

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2018/0002A

BETWEEN:

THE ATTORNEY GENERAL

CLAIMANT

AND

KEITH ALLEN

DEFENDANT

Appearances:

Ms. Kaywana Jacobs with Ms. Janette Williams and Ms. Nekoosa Caesar for the Claimant

Mr. Richard Williams and Ms. Danielle France for the Defendant

Ms. Moureeze Franklyn representative for the Claimant

2020: 16th November
17th November
19th November
2021: 28th January

JUDGMENT

Byer, J.:

- [1] As the world has changed around us, the culture of “following the money” has taken on a whole new meaning. This case is one such case in which the claimant herein, the recovery agency filed this action against the defendant, following the money and in so doing seeks an order of recovery claiming that the defendant’s assets could not have been obtained by any lawful means and should therefore be forfeited to the State.
- [2] By claim form filed on the 25th May 2018, the claimant claimed an order for recovery pursuant to section 74(1) of the Proceeds of Crime Act¹ (hereinafter referred to as “POCA”) for the following orders:

1. Vehicles:

¹ Act No.38 of 2013 as amended by the Proceeds of Crime (Amendment) Act No 18 of 2017

- (i) One (1) Toyota Altezza bearing registration number P543, registered in the name of Keith Allen, insured at the Metrocint General Insurance Company and valued as at the date of renewal of the insurance policy, 19th April 2011, at Twenty Five Thousand Eastern Caribbean Dollars (EC\$25,000.00).
- (ii) One (1) Suzuki Escudo bearing registration number R810, registered in the name of Keith Allen, insured at the Metrocint General Insurance Company and valued as at the date of renewal of the insurance policy, 11th October 2011, at Thirty Eight Thousand Eastern Caribbean Dollars (EC\$38,000.00).

On the ground that they are Recoverable property;

Real Property:

- (i) Five Thousand Five Hundred and Thirteen square feet of land (5,513 sq. ft.) (Deed No. 3829/2011) located in Cane Garden registered in the name of Keith Allen valued at One Hundred and Forty Four Thousand, Two Hundred and Eighty Four Eastern Caribbean Dollars (\$144,284.00) (as at June 3rd 2011).

Accounts:

- (i) Savings Account No. 103547 at the Bank of Nova Scotia in the name of Keith Allen with a balance of EC\$176,198.85 as at May 16th, 2018.
- (ii) Savings Account No. 107470 at the Bank of Nova Scotia in the name of Keith Allen with a balance of EC\$22,501.92 as at May 16th, 2018.
- (iii) Savings Account No. 103547 at the General Employees Cooperative Credit Union in the name of Keith Allen with a balance of EC\$964.48 as at May 24th, 2018.

On the ground that the stated property and monies are Associated property.

2. An Order appointing Mr. Kirk DaSilva, a qualified accountant of over twenty seven (27) years, to carry out the functions of a Trustee for Civil Recovery.

3. Further or other order as the Court deems fit.

[3] The defendant in his defence² made a blanket denial of the allegations that monies that were used for the acquisition of the assets deemed to be recoverable by the claimant, were from any unlawful conduct and rather indicated that he had been involved in several business ventures that supplemented his formal salary as a pilot at LIAT.

[4] However by the time the matter came to trial, the claimant's claim had been whittled down to three main claims³ -

a. One (1) Toyota Altezza bearing registration number P543 and registered in the defendant's name. The vehicle was valued Twenty Five Thousand Eastern Caribbean Dollars (EC\$25,000.00) as at 19th April, 2011.

b. One (1) Suzuki Escudo bearing registration number R810 and registered in the defendant's name. The vehicle was valued Thirty Eight Thousand Eastern Caribbean Dollars (EC\$38,000.00) as at 11th October 2011.

² Filed on the 3/7/19

³ As identified in the submissions of the Claimant filed 1/12/2020

c. The sum of EC\$111,944.81 held in Account No. 103547 at the Bank of Nova Scotia in the defendant's name.

It is however to be noted that the claim for the monies held in the bank account of the defendant also included a sum that the claimants maintain was the portion of monies that the defendant invested in the original property claimed at Cane Garden, that they say came from unlawful conduct.

Background

- [5] The defendant was employed by LIAT as a Pilot and on the 23rd November, 2011, he was arrested and charged for the trafficking of narcotic drugs, namely, marijuana, in Barbados. The drugs weighed sixty-five pounds (65lbs) and held an estimated street value of One Hundred and Thirty Thousand Barbados Dollars (BDS\$130,000.00). The defendant on his first appearance at the District F Magistrate's Court on 25th November, 2011 pleaded not guilty to the offences. However the defendant changed his plea to guilty on his subsequent appearance on 2nd December, 2011.
- [6] The defendant was fined the sum of Two Hundred and Fifty Thousand Barbados Dollars (BDS\$250,000.00) and deported to Saint Vincent and the Grenadines on 27th January, 2012.
- [7] Thereafter, financial investigations were conducted at the request of the Barbados authority, in the pursuit of confiscation proceedings in that country. The investigations revealed that the defendant held significant assets which were subsequently restrained by Court Order.
- [8] Following the discontinuation of confiscation proceedings in Barbados, this claim was brought on the basis that the properties acquired by the defendant were obtained from proceeds of his unlawful conduct, namely, drug trafficking.
- [9] The claimant asserts that the defendant was routinely involved in the trafficking of the drugs prior to being arrested and convicted in Barbados in 2011 and that the property itemized at paragraph 4 (a) to (c) were acquired using funds from unlawful conduct.
- [10] The court is therefore in agreement with counsel for the claimant that the sole issue for the determination of this court can be stated thusly: ***whether on a balance of probabilities the property as claimed (as itemized after trial) is recoverable property having been obtained through unlawful conduct.***

