

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

COMMONWEALTH OF DOMINICA

DOMHCVAP2020/0005

BETWEEN:

[1] JHAWNIE GAGE
[2] ARAH PAULA CECIL DAVIS
[3] EDGAR AUGUSTUS PELTIER

Appellants

and

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mrs. Gina Dyer-Munro for the Appellants
Ms. Tameka Hyacinth Burton with her Ms. Jo-Anne Xavier-Cuffy for the Respondent

2020: November 10;
2021: June 11;
Re-Issued: June 15.

Civil appeal – Recovery of property under Proceeds of Crime Act Chap 12:29 (“POCA”) – Interim property freezing order – Whether learned judge erred in failing to consider submissions filed by appellants in the court below – Whether trial judge obliged to refer to all evidence in judgment – Indefeasibility of Title – Title by Registration Act, Chap. 56:50 – Whether the learned judge erred in that she failed to consider that second appellant held an indefeasible certificate of title – Whether in accordance with the Title by Registration Act it was open to respondent to challenge the second appellant’s ownership of that property – Registration of a charge is not challenge to title – Indefeasibility of title not a bar to the issue

of a property freezing order – Whether property recoverable property under POCA – Risk of dissipation – Whether there was a risk of dissipation by the appellants of the property listed in the freezing order – Material non-disclosure – Whether there had been material non-disclosure by the respondent in making application to the court for the freezing order – Privilege against self-incrimination – Whether the learned judge erred in not discharging the freezing order for breach of the appellants’ privilege against self-incrimination – Extraterritoriality – Whether the freezing order should have applied to property outside of Dominica

On 19th December 2014, the Attorney General of the Commonwealth of Dominica (“the respondent”) sought a recovery order pursuant to Part IIIA of the **Proceeds of Crime Act** (“POCA”) against Jhawnie Gage, Arah Paula Cecil Davis and Edgar Augustus Peltier (“the appellants”) in respect of certain items of real and personal property, including a Hummer H3 sports utility vehicle, bank accounts, and a parcel of land with a dwelling house on it at Shawford Estate.

On 23rd December 2014, the respondent obtained an interim property freezing order (“the freezing order”) which, inter alia, prohibited the appellants from ‘disposing of, tampering with, removing from the jurisdiction or in any way diminishing the value of the property and assets’ set out therein and which imposed on the appellants an obligation to inform the Financial Intelligence Unit (“FIU”) of all of their assets, whether inside or outside the Commonwealth of Dominica, and to give the location and details of all such assets. On 27th January 2015, the appellants filed applications to discharge the freezing order. The learned judge having heard the evidence and submissions, on 5th January 2020, dismissed the applications.

The appellants, being dissatisfied with the learned judge’s decision, have appealed to this Court, relying on fourteen grounds of appeal. The main issues that arise for determination before this Court are: (i) whether the learned judge erred in failing to consider submissions filed by the appellants in the court below in reply to the respondent’s submissions; (ii) whether the learned judge erred in that she failed to consider that the second appellant held an indefeasible certificate of title to the Shawford Estate land and that, in accordance with the **Title By Registration Act** (“TRA”) it was not open to the respondent in this case to challenge the second appellant’s ownership of that property; (iii) whether the property subject to the freezing order was recoverable property under POCA; (iv) whether there was unlawful conduct on the part of the first appellant from which the property listed in the freezing order was derived; (v) whether there was a risk of dissipation by the appellants of the property listed in the freezing order, so as to justify the grant of the freezing order in December 2014 and its continuation in January 2020; (vi) whether there had been material non-disclosure by the respondent in making application to the court for the freezing order and, if so, whether the learned judge should have discharged the order; (vii) whether the learned judge erred in not discharging the freezing order for breach of the appellants’ privilege against self-incrimination by virtue of the disclosure obligations under the order; and (viii) whether the freezing order should have applied to property outside of Dominica.

Held: dismissing the appeal; and making the orders set out in paragraph 75 of this judgment, that:

1. **Per Baptiste JA and Webster JA [Ag.]:** The general rule is that in delivering a judgment a trial judge is not obliged to refer to all the evidence in the trial and all the submissions of counsel. A judge does not have to deal expressly with each and every point in issue in his judgment, but where the issue is fundamental to the case, it deserves mention and an explanation for the judge's decision. It is only when the trial judge's failure to deal with material facts or legal submissions can be shown to have led to or contributed to an error in the findings that the appellate court should set aside the findings. The Court, however, undertakes a formidable task when invited to upset a judgment on this basis, as it is entitled and bound to assume that the trial judge considered all the materials before him, in the absence of compelling evidence to the contrary. In the case at bar, the learned judge had the entire record before her and in the absence of compelling evidence to the contrary, the assumption is made that she took the reply submissions into account. The learned judge's judgment does not lend itself or give rise to a reasoned belief that the learned judge forgot or ignored the reply submissions.

