possession.
- [86] The evidence of Sergeant Cools is that when questioned, Mr. Toussaint at first said he had one bus on the road and then it changed to two buses but Sergeant Lamontagne's evidence is that his investigations revealed not two but one bus. Mr. Toussaint clearly attempted to give an additional source of income to justify the sums found in his possession.
- [87] Mr. Toussaint said during the interview under caution form that he had built his house for approximately \$50,000.00 about three or four years before and he had also purchased a minibus about a year prior. Yet there are no withdrawals from his bank account at 1st National and no evidence of loans taken to finance the acquisition of these assets. Despite this, Mr. Toussaint had in his possession, approximately \$80,000.00 cash which he says was his life's savings and which in my view is improbable. Sergeant Lamontagne's evidence was not controverted in any way by Mr. Toussaint. I therefore agree with Sergeant Lamontagne when he concluded that it is not a usual practice for a person to conduct legitimate business with such large sums of money.
- [88] I accept the evidence of Sergeant Lamontagne again uncontroverted that no evidence of payment of taxes or customs duties by Mr. Toussaint was discovered during his investigations. The net worth analysis done by Sergeant Lamontagne revealed that Mr. Toussaint's income less his monthly expenses could not generate such a large amount of cash. The cross-examination of Sergeant Lamontagne in relation to the net worth analysis did not in my view undermine the credibility of the exercise conducted by Sergeant Lamontagne as no contrary evidence or analysis of Sergeant Lamontagne's net worth analysis was presented. In the absence of such evidence, I accept the net worth analysis

conducted on the basis that Sergeant Lamontagne was trained to carry out such an exercise.

[89] Whilst it is that Mr. Toussaint had sources of income which he could identify, he gave no evidence himself to controvert any evidence presented by Sergeant Cools or Lamontagne. Counsel, Mr. Francis sought to make certain assertions in his cross-examination of the two officers but none of that evidence is on affidavit from Mr. Toussaint. He chose to remain silent perhaps it being forgotten that these are civil proceedings and the appellant does have the burden of proving on a balance of probabilities that what the respondent says is inaccurate. By remaining silent, Mr. Toussaint did not discharge the evidential burden which lay at his feet.

[90] It is clear from the evidence presented by the applicant, that section 49A has been satisfied. There was enough circumstantial evidence to allow this Court to find that the cash seized and detained pursuant to section 29A directly or indirectly represents any person's proceeds of or benefit from or is intended by any person for use in the commission of criminal conduct and I so find.

Conclusion and Order

[91] In light of the foregoing discussion, I therefore order that the sums seized by respondents, that is, XCD\$71,920.00, USD\$4,249.00, EUR\$1,460.00 and CAD\$20 be forfeited forthwith together with any interest accrued thereon pursuant to section 49A of the **Proceeds of Crime Act**. I make no order as to costs on the appeal given my indication below.

Postscript

[92] It is my understanding that the appellant, Mr. Toussaint passed away before the delivery of this judgment which is regrettable. I deeply regret the delay in the delivery of the judgment which was by no means intentional and sincerely apologise to Counsel and to the estate of Mr. Toussaint.

Kimberly Cenac-Phulgence
High Court Judge

By The Court



Dp. Registrar