The Claimant's Submissions

- [11] The basic premise of the case for the claimant was that the defendant had been regularly engaged in the trade of trafficking drugs for which he had been paid. It is these monies that the defendant then deposited into his account in an attempt to launder the same, comingling them with legitimate monies and utilized them for the acquisition of the assets that were presently sought to be forfeited.
- [12] In the claimant's view, none of the sources of income relied upon by the defendant were either legitimate or were they capable of supporting the acquisitions as seen by the claimant in their review of the defendant's financial life.

- [13] In the submissions of the claimant, the claimant examined the individual sources of income relied upon by the defendant to substantiate his lifestyle. Therefore, it is of some necessity that the court must examine those individual submissions in some detail.

Sale of Vehicles and Rentals

- [14] The submission of the claimant on this source of income was essentially that having looked at the records at the Inland Revenue Department, it was clear that as of 2009 the defendant was the owner of six vehicles, with no evidence of legitimate purchase. They submitted that the evidence from the person who sold the vehicles indicating that the same had been paid by way of manager's cheques was in direct contradiction to the defendant's own evidence that the purchases were undertaken by installment payments over a period of time. This contradiction in the evidence along with lack of bank transactions clearly indicated to the claimant, that the defendant was laundering monies received in his trade of drug trafficking by buying multiple vehicles. In fact, the claimant insisted that the dishonesty of the defendant was clear when they submit that when one of the defendant's vehicles was written off, and he received payment for the same, that the defendant then claimed that the wreck had been sold to a third party from whom he was then able to scrap the jeep and collect over thirty thousand dollars from those parts. The claimant's submission was that this was entirely a fraudulent transaction that never took place and that this was just a means to cover monies from unknown and unlawful sources.
- [15] With regard, to the rental of the vehicles, the claimant's contention was that firstly there could have been no rentals in 2009 as the defendant owned no cars with the designation "R". Additionally, and further, the claimant submitted that in any event if the defendant was so engaged in the period after 2009 that is during the period of the investigation to 2011, none of the defendant's financial information indicated any deposits of any sums that could be attributed to the rental agreements as presented.
- [16] Indeed the claimant submitted that none of the information provided which allegedly spoke to the business of car rentals should be accepted by this court, nor should this be considered a source of income for the defendant.

Scrap Metals

- [17] In relation to this declared source, the claimant submitted that not only were the receipts of dubious origin but that there was not one deposit into the defendant's bank account that reflected any of these sales that the defendant indicated that he had made. In fact, the claimant was completely derisory of the claims of the defendant that the amount of metal sold was always a round number which translated to a round sum for payment. Once again, they submitted that this declared source was less than credible and that the same should not be considered.

Foreign Currency

- [18] The sum of all Forex (foreign exchange) deposits made to the defendant's account for the period 2009 to 2011 showed a total of over twenty-six thousand Eastern Caribbean dollars. The claimant

submitted that when the actual deposits were examined, especially the Barbados dollars amounts, there was a clear increase during the period immediately before the defendant was arrested and charged but additionally the sum was always in the region of five hundred Barbados dollars the maximum amount that can be changed in any one day. The claimant submitted that this activity is indeed suspicious and that it cannot be coincidental as the defendant sought to indicate to the court.

General Merchandise

- [19] In the submissions of the claimant, this source of income was completely discounted. The claimant submitted that even though the defendant showed receipts for the purchase of merchandise, there were no records of the persons to whom the defendant sold or the price at which he sold the merchandise. The claimant therefore submitted that this lack of documentation must therefore result in the same being completely discounted.
- [20] Having therefore considered the sources of income, the claimant therefore stated categorically that the property that was acquired in Cane Garden also was acquired with sums that had no legitimate source and overall it was clear that although they could not specifically trace or track a specific sum to a specific asset, that when the court considers the overall behaviour of the defendant, and the lack of credible evidence to support his contentions, the court, the claimant submitted would have no other option but to grant the orders as prayed.

The Defendant's Submissions

- [21] The nub of the defendant's submission was that the claimant having had the burden of proof failed to adequately investigate the matter especially when the defendant had provided information that buttressed his explanations, but which were never followed up on or investigated.
- [22] The defendant made it clear that it was not open to the claimant to make bald statements denying the contentions of the defendant without doing their own due diligence.
- [23] In relation to the source of income from rental cars, the defendant had made it clear that he had rental vehicles which he hired out from time to time and provided the rental agreements to substantiate the same. The defendant submitted that it could not be open to the claimant to come to court, say that the rental agreements were not legitimate but failed to contact one person whose name and number appeared on the agreements as provided. The defendant further submitted that it was also not open to the claimant to make the assertion that the defendant having not declared this income to the Inland Revenue, that any sums that the defendant claimed to have made were not legal income.
- [24] In relation to the source of income from the sale of cars, the defendant's submission was that once again it was not open to the claimant to make statements that they did not accept the sums that were paid to the defendant when they had in fact made no search for the bill of sales that accompanied the sale of the vehicles nor did they investigate the documentary evidence provided for the transactions. The defendant stated that rather the claimants discounted a sum in excess of fifty thousand dollars as income to the defendant without proper investigation which the defendant

submitted was manifestly unfair to the defendant especially in relation to the ramifications of doing so.