Watt (Or Thomas) v Thomas [1947] A.C. 484 applied; **Montgomery v Lanarkshire Health Board** [2015] UKSC 11 applied; **Correia v University Hospital of Staffordshire NHS Trust** [2017] EWCA Civ 356 applied; **Ming Siu Hung and others v J F Ming Inc and another** [2021] UKPC 1 applied; **Piglowska v Piglowski** [1999] 1 WLR 1390; **Housen v Nikolaisen** 2002 SCC 33 considered; **Henderson v Foxworth Investments Limited** [2014] UKSC 41 applied; **Eagil Trust Co. Ltd v Piggot-Brown and another** [1985] 3 ALL ER 119 at 122; **Wakeem Guishard v The Attorney General of the Virgin Islands** [2020] ECSCJ No. 327, (delivered 2nd October 2020) applied; **Cobham v Frett** [2001] 1 WLR 1775 considered.

Per Michel JA: Upon a review of the learned judge's decision, it is clear that the learned judge failed to consider the submissions filed by the appellants in the court below in reply to the respondent's submissions. Given the extensive and intensive nature of the overlooked submissions and the fact that they specifically controverted the respondent's submissions upon which the learned judge appeared to have based her findings and conclusions that the freezing order should not be discharged, or at the very least relied on in arriving at her findings and conclusions, these findings and conclusions by the learned judge cannot be sustained.

2. In the Commonwealth of Dominica, the holder of a certificate of title to a parcel of land cannot be challenged in a court of law on the ground that another person is the true owner of the parcel of land, except if the challenger can establish that the certificate of title was procured by its holder by fraud or that the challenger has become entitled to the parcel of land by his adverse possession of it for a period of at least 12 years. Neither of these two exceptions is applicable in the present case, because there is no evidence of the second appellant having acquired title to the parcel of land by virtue of any fraud committed by her, nor is

there any evidence of any other person becoming entitled to the parcel of land by virtue of adverse possession of it for 12 years. The title of the second appellant to the parcel of land with the dwelling house on it at Shawford Estate is accordingly indefeasible and cannot be ascribed to the first appellant on the basis of any contribution which he may have made (in whole or in part) to the acquisition of the property. Notwithstanding this, the second appellant's indefeasibility of title is not a bar to the issue of a property freezing order, so long as the property is recoverable property under POCA.

National Crime Agency v Azam [2014] EWHC 2722 (QB) considered; **David George v Albert Guye** [2019] CCJ 19 (AJ) applied; **Title by Registration Act** Chap 56:50, Laws of the Commonwealth of Dominica 1993 applied.

3. The provisions under POCA, insofar as they relate to the registration of charges, are not contradictory to the TRA. A charge on land under POCA could effectively be registered, as the registration of a charge is not a challenge to title in the sense contemplated by the TRA, but rather a statement that there is an interest held by another in the land. Further, the TRA does in fact provide for incumbrances to be noted on the title, and registration of incumbrances is not one of the carved-out exceptions to the indefeasibility of title.

David George v Albert Guye [2019] CCJ 19 (AJ) applied; **Title by Registration Act** Chap. 56:50, Laws of the Commonwealth of Dominica 1993 applied.

4. Recoverable property under POCA is property that was obtained through unlawful conduct or was derived from property which was obtained through unlawful conduct. To establish unlawful conduct, it must be established that there is a good arguable case that a certain kind of unlawful conduct had occurred and then a good arguable case that property was obtained through that kind of unlawful conduct. It is clear from the evidence and the inferences drawn from it, that the learned judge was entitled to find that there was at least a good arguable case that the first appellant was engaged in unlawful conduct involving illicit drugs and that the property listed in the freezing order was obtained through this unlawful conduct. Accordingly, the property listed in the freezing order is property for which a recovery order can be obtained by the Attorney General against the appellants and consequently, the Attorney General was entitled to seek and obtain the property freezing order in respect of the property.

Proceeds of Crime Act Chap. 12:29, Laws of the Commonwealth of Dominica 1993 applied; **Director of the Assets Recovery Agency v Szepletowski** [2007] All ER D 364 (Jul) applied.