- [25] With regard to the source of income from the sale of scrap metals and the general merchandising. The defendant criticized once again the claimant's failure to make any inquiries of the individual who is stated to have bought the scrap metals but with no evidence requested the court to discount the same. In relation to the monies earned from the sale of general merchandise the criticism was leveled at the claimant's failure to investigate but to however reject the receipts submitted as proof that the defendant would not have bought 15 to 17 television sets for his own personal use.
- [26] In general, the complaint of the defendant was that the claimant having failed to adequately discharge their burden was not entitled to the reliefs as prayed. That it was incumbent upon the claimant to have been thorough and to present cogent evidence to the court.

Court's Considerations and Analysis

- [27] In looking at this matter, it is clear to the court that it must be borne in mind that "civil recovery of the proceeds of crime is designed to target the wealth of criminal groups....civil recovery operates to allow the Attorney General to recover criminally acquired property, even if the owner themselves has not for whatever reason, been prosecuted for the criminal offence...serious organized crime is a global problem and in order to combat it, every country must play its part..."⁴ In fact the "purpose of civil recovery proceedings is to recover property which represents the proceeds of crime, not to prove particular criminal guilt in relation to particular acts against particular individuals."⁵ Therefore in saying this, there has to be, in this court's mind the presentation to the court of a thorough, well-reasoned investigation which would satisfy the court that they are entitled to deprive an individual of his property as enshrined in the Constitution.
- [28] That being said, it is therefore incumbent upon the claimant in these proceedings to never lose sight of two fundamental tenets involved in cases of this nature. Firstly, that the burden of proof always remains on them and secondly that the standard of proof is on a balance of probabilities.
- [29] As this court stated elsewhere⁶, the burden of proof always resides with the recovery agency, in this case the claimant, to prove that the defendant to the action has acquired assets by means of unlawful conduct. The claimants have stated that their case is that the monies used by the defendant to acquire the assets represents sums that came from unlawful conduct, namely drug trafficking. This is the case that the claimant is mandated to prove, and that burden remains on them throughout. However, when a claim is laid, it is usual that the facts as presented by the recovery agency would require an explanation to the same by the defendant. It is that explanation that is then assessed closely linked to the case of the claimant. This however "does not amount to a shift in any burden of proof."⁷ The defendant does not have to prove anything.
- [30] In relation to the standard of proof, this court is satisfied that the applicable standard is that of the balance of probabilities. That is, that the claimant proves their case on a balance of probabilities.

⁴ *Civil Recovery of the Proceeds of Crime: A Practical Guide For Conducting Civil Recovery Cases in Saint Vincent and the Grenadines* (2014)

⁵ **The Director of Assets Recovery Agency and ors v Jeffrey Green and ors** [2005] EWHC 3168 (Admin)

⁶ **The Commissioner of Police v The sum of EC\$41,390.00 and ors** SVGHACV2018/105 at paragraph 53

⁷ **Bujar Muneka v Commissioners of Customs and Excise** [2005] EWHC 495 Admin 0

- [31] In looking at this standard, the case law is clear that what is required is a “degree of probability which is proportionate to the subject matter”⁸. Thus, it has been recognized⁹ that there must be a degree of satisfaction in the court’s mind that a particular event has occurred. It has been stated thusly, *“the balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. This does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungood-Thomas J expressed this neatly in In re Dellow’s Will Trusts [1964] 1 WLR 451, 455: ‘the more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.’ This substantially accords with the approach adopted in authorities such as the well known judgment of Morris LJ in Hornal v Neuberger Products Ltd. This approach also provides a means by which the balance of probability standard can accommodate one’s instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.”*
- [32] It is therefore clear that the standard of proof that where the allegation is a serious one as in the case where the recovery agency is seeking to deprive an individual of certain constitutional rights to property, that the court must be “more sure” which can only occur if the court is given “...cogent evidence before deciding the balance of probabilities has been made out.”¹⁰
- [33] That being said in order to address its mind to the evidence that was led before the court, it is necessary to underscore the provisions upon which the claimant has relied for the filing of this claim.
- [34] The claimant’s contention is that the two motor vehicles in the name of the defendant and the sums of money held in account #103547 at the former Bank of Nova Scotia are recoverable property under the terms of POCA. Pursuant to section 65(1) of POCA, property that is obtained through unlawful conduct is recoverable property. What therefore is unlawful conduct? By section 63 of POCA, unlawful conduct is defined as ‘conduct which: if it occurs in the State, is unlawful under the criminal law of the State; or, if it occurs in a country outside the State: (i) is unlawful under the criminal law applying in that country, and (ii) if it had occurred in the State, would be unlawful under the criminal law of the State’. Finally, the claimant’s claim is that there was a sum of money invested in the property held in the name of the defendant which has no legal genesis, in that it was obtained from unlawful conduct. That sum is in the amount of Twenty-Two Thousand Dollars and this forms part of the sums sought to be recovered in the bank to the name of the defendant. Since this money was comingled with legitimate funds, the account is recoverable because it is associated property.

⁸ Denning LJ in **Bater v Bater** [1955] 2 QB 600

⁹ **Re H (Minors)** [1996] AC 563 at 586 D-F per Lord Nicholls

¹⁰ **ARA v He & Chen** [2004] EWHC 3021

- [35] In making an assessment of the evidence it was clear to the court that the claimant has not sought to aver that any specific asset sought to be recovered related to a particular transaction or was acquired by virtue of a particular transaction. Rather the case of the claimant is that the lifestyle and the acquisition of the assets were not supported by the defendant's declared legitimate income during the period 2009 to 2011 and therefore what was acquired during that period was acquired with significant assistance and support from unlawful conduct and they are entitled to recover those to the extent that they can prove that the defendant had not legitimately acquired the same.
- [36] In undertaking this exercise this court will not assess the assets but rather look at the evidence that was led on the sources of income that was stated by the defendant which allowed for him to acquire the named assets.

Car Rentals and Sales

- [37] The evidence of the defendant to substantiate his acquisitions was that; i) he was paid a good salary from his position as First Officer with LIAT, ii) he received extra benefits with the job which were paid to him separately from his salary and iii) he engaged in several business ventures that brought in extra cash. Two such ventures were car rentals and car sales.
- [38] In the witness statement of the defendant¹¹ he made it clear that initially his interest in vehicles had led him to buy and sell to upgrade the cars that he personally drove. He then relayed how he got into the rental car business by buying cars at a deal either by loans from the bank or from the seller themselves. The defendant made it clear that from that process he was able to acquire several vehicles during the period of investigation. However, by the time the matter came to trial the claimant only sought recovery of two of these vehicles.
- [39] The evidence of the defendant was supplemented by the evidence contained in Bills of Sale that were attached to the witness statement¹² as well as documentation from LIAT in 2012 of payment of a lump sum in excess of EC\$20,000.00¹³. Even though a close perusal of these documents show that they all were transacted outside of the period of investigation, this court cannot discount the same and accepts that those documents show a period of influx of cash (by way of the loans via the bills of sale) to buy the initial vehicles. Vehicles that in turn were sold to provide further cash injection for other vehicles subsequently acquired.
- [40] It is these vehicles that the defendant then states were rented under the umbrella of Keith Allen Rentals. Once again, the defendant supplied¹⁴ in total thirty-three rental agreements with the names and phone numbers of the renters clearly stated there. The claimant through the lead investigator Sgt Ivo Ash in response to this information on cross examination told the court the following:
- "I have seen the rental agreements ...I did count the rental contracts, it is possible that they are about 40. Each one has a name, address and some have phone numbers. I did not speak to the people that rented. I saw discrepancies ...all the agreements were written by the defendant ...there are no receipts or deposits....I analysed the information provided...my investigation would have*

¹¹ Filed on the 31/1/2020

¹² Exhibit KA12 to the WS of the Defendant filed 31/1/2020

¹³ Exhibit KA28 to the WS of the Defendant filed 31/1/2020

¹⁴ Exhibit KA9 to the WS of the Defendant filed 31/1/2020

been looking for receipts for transactions – there was not one - in my experience there would have been some paper trail ...my investigations was to find out whether contracts were legitimate or not - my investigation was not to find out if people had in fact rented ...if he was renting he would have had a set of rotating money.”

- [41] However it was of note, in this court’s mind that the second witness called by the claimant Officer Jovarni Browne, the titled financial analyst for the claimant also had this to say in cross examination which in this court’s mind was indeed telling:
“As far as I am aware [the defendant] had no other income than as a pilot ...the respondent did not file anything with the inland revenue department declaring to government that he was making extra monies ...he did not file income tax returns...I now know that he had other income but not at the time of my witness statement ...we received various documents from the respondent ...they had what appeared to be rental contracts ...I cannot say that they are contracts ...I see the signature of the owner...I see the signature where said renter ...the transaction must be closed, there must be a receipt. There was not one receipt that confirmed that there was a rental. Based on the documents provided there is no clear analysis that money was made.”
- [42] In this court’s mind, this was however not a position that the claimant could have taken in this regard. Indeed, it is clear to this court that if the defendant has raised a feasible positive case to answer the issue of additional monies from a business that he said rented vehicles over a period of time, the onus must be on the party to prove their case and to take positive steps to show that the explanation offered made no sense and should be entirely discounted.
- [43] In this regard, on the cross examination of the defendant on his evidence, counsel for the claimant took the court on a painstaking exercise of showing that there had been no deposits that correlated to the rental agreements that were exhibited. Indeed, it was clear to this court that if the defendant had wished the court to take into account that monies that were deposited into his account from this business which supported the acquisitions, there would have had to have been in this court’s mind some evidence of that fact. By his own evidence, the defendant admitted that for the period 2009 to 2011 the majority of the monies that he said he collected on rentals were not deposited in his account. However, can this fact alone lead to an inescapable conclusion that these rental transactions did not exist or did not take place as intimated by the claimant? In this court’s mind the answer to that cannot be as simple as yes.
- [44] When one considers the evidence of the defendant, his information and that as purportedly substantiated by his expert Mr. Stanley Defreitas (whose evidence this court found to be less than helpful in its independence or thoroughness) for the period 2010 and 2011 the defendant apparently made the sum of \$54,325.00, and an additional \$11,180.00 for 2009. It was however clear that none of these proceeds could be traced to any deposits that were made to the defendant’s account during that period and indeed the defendant was unable to substantiate the payments by the presentation of receipts. However, the burden is not on the defendant to prove anything, there was no “reverse burden of proof.”¹⁵
- [45] Even bearing that in mind, it is however clear that his evidence had to be credible. In this regard, the court had some concerns about the credibility of the defendant on this source of income:

¹⁵ **The Director of the Assets Recovery Agency v Fabian Jackson and anr** [2007] EWHC 2553 at para 118 per King J

- the defendant made a claim for the year 2009 in the sum in excess of \$11,000.00 yet in cross examination he clearly stated that he had not presented any rental agreements for the year 2009 as he could not find them, yet his expert stated in his report the figure attributable to car rentals and in evidence said that he got the figures from receipts and agreements that were presented to him. Mr. Defreitas categorically stated that he had seen receipts for the car rentals but that he was unable to specifically identify any deposit with any activity claimed to have been undertaken by the defendant.

- there was not one receipt presented to the court or the claimant to substantiate the rentals in the rental agreements for 2010 and 2011.

- there were only approximately two deposits in a 2 year period that the defendant identified were attributable to the rental periods under agreements.

[46] This court therefore accepts that the defendant to some degree had undertaken motor vehicle rentals during the period under investigation, that vehicles had been acquired for that purpose and that there would have been a rotating pool of funds that would have been created by this activity. The fact that the defendant failed to produce a deposit for those funds or receipts in this court's mind cannot amount to a total discredit of sums so collected. What it does show is that there was indeed a casual manner in which the defendant dealt with his business. Indeed, there is no obligation on a businessman to deposit monies he makes. It may raise an eyebrow or two, but a raised eyebrow does not amount and cannot equate to the same as the defendant having acquired any such sums by unlawful conduct. I therefore accept that the defendant made an income, of an undisclosed amount from the business of car rentals.

[47] As it relates to the source of income from the sale of vehicles.

[48] It was of some consternation to the court that in this regard the claimant's submissions on the evidence surrounding this source of income, was completely misleading. In relation to the disposition of the vehicle R808 the claimant had this to say¹⁶:

"(xiv) The defendant indicated that he sold the wreckage of R808 to Bernard Punnette for EC\$35,650.00 on 18th November, 2011. There are however no deposits into the defendant's account to support this claim. Further, the claimant asserts that it is ludicrous that the defendant would purchase his scrapped vehicle from Mr. Punnette and then resell it to Mr. Punnette for EC\$33,650.00 (**paragraph 37 of the defendant's Witness Statement and KA16 of the defendant's Witness Statement where there is a letter from Punnette dated 9th October 2014, as well as a 'receipt' for EC\$33,650.00**). The claimant asserts that the defendant never received this sum from Bernard Punnette.

(xv) The claimant however concedes that the defendant did receive EC\$28,500.00 from Metrocint Insurance Company on August 17th 2011 in respect of R808. Following this payout, the defendant no longer had possession of the vehicle and therefore could not have sold it.

(xvi) The fact that the defendant claimed to receive the amount of EC\$33,650.00 for the sale of parts from a vehicle he no longer owned shows that the receipts and statements presented by the defendant should not be relied upon."

¹⁶ Paragraphs xiv, xv and xvi of the submissions of the Claimant filed on the 1/12/2020

It was on the basis of this interpretation that the claimant then seeks this court's finding that the transaction relied on by the defendant should be completely discredited.

- [49] When the court reviewed the evidence that remained uncontroverted on this point, it was clear from the evidence of the defendant that after the vehicle R808 was written off by the insurance company he was paid a lump sum figure of EC\$28,500.00. The wreck then belonged to the insurance company who in turn sold it to one Bernard Punnette. It was from Mr. Punnette that the defendant then bought the wreck and scrapped the vehicle and sold it in parts. It is that sum of EC\$33,650.00 that the defendant then states that he was able to make in 2011 that was part of his income that year. This is an entirely different version of events as was stated by the claimant and in this regard the court accepts on a balance of probabilities that this was what transpired.
- [50] That sum as claimed to have been made by the defendant is therefore accepted by the court.
- [51] The defendant was also involved in the sale of vehicles in 2010 and 2011 to third parties. These transactions which took place with three different individuals were all questioned by the claimant as to their veracity on the basis among other things that there were no concomitant deposits to the defendant's account of the sums that he is said to have received as well as a query raised that one vehicle was transferred to the name of the purported purchaser before the monies were in fact paid. In cross examination the claimant by Sgt Ash told the court that of that total sums attributed to the sales from cars, he was not taking into account certain sums based on what he saw on the documents but when he was asked if he made any attempt to contact the persons who bought or make any investigations as to the actual sales, his answer was a resounding no. Additionally, when his colleague Officer Browne was cross examined he admitted that the extent of the investigation was that the bank and the Inland Revenue department were checked for the payment/deposits and the transfers. Neither of these witnesses made any search for the presence of Bills of Sale or even contacted the purchasers themselves to provide documentation of purchase.
- [52] It was therefore difficult for the court to draw the inference as sought by the claimant in this regard, namely that these sales were nonexistent or that they were somehow fraudulent in fundamental particulars. Although this court accepts that the claimant in cases such as these may not be able to provide conclusive evidence to a court that a particular defendant has engaged in or is in engaged in unlawful conduct, it is self evident that the court must be provided with information that a thorough investigation was undertaken and that the same at that point produced inferences that can be reasonably drawn.
- [53] Thus in this court's mind, the indication by the claimant's witnesses that the limit of the investigation and analysis were the bank deposits and the records of the inland revenue department does not and cannot amount in this court's mind to the "cogent evidence" that is required to support such serious allegations¹⁷. Indeed, although it must be however recognized that "...there is a danger in seeking to identify absolutes where questions of proof are in issue... the question in this case is whether [Mr. Allen] obtained the property in issue through the unlawful conduct alleged. The test is whether it is more probable than not that such is the case...it is the **whole case** that has to be balanced ..." ¹⁸ (My emphasis added). This court must therefore always be mindful that the whole case must be assessed based on what is presented before it.