5. In light of the fact that there needs be no more than an arguable case of the risk of dissipation, and the fact that there is the largely uncontroverted evidence that there was a risk of dissipation by the appellants of the property listed in the

freezing order, given the activities of and suspicions around the first appellant, and his relationship with the listed properties registered in the names of the second and third appellants, the judge was entitled to find, that there was a real risk of dissipation of the property by the appellants. This suffices to justify the grant of the freezing order by a judge in December 2014, and its continuation in January 2020, of the properties listed in the freezing order.

Nuttal v National Crime Agency [2016] EWHC 1911 (Admin) considered.

6. There was no non-disclosure by the respondent (through the agency of the FIU) of material information to the judge who made the property freezing order on 23rd December 2014, at least none so significant as to justify the lifting of the freezing order in circumstances where there is clearly a good arguable case that the first appellant engaged in unlawful conduct, likely connected to trafficking in illicit drugs, and that the property frozen by the order of 23rd December 2014 was acquired as a result of the unlawful conduct.

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 applied.

7. It was within the judge's jurisdiction and discretion to accept the undertaking of an agency acting on behalf of the Attorney General of the Commonwealth of Dominica not to use information obtained from the appellants' discharge of their disclosure obligations under the freezing order in any criminal proceedings against any of the appellants. It follows that the appellants' right or privilege not to self-incriminate was not breached or violated by their disclosure obligations under the freezing order.
8. The primary significance of the extraterritorial reach of the freezing order, is that it places on the appellants the obligation to disclose to the FIU the details of any property which they own outside of the Commonwealth of Dominica, so that the respondent can include such property in the civil recovery order. However, based on the disclosures made to date or the lack thereof, it would appear that the extraterritorial reach of the freezing order is no longer necessary, and it can be excised from the order without affecting its efficacy. Therefore, the freezing order will continue, but for the obligation which it placed on the appellants to disclose to the FIU details of any property that they own outside of the Commonwealth of Dominica, and so that no restrictions are placed on the appellants with respect to any properties which they may own outside of the Commonwealth of Dominica.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against an order by a judge of the High Court made on 5th January 2020 dismissing two applications filed by the appellants which sought to discharge an interim property freezing order obtained against them by the respondent.

Background

- [2] On 19th December 2014, the Attorney General of the Commonwealth of Dominica (hereafter “the respondent”) filed a fixed date claim seeking a recovery order against Jhawnie Gage, Arah Paula Cecil Davis and Edgar Augustus Peltier (hereafter “the appellants”) in respect of certain items of real and personal property listed in the fixed date claim form. The respondent alleged that the property is recoverable property under Part IIIA of the **Proceeds of Crime Act**¹ (“POCA”) as amended by the **Proceeds of Crime (Amendment) Act**.²
- [3] On 23rd December 2014, the Attorney General obtained an interim property freezing order (hereafter “the Freezing Order”) which, inter alia, prohibited the appellants from ‘disposing of, tampering with, removing from the jurisdiction or in any way diminishing the value of the property and assets set out herein’ and which imposed on the appellants an obligation to inform the Financial Intelligence Unit (“the FIU”) of all of their assets, whether inside or outside the Commonwealth of Dominica, and to give the location and details of all such assets.
- [4] The property which the appellants were restrained from dealing with, included jewelry, electronic equipment and devices, furniture, a sport fishing boat, motor vehicles; including a Hummer H3 sports utility vehicle registered in the name of the third appellant, bank accounts held in the name of the first appellant, and a parcel of land, together with the dwelling house erected on it, at Shawford Estate

¹ Chap. 12:29, Laws of the Commonwealth of Dominica 1993.

² Act No. 7, Laws of the Commonwealth of Dominica 2013.

somewhere in Dominica, and registered in the name of the second appellant (who is the first appellant's mother).

- [5] On 27th January 2015, the first and second appellants jointly filed an application to discharge the Freezing Order, whilst the third appellant filed a similar application, also on 27th January 2015. Following sundry further applications, delays and adjournments, the applications by the appellants to discharge the freezing order were heard on 29th March 2019, and on 5th January 2020 the learned judge dismissed the applications.
- [6] By notice of appeal filed on 2nd June 2020, the appellants appealed against the judgment of the learned judge. The appellants' grounds of appeal were listed in the notice of appeal as being from ground 1 to ground 16, but were in fact 14 grounds on the basis of which they submitted that the judge had erred; what was listed as a fifteenth ground of appeal was merely a summary of the 14 grounds; whilst what was listed as a sixteenth ground was notice of a possible leave application to file additional grounds when the notes of evidence of the proceedings before the learned judge became available.
- [7] From the 14 grounds of appeal and the submissions (both oral and written) made on behalf of the parties, I consider that the issues to be resolved by this Court in determining this appeal are the following:
- (1) Whether the learned judge erred in failing to consider the submissions filed by the appellants in the court below in reply to the respondent's submissions?
 - (2) Whether the learned judge erred in that she failed to consider that the second appellant held an indefeasible certificate of title to the Shawford Estate land and that, in accordance with the **Title by Registration Act**³ (hereafter "the TRA") it was not open to the

³ Chap. 56:50, Laws of the Commonwealth of Dominica 1993.

respondent in this case to challenge the second appellant's ownership of that property?