¹⁷ **ARA v Jackson and anr** Op Cit at paragraph 121

¹⁸ **Director of the Assets Recovery Agency v Olupitan and anr** [2007] EWHC 162 QB

- [54] Therefore having accepted the evidence of the defendant as being truthful as to the activities undertaken for both car rental and sales I accept on a balance of probabilities that the sums claimed for these activities are legitimate save and except the sums claimed for the year 2009 for rental profits.

Scrap Metals

- [55] The sum attributed to this venture by the expert Mr. Defreitas in the years 2010 to 2011 was EC\$36,000.00. The defendant in this regard provided several documents¹⁹ upon which he relied as the receipts from sales he made to one Mark Jacobs at Caribbean Scrap Enterprise.
- [56] Unlike the other documents that were presented to the court for the other sources of income by the defendant, these receipts were by far the most vague and indecipherable. The evidence of the defendant was, *"I was also involved in the Scrap Metal Business. I would purchase scrap metal from various person in St. Vincent and the Grenadines and would sell them to Mr. Mark Jacobs of Caribbean Scrap Metals."* In this court's mind this was the barest and baldest statement as to the enterprise undertaken. However, it was clearly on the claimant to have conducted a thorough investigation that at the minimum should have involved contact with Mr. Jacobs. This was not done. However, this court as much as it finds fault with the claimant for failing to carry out appropriate due diligence, this court is unable to accept this evidence as it was presented to the court.
- [57] When this court viewed the documents and the bald statements of the defendant, it was very unclear to the court as to the extent of this venture or even any details of the same.
- [58] I therefore do not accept that the sum of EC\$36,000.00 can be attributed to such revenue.

General Merchandising

- [59] The defendant proffered that while flying he would visit St. Marten regularly and would purchase items such as electronics and cell phones and re sell them to interested persons in St. Vincent and intimations were made as to Barbados as well although that was not specifically stated in evidence.
- [60] By doing this, the defendant attributed EC\$92,605.00 in 2011 to this venture and EC\$9,481.00 in 2010.
- [61] In support of this information the defendant provided²⁰ receipts that showed that he had bought various items in St. Marten over that period including thirteen to fourteen televisions. There was however no corresponding information as to whom these items were sold to or the price at which they were sold. There was therefore no information that the claimant could verify.
- [62] The court was therefore left with the following evidence of the defendant: *"During the period of October 2010 – October 2011 I made frequent trips to St. Marteen to purchase electronics and clothes. These items amounted to approximately \$60,000.00EC dollars. I would add an average mark up of 100% on each item. If I paid \$400.00 for an item at a greatly reduced price I would sell*

¹⁹ Exhibit KA25 to the WS of the Defendant filed 31/1/2020

²⁰ Exhibit KA26 to the WS of the Defendant filed 31/1/2020

for \$800.00 and the profit would go to my achieving short term goals of reducing the land loan. I invested an average of \$60,000.00 over the year 2010 October to 2011 October. I have receipts to show the various transactions of the items purchased in St. Marteen."

On cross examination he added:

"I would buy stereo systems, TV's, cell phones and computers. I did not issue a receipt for these – there is no proof in the form of a receipt."

- [63] The defendant was then taken on an in depth review of the documents that he relied upon to show that income. Of those documents it was clear that the majority of the documents had no name as to who had purchased the items in St Marten and there was no evidence as to who he sold the same. The defendant's sole information to indicate that he was the one who purchased was the correlation seen on the bank statements where forex debits were made which were somewhat synced with the purchase of goods in St Marten. For example, the court saw an ATM withdrawal in St. Marten on the 9th June 2011 and on the 9th June 2011 there was also a receipt (with no name) paid for in cash and card for several electronic items.
- [64] So when this court considers this evidence and the claim of the claimant that there is not a scintilla of evidence of sale of these items steadfastly holding onto the position that "the respondent was not doing any general merchandising out of St Marten from sales of items he bought there"²¹ the question the court must again ask itself, is it more probable than not, that the defendant was engaged in the business of buying merchandise in St Marten and selling it in St Vincent as he indicated. In the case of **The Director of the Assets Recovery Agency v Woodstock**²² the court held per Hughes LJ²³ that a court should resist the temptation "...to equate the absence of regular documented source of income or capital with proof of criminal origin."
- [65] Indeed in the words of the expert Mr. Defreitas²⁴ "the defendant asserted that these goods ...had an average markup of 100% but there was no evidence of issued receipts to customers to corroborate this assertion. Nevertheless, we considered the plausibility because of the volume and nature of the goods as well as the prevailing market conditions in St Vincent and the Grenadines." Further in cross examination although the expert admitted that there were no deposits that equated to any sales from this merchandise, he did state that based on the quantity of items, he could not say that the same were bought for someone else, as gifts.
- [66] What therefore does this court believe in this regard? I believe that the defendant did purchase items from St. Marten while he was able to freely travel to St Marten. Those items were bought in sufficient quantities to suggest that the defendant was not buying them for his personal use. That the defendant was far from an organized efficient businessman but rather someone who was on "a side hustle" to make money taking advantage of his ability to fly with ease. I however do not accept that the claimant has proven its case in this regard either as to this source of income.

²¹ Cross examination of Sgt Ivo Ash on 16/11/2020

²² [2006] All ER (D) 271

²³ Op Cit at paragraph 10

²⁴ Page 16 of the Expert Report filed 24/10/19

Forex Credits

- [67] The claim of the claimant in this regard is that between deposits of Barbados dollars and another unknown currency, during the period under investigation, the defendant made deposits totaling EC\$26,240.64. The claimant also stated that it was during the year 2011 when the defendant was in fact arrested and charged with the trafficking of sixty-five pounds of marijuana that the deposits increased to an amount more than the combination of the two years previously.
- [68] The claimant accepted that the defendant resided in Barbados²⁵ but submitted that even if he did live there, it was more than a coincidence that he always was able to deposit the maximum amount of Barbados dollars. There was no evidence led as to the nature of the other currencies that were deposited from time to time in the account of the defendant.
- [69] The defendant's case made no clear indication as to where the foreign exchange came from save and except the amplification on direct examination to clarify that during the period of the investigation he lived in Barbados.
- [70] The one document that the defendant produced to apparently substantiate the claim that he was paid "regularly" in Barbados currency was a document that emanated from LIAT in 2012 that indicated he was made a onetime payment of BBD\$125.00²⁶.
- [71] In relation to the other unspecified forex deposits the defendant produced correspondence from LIAT dated the 15th September 2011²⁷ in which it was clearly stated that the defendant also received a sum of USD\$400.00 meal allowance every month. It appears therefore that this was a sum that was additional to the defendant's salary which the claimant by both their witnesses indicated they were unable to clarify through the auspices of the Antiguan authorities.
- [72] The court was therefore left with the impression that in relation to a portion of the forex deposits noted in the account of the defendant, that the claimant's conclusions were once again based on conjecture and lacked the cogency that needed to satisfy the court in this regard.
- [73] In relation to the unspecified forex deposits that were noted in the account of the defendant this court accepts that it is very likely that they represented the payment of the meal allowance that was paid by LIAT as indicated on their own documentation to that effect. Of course, it is more than passing strange that when the claimant attempted to clarify this payment that they were unable to do so, but this court accepts that there was such a payment made. However, regarding the deposit of the Barbados dollars this was seen frequently to equate to a sum equivalent to BD\$500.00. There was however no documentary evidence from the defendant to show that this was a sum that he received regularly from any legitimate source. Indeed, the concern for the court was the frequency of the same and the failure to account for the same by any means.
- [74] I cannot accept therefore those payments that could be attributed to the deposits of equivalent to BBD\$500.00 came from any identifiable source. On a "fine balance"²⁸, I do find that the claimant has established on a balance of probabilities that the genesis of the payments which may be unknown were also unlawful.

²⁵ Evidence on cross examination of Officer Jovarni Browne 17/11/2020

²⁶ Exhibit KA28 to the WS of the Defendant filed 31/1/2020

²⁷ Exhibit KA8 to the WS of the Defendant filed 31/1/2020

²⁸ **Olupitan Case** per Langley J Op Cit at paragraph 64

Land at Cane Garden

- [75] Initially the claimant had sought a recovery order in relation to this property at Cane Garden but at trial the witness for the claimant Sgt Ash clearly stated that they were not pursuing forfeiture of the land and at the end of trial the said lot of land was released from the earlier obtained property freezing order and instead a sum of \$22,000.00 was frozen which the claimant indicated was equivalent to the sum of money inputted into the land that was from unknown sources and therefore from unlawful sources.
- [76] This allegation therefore related to the issue as to how a court must deal with property that was obtained by what the claimant would consider lawful and unlawful means and therefore fell to be considered associated property.
- [77] Under the POCA, associated property is defined²⁹ as meaning:
- “...property of any of the following descriptions (including property held by a respondent) which is not itself recoverable property:
- a) any interest in the recoverable property
 - b) any other interest in the property in which the recoverable property subsists
 - c) if the recoverable property is in common ownership, the share of the other owner
 - d) if the recoverable property is part of a larger property but not a separate part, the remainder of that property ...”
- [78] In this regard it is therefore clear that the claimant is seeking to recover that portion of the value of the property at Cane Garden that represents the initial deposit on the purchase of the land. In the words of their witness Sgt Ash:
- “It is believed that in addition to his mortgage, Allen paid a deposit of Twenty Two Thousand and Ten Eastern Caribbean Dollars and Fifteen Cents (EC\$22,010.15) to Laflouf. This deposit was withdrawn from Account No. 103547 on 25th May, 2011.*
- While the monies were withdrawn from Account No. 103547 into which Allen’s salary was deposited, it is the submission of the Recovery Authority that the provenance of these monies, at least in part, was unlawful conduct and therefore constituted mixed property as described at section 67 of the Act. As indicated previously, there were numerous deposits from unknown sources into Account No. 103547. In May, 2011 when the deposit was paid to Laflouf from this account, the deposits from unknown sources totaled Forty Nine Thousand, One Hundred and Nineteen Eastern Caribbean Dollars and Twenty Eight Cents (EC\$49,119.28). This figure does not include funds transferred from Account No. 107470 and his salary.”*
- [79] It was also the initial contention that the defendant had falsified a transaction for \$30,000.00 from Curtis Lewis to buy the land as the same was actually seen to have been deposited in September 2011 some two or so months after the transfer of the land had been effected to the defendant. The claimant had contended that that purported loan from Curtis Lewis was merely a smoke screen for the input of this sum and in fact the source was unknown and suspicious.