- (3) Whether the property subject to the freezing order was recoverable property under POCA?
- (4) Whether there was unlawful conduct on the part of the first appellant from which the property listed in the freezing order was derived?
- (5) Whether there was a risk of dissipation by the appellants of the property listed in the freezing order, in respect of which the respondent was seeking a recovery order, so as to justify the grant of the freezing order in December 2014 and its continuation in January 2020?
- (6) Whether there had been material non-disclosure by the respondent in making application to the court for the freezing order and, if so, whether the learned judge should have discharged the order?
- (7) Whether the learned judge erred in not discharging the freezing order for breach of the appellants' privilege against self-incrimination by virtue of the disclosure obligations under the order?
- (8) Whether the freezing order should have applied to property outside of Dominica?

Judge's failure to consider appellants' reply submissions

[8] The appellants say that they filed the following submissions as applicants in the court below for the discharge of the Freezing Order:

- (1) Submissions filed on 6th November 2016 in support of their applications to discharge the freezing order;

- (2) Amended Submissions filed on 30th November 2018;
- (3) Submissions filed on 13th December 2018 in reply to the respondent's submissions; and
- (4) Submissions filed on 10th May 2019 in response to the respondent's speaking notes.

[9] The appellants argue that in paragraph 7 of the judgment, the learned judge, in referring to the submissions which the appellants relied on, omitted the submissions in reply filed by the appellants on 13th December 2018 (hereafter 'the reply submissions'). They say that the reply submissions were not considered by the learned judge at all and that this can be seen in the judgment rendered, where the cases and legal submissions referred to in the reply submissions and relied on by the appellants were never even mentioned. They say that the reply submissions developed the appellants' arguments in support of their applications and responded to arguments advanced by the respondent in the submissions of 3rd December 2018, including distinguishing the cases referred to by the respondent and asserting that the cases were not applicable. They say too that, in her judgment, the learned judge referred to cases cited and relied on by the respondent, but not to the appellants' reply to the cases. The appellants specifically mentioned in this regard the case of **National Crime Agency v Simkus et al**,⁴ relied on by the respondent and distinguished by the appellants, but addressed by the learned judge only in the context of the respondent's submissions and not in the context of the appellants' reply to these submissions.

[10] The respondent's submissions in answer to the appellants' contention that their reply submissions were not considered by the learned judge, is that although the judge did not specifically refer to the appellants' reply submissions filed on 13th

⁴ [2016] EWHC 255.

December 2018, she expressly stated in her judgment that she considered all submissions made by counsel on both sides. The respondent's counsel also attempted to make an issue about the propriety of the appellants' argument that their reply submissions were not considered by the learned judge, by suggesting that this argument advanced by the appellants was 'a most serious allegation to be made by any party to the proceedings and there is no basis whatsoever upon which such an imputation can be made in the instant case'. This was, however, a completely unwarranted attack levelled by the respondent's counsel arising from a perfectly legitimate complaint made by the appellants.

- [11] The appellants' reply submissions consisted of 20 pages, with another 434 pages comprising mainly affidavits, judgments and textbook extracts, as attachments to the submissions. These submissions replied to the respondent's submissions, filed on 3rd December 2018, consisting of 18 pages, with another 348 pages comprising mainly statutory and judicial authorities. Despite this voluminous reply to the respondent's voluminous submissions, the learned judge addressed the respondent's submissions but did not even acknowledge the appellants' submissions in reply. Indeed, the learned judge appeared to have devoted about 22 paragraphs of her judgment to addressing the respondent's submissions, but none addressing the appellants' reply.
- [12] It is fairly obvious that the judge somehow overlooked, no doubt unintentionally, the appellants' submissions filed on 13th December 2018 in reply to the respondent's submissions filed on 3rd December 2018. Given the extensive and intensive nature of the overlooked submissions and the fact that they specifically controverted the respondent's submissions upon which the learned judge appeared to have based her findings and conclusions that the freezing order should not be discharged, or at the very least relied on in arriving at her findings and conclusions, these findings and conclusions by the learned judge cannot be sustained. This Court must therefore set aside the learned judge's decision to dismiss the appellants' applications to discharge the freezing order.

[13] Having done so, however, this Court is well placed to exercise its own discretion to discharge or continue the freezing order. We have the benefit of having before us all of the evidence (in the form of affidavits and exhibits) and all of the authorities (cases and statutes) and all of the submissions (of both the appellants and the respondent) which were before the court below, and even the benefit of having also the submissions of the appellants and the respondent filed in this appeal. With this rich reservoir of information available to this Court, I can proceed now to make my own findings and reach my own conclusions on the principal issues to be addressed in determining whether the freezing order made on 23rd December 2014 should be discharged.

Indefeasibility of certificate of title

[14] One of the primary bases on which the appellants say that the freezing order should be discharged, at least as far as it concerns the Shawford Estate property, is that the second appellant, being the holder of a valid certificate of title to the land on which the house is erected, has an indefeasible title to the property which is not open to be challenged as being the property of the first appellant or of any other person. They say this means that the Shawford Estate property cannot be the subject of a freezing order because it is not recoverable property by virtue of any unlawful conduct of the first appellant or of any other person apart from the second appellant, of whom no allegation of unlawful conduct has been made.

[15] The appellants' submission on the issue of the indefeasibility of the title of the second appellant to the parcel of land at Shawford Estate, is that the learned judge was not entitled to find that the land at Shawford Estate, which is registered in the name of the second appellant, was recoverable property under POCA, because recoverable property must be property owned by the person involved in unlawful conduct. They contend that the certificate of title which bore the name of the second appellant was indefeasible, by virtue of the TRA, and the learned judge should have found that the respondent was not allowed to 'go behind' the certificate of title to

assert that someone other than the registered owner of the land was the owner. This, they contend, is the effect of the indefeasibility of a certificate of title.

[16] The appellants question the respondent's reliance on the case of **National Crime Agency v Azam**⁵ and contend that that case is distinguishable from the present case, because the United Kingdom **Land Registration Act 2002**, on which the case was based, does not cloak titles issued under it with indefeasibility. Indeed, they contend (exaggeratedly though) that the indefeasibility of a certificate of title is unique to the Commonwealth of Dominica, and they cite the judgment of the Caribbean Court of Justice in the case of **David George v Albert Guye**⁶ in support of this contention. The appellants submit that there can be no challenge, therefore, to the ownership of land contained in a certificate of title unless it is on the basis of one of the two exceptions provided for in the TRA, these being, an allegation of fraud or a claim of adverse possession.

[17] The respondent, on the other hand, contends that Part IIIA of POCA, which deals with the civil recovery of property, is not concerned with any challenge as to whether a person is the legal or registered owner of a particular property. The respondent contends also that once it can be proven on a balance of probabilities that the property in question is recoverable property or associated property, as defined by POCA, then the property can be subject to a property freezing order, regardless of who is named in the certificate of title as the registered owner.

[18] Consideration of the merits of the conflicting positions of the parties should begin with section 8 of the TRA, which provides that – '[a]ll certificates of title granted under this Act, and all notings of mortgages and incumbrances on the same, shall be indefeasible'.

[19] Indefeasible is defined in the First Schedule to the TRA as follows:

⁵ [2014] EWHC 2722 (QB).

⁶ [2019] CCJ 19 (AJ).

“The word used to express that the certificate of title issued by the Registrar of Titles, and the notings by him thereon, cannot be challenged in any court of law on the ground that some person, other than the person named therein as the registered proprietor, is the true owner of the land therein set forth, or on the ground that the mortgages or incumbrances in the notings thereon are not mortgages and incumbrances on the said land; except on the ground of fraud connected with the issue of the certificate of title, or the noting of the mortgages or incumbrances, or that the title of the registered proprietor had been superseded by a title acquired under the Real Property Limitation Act, by the person making the challenge. The word also means that, the certificate of title being issued by the Government, the Government is, with the exceptions above mentioned, prepared to maintain the title in favour of the registered proprietor, leaving anyone justly aggrieved by its issue to bring an action for money damages against the Government.”

[20] In giving the majority judgment of the Caribbean Court of Justice in **David George v Albert Guye**, Justice Adrian Saunders provided a brief background to the TRA and the system of title by registration which it introduced into the laws of the Commonwealth of Dominica. In paragraphs 9 to 11 of the judgment, Justice Saunders said:

“[9] The TRA was enacted in Dominica about ten years after the passage of the [Real Property Limitation Act]. In enacting the TRA the legislature took fully into account the provisions of the RPLA. But nothing in the TRA states that it was an Act to amend the RPLA in any way. The purpose of the TRA was to enact the system of land ownership that had been adopted by some countries. It is a system that is named after Sir Robert Richard Torrens who designed and first introduced it into South Australia. The Torrens system encourages, if not mandates, landowners to bring their land under a registered system of land ownership and so to obtain a registered title certificate for the land you own.

[10] Before the Torrens system was introduced in the latter half of the 19th century, a purchaser or mortgagee of land, for example, could not depend on a title deed as evidencing the true ownership of the person whose name was on the title deed. Lawyers and/or their clerks would have to engage in much arduous research and inquiry to ensure that the title was a good and marketable one. The legislative scheme behind the Torrens system has been aptly described in *Gibbs v Messer* as being to

...save persons dealing with registered proprietors the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, bona fide and for value, from a registered proprietor,

and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title."

Dominica's TRA provides, for example, that a certificate of title and the notings on the certificate "cannot be challenged in any court of law on the ground that some person, other than the person named therein as the registered proprietor, is the true owner of the land therein set forth".

[11] The indefeasibility of a Certificate of Title in Dominica is not absolute. The TRA expressly admits of two exceptions to such indefeasibility. The first is 'fraud connected with the issue of the certificate of title'. So, for example, if you deceived the Registrar of Titles into issuing you with a certificate for a parcel of land that is in fact rightfully owned by someone else, then your certificate is not 'indefeasible'. The true owner would naturally be entitled to defeat its validity by establishing the fraud. The second exception is the one that is relevant to this case."

The second exception to which Justice Saunders referred is the exception to the indefeasibility of the title of the registered proprietor when his title is superseded by the adverse possession of the land by someone else for a period in excess of 12 years.

[21] It is clear from the definition of indefeasible in the TRA, and from the dicta of Justice Saunders in **David George v Albert Guye**, and indeed from the dicta of the other judges who delivered judgments in the CCJ (whether concurring or dissenting) that the holder of a certificate of title to a parcel of land in the Commonwealth of Dominica cannot be challenged in a court of law on the ground that another person is the true owner of the parcel of land, except if the challenger can establish that the certificate of title was procured by its holder by fraud or that the challenger has become entitled to the parcel of land by his adverse possession of it for a period of at least 12 years. For the latter exception to avail the challenger, however, the two dissenting judges would go further in requiring the challenger to first apply for registration of his title to the land as an adverse possessor before he could even defend a claim against him for possession of the land. But neither of these two exceptions is in play on the facts of the present case, because there is no evidence of the second appellant having acquired title to the parcel of land by virtue of any fraud committed by her,

nor is there any evidence of any other person becoming entitled to the parcel of land by virtue of adverse possession of it for 12 years. The title of the second appellant to the parcel of land with the dwelling house on it at Shawford Estate is accordingly indefeasible and cannot be ascribed to the first appellant on the basis of any contribution which he may have made (in whole or in part) to the acquisition of the property. This, however, is not the end of the matter.

- [22] What the respondent had put in issue in the court below, and what the learned judge in the court below accepted, is that the indefeasibility of the second appellant's certificate of title does not protect the property from being treated as recoverable property (by virtue of it being acquired by unlawful conduct of the first appellant) and from it being the subject of a property freezing order under POCA.
- [23] The judgment of the Caribbean Court of Justice in **David George v Albert Guye** does not assist the appellants. That judgment can be taken no further than to confirm that a certificate of title issued by the Registrar of Titles in the Commonwealth of Dominica is indefeasible and can only be challenged by satisfying the court that it was obtained by fraud or was superseded by a title acquired by another person by adverse possession of the property for a period of at least 12 years. But, as submitted by the respondent, and as found by the learned judge, this was not the issue in contention between the parties in this case and/or, in any event, this was not what the court had to decide.
- [24] As previously indicated, the court in this case had to decide whether the parcel of land at Shawford Estate, with the dwelling house on it, was recoverable property in accordance with POCA and could therefore be subject to a freezing order, and not whether any other person, including the first appellant, was the owner of the land.
- [25] This then leads on to the next issue for consideration by this Court, which is, whether the property listed in the freezing order was in fact recoverable property.

- [26] Before going on to address the issue, however, I will first address briefly a sub-issue raised by the appellants on the broader issue of indefeasibility of title.

Registration of charges

- [27] The appellants sought to advance the argument that the requirement for registration of charges under POCA is itself evidence of the indefeasibility of the title of the registered owner. I do not, however, agree with this argument. When a charge is registered as an incumbrance on a parcel of land, it is not a challenge to title in the sense contemplated by the TRA, but rather a statement that there is an interest held by another in the land. This is no challenge to the title holder, as the holder of a charge is not seeking to supplant the title holder, but rather is seeking to retain his beneficial interest in the land, and/or retain the right to receive the benefit of that interest when he so chooses, or when the title holder seeks to transfer his title interest.

- [28] The appellants also argued that **David George v Albert Guye** is authority for the position that POCA provisions, insofar as they are related to registration of charges, were contradictory to the TRA, in that someone could not effectively register any charge on land under POCA unless the TRA expressly provides for such registration. This, however, is not the case. As earlier stated, the registration of a charge is not a challenge to the title and, in fact, the TRA provides for incumbrances to be noted on the title, and registration of incumbrances is not one of the carved-out exceptions to the indefeasibility of title. What the Caribbean Court of Justice was dealing with in **David George v Albert Guye** was a challenge to the title of the holder of a certificate of title by an adverse possessor, and the court was grappling with the fact that it seemed contradictory that a squatter could obtain title to land although the title holder held an indefeasible title. Paragraph 34 of the CCJ's judgment reads:

“Some may consider that the concept of the indefeasibility of a registered title, with all the commercial advantages that possession of a certificate of title should bring, sits uneasily with the idea of adverse possession superseding such a title. But, for better or worse, that is precisely and expressly what the TRA allows. If this seems odd, then it is for the

Parliament to address that seeming contradiction by removing or qualifying the second exception to indefeasibility. The United Kingdom Parliament, for example, did so in 2002”.

[29] I take the view that the indefeasibility of the certificate of title of a registered owner of land does not affect the ability of a court to consider that a person other than the holder of an indefeasible certificate of title may have an interest in the land. It is therefore of no moment that there is no provision which enshrined indefeasibility in the UK **Land Registration Act 2002**, because the Court in **National Crime Agency v Azam** simply had to satisfy itself, as does this Court, and as the court below was charged to do, that the property which is subject to the freezing order was property which could be subject to recovery proceedings under POCA.

[30] Looking afresh then at the issue of the indefeasibility of the certificate of title of the second appellant to the property at Shawford Estate, my conclusion is that, although the second appellant’s certificate of title to the property is indefeasible, this is no bar to the issue of a property freezing order with respect to the property, as long as the property was recoverable property under POCA.

[31] This brings me to the question of whether the property for which the freezing order was granted was in fact recoverable property under POCA.

Was the property subject to a freezing order

[32] The appellants submit that in order for property to be subject to a freezing order, it must be property which is recoverable property under POCA. They further submit that in order for property to be recoverable property, the owner of the property must have engaged in some unlawful conduct, and that the unlawful conduct of someone other than the owner does not suffice. This they say is because recoverable property must also be tainted property, which they say is in keeping with POCA, because it confines the definition of recoverable property to property which is owned by the person who is alleged to have engaged in unlawful conduct.

[33] The appellants' submission therefore is that, insofar as there has been no allegation of unlawful conduct against the second appellant (as the registered owner of the Shawford Estate property) and the third appellant (as the registered owner of the Hummer H3 sports utility vehicle) the property Freezing Order cannot be maintained against them in respect of these items of property.

[34] The respondent, in rebuttal, submits that the civil recovery regime under POCA is an "in rem" regime where the orders are made against the property and not the individual. The respondent says, therefore, that the absence of criminality on the part of the second and third appellants is immaterial.

[35] Freezing orders, such as the type sought to be set aside in the court below, are governed by section 59M of POCA. Subsection (1) of this section reads:

"Where the Attorney General may take proceedings for a recovery order in the Court, the Attorney General may apply to the Court for a property freezing order, whether before or after instituting the proceedings".

Subsection (4) reads:

"The Court may make a property freezing order if it is satisfied that –
(a) there is a good arguable case that –
 (i) the property to which the application for the order relates is or includes recoverable property; and
 (ii) if any of the property is not recoverable property, it is associated property; and
(b) if the property to which the application for the order relates includes property alleged to be associated property, and the Attorney General has not established the identity of the person who holds it, the Attorney General has taken all reasonable steps to do so".

[36] Section 59L (1) of POCA stipulates that: '[t]he Attorney General may apply to the Court for a recovery order against any person who the Attorney General believes holds recoverable property'.

- [37] The conjoint effect of subsections 59M (1) and (4) and subsection 59L (1) of the POCA is that once the Attorney General can seek a recovery order in respect of any property, then he can also seek a property freezing order in respect of that property.

Whether the items frozen were recoverable property

- [38] Recoverable property, associated property, and tainted property are defined in section 59A (1) of POCA as follows:

“... “recoverable property” means – (a) property obtained through unlawful conduct and tainted property; (b) property obtained through unlawful conduct that has been disposed of since it was obtained through unlawful conduct or tainted property that has been disposed of since it became tainted property, if it is held by a person into whose hands it may be followed;”

“associated property” means property of any of the following descriptions, including property held by the respondent, which is not itself the 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”

“tainted property” means, subject to subsection (2), property that - (a) has been used in, or in connection with, unlawful conduct; or (b) is intended to be used in, or in connection with, unlawful conduct”.

- [39] The meaning of recoverable property under POCA, and its distinction from tainted property, is further exemplified by section 59D, which says in part in subsection (1) that – ‘[p]roperty obtained through unlawful conduct, or tainted property, is recoverable property ...’.

- [40] I do not therefore agree with the submission of the appellants that recoverable property must also be tainted property. The definition of the terms clearly indicates that tainted property is recoverable property, but recoverable property may not be tainted property. To put it in language that I recall from my elementary school days – ‘all tainted property is recoverable property, but not all recoverable property is tainted property’. This being the case, the stipulation at section 59A (1) of POCA

that 'property belonging to a person is not tainted property if the unlawful conduct is not the unlawful conduct of the owner' does not mean that property acquired from the unlawful conduct of a person other than the owner is not recoverable property.

[41] The question for the determination of the court below was whether any of the properties fell into the category of properties for which the Attorney General was entitled to seek a recovery order. Put another way, was any of the property obtained through unlawful conduct, or was derived from property which was obtained through unlawful conduct? If this could be established, then it would confirm the entitlement of the Attorney General to seek a property freezing order.

[42] The Court's consideration therefore moves to the question of whether unlawful conduct on the part of any of the appellants could be established.

Establishing unlawful conduct

[43] The appellants submit that there is no evidence of unlawful conduct with respect to the second and third appellants and so their property could not therefore come within the category of properties for which the Attorney General was entitled to seek a recovery order. They submit too that the applicable test for unlawful conduct is not one of irresistible inference as applied by the judge in the court below. They contend that a court is entitled to draw an inference of unlawful conduct in cases where someone has large amounts of cash in his possession in circumstances giving rise to suspicion, such as cash strapped to the person's body.

[44] The appellants contend that the case of **R v Anwoir**,⁷ which was relied on by the respondent, does not apply to circumstances other than those involving cash, and that the mere holding of property or having an expensive lifestyle is not what was contemplated in **R v Anwoir**. They also assert that **R v Anwoir** was a criminal case, the approach to which is different from civil recovery proceedings.

⁷ [2008] 4 All ER 582.

- [45] The appellants rely on the case of **Director of the Assets Recovery Agency v Szepletowski**⁸ and argue that the analysis of unlawful conduct must be twofold. They contend that the analysis has to first establish a good arguable case that a certain kind of unlawful conduct had occurred, and then a good arguable case that property was obtained through that kind of unlawful conduct. They contend that such an analysis was not done by the judge in the High Court.
- [46] The respondent argued in the court below, and the judge found, that the first appellant was engaged in unlawful conduct related to trafficking in illicit drugs. The respondent submitted that the court's approach to proving unlawful conduct was through the drawing of inferences by the learned judge, who found, on a balance of probabilities, that the property listed in the freezing order, including the land (with dwelling house) at Shawford Estate registered in the name of the second appellant and the Hummer H3 sports utility vehicle registered in the name of the third appellant, were procured by the unlawful conduct of the first appellant, who had no discernible income but had considerable personal property, and expensive real property owned by his mother but evidently paid for by him.
- [47] The Freezing Order, obtained by the Attorney General, was in respect of property owned by and/or registered in the name of all three appellants. There was, however, no evidence led in the court below of any alleged unlawful conduct of the second or third appellants, but there was affidavit evidence led by the respondent of unlawful conduct by the first appellant, from which conduct the court was invited to infer, and did infer, that all of the property covered by the Freezing Order was obtained. The evidence consisted of statements made by Corporal Patrick George, the Senior Financial Investigator at the FIU, in sworn affidavits filed in support of the application for the freezing order and in opposition to the application to discharge the order.
- [48] The evidence of Corporal George was that the first appellant not only purchased all of the items of jewellery, furniture, electronic equipment and devices, and other

⁸