²⁹ Section 72 POCA

- [80] On the morning of the first day of trial³⁰, the defendant under his ongoing obligation to disclose documents, disclosed a letter dated 23rd September 2011 from the then Bank of Nova Scotia, a letter offering the defendant a mortgage over the land at Cane Garden in the sum of \$517,000.00 for the construction of the home at Cane Garden. The defendant's explanation of the \$30,000.00 was that it was borrowed from Curtis Lewis so that he could qualify for this loan and that the same would be re-paid to him upon the loan being disbursed.
- [81] The court has seen the deposit of the \$30,000.00 that was made by way of a cheque from the Bank of St. Vincent and the Grenadines on the 2nd September 2011. It is this sum that the defendant alleges was used to qualify for the mortgage loan he received later that month. In this court's mind this cannot now be disputed given the correspondence that has come from the bank and the timing of the deposit into the defendant's account. It was therefore of some concern to the court that although the claimant did not doubt the authenticity of the correspondence from the bank, upon receipt it does not appear that any other question was asked as to the requirements of the defendant to have qualified for the mortgage of the said bank to discredit the claims of the defendant. I therefore accept that the monies that were said to have been a loan from Mr. Lewis were in fact just that.
- [82] In relation to the sum that was claimed as the initial deposit to the vendor of \$22,000.00, the claim of the claimant was based on the fact that the defendant had made numerous deposits outside of his salary that could not be accounted for which he then used to pay the deposit. However, since this court has found that the defendant on a balance of probability was engaged in other ventures that generated income, the court cannot accept the contention of the claimant with regard to the deposit paid for the purchase of the land at Cane Garden. The court finds that the monies in the account from which the deposit was paid was not mixed with monies obtained from unlawful conduct.

Conclusion

- [83] This court accepts that there is no need for the claimant to have proven a particular offence or particular conduct³¹ but in this case they did. However be that as it may, what the claimant must do is to prove on a balance of probabilities that the property was obtained by or in return for a particular unlawful conduct. It is not "sufficient solely to establish a lifestyle inconsistent with any identified lawful income. It is for the court to decide on a balance of probabilities whether the matters alleged constitute unlawful conduct have been proved."³²
- [84] In saying that this court is required to look at the totality of the evidence that had been presented to it on this case and that this court is also required to "...take a common sense approach to the inferences to be drawn from ...the failure of the Respondent to keep any business records in the context of the evidence as a whole."³³
- [85] In this court's mind, there is of course no doubt in this court's mind that the defendant would have benefitted from the transaction that he was found guilty of in Barbados, however this court is not

³⁰ Supplemental List of Documents filed on 16/11/2020

³¹ **Director of Assets Recovery Agency v Green** [2005] EWHC 3168 (Admin) per Sullivan J

³² **Olupitan case** Op Cit per Langley J at paragraph 22

³³ **Jackson case** Op Cit at paragraph 118

satisfied that the manner in which the defendant conducted himself in the three years prior to that arrest shows that he was either habitually involved in drug trafficking or that the supplements to his income came from that activity.

[86] At all times the onus is on the claimant to prove their case, they must be meticulous and thorough always bearing in mind that "...the Act represents a significant inroad into traditional property rights not depending on proof of criminal offence."³⁴ Bearing that in mind, in the case at bar the court is not satisfied on a balance of probabilities that the claimant is entitled to the entire recovery order as sought.

[87] The claim is therefore dismissed and the property freezing order obtained on the 15th May 2018 as varied is dismissed. Costs to the defendant on an unvalued claim pursuant to Part 65.5 CPR 2000.

Order of the court:

1. The sum of \$26,240.64 being the sum attributed to Forex credits together with the sum of \$36,000.00 representing the purported Scrap Metals income are to be forfeited to the State.
2. The balance of monies held in the account at Scotia Bank (now Republic Bank Ltd) in the name of the defendant is to be released forthwith.
3. The property freezing order obtained on the 15th May 2018 as varied on the 19th November 2020 stands dismissed.
4. The claimant having been largely unsuccessful on the claim, the sum equivalent to two-thirds (2/3) of the costs due to the defendant on an unvalued claim pursuant to Part 65.5 CPR 2000 are to be paid to the defendant.

**Nicola Byer
HIGH COURT JUDGE**

By the Court

Registrar

³⁴ **Ayodele Olupitan and ors v Director of Assets Recovery Agency** [2008] EWCA Civ 104 at paragraph 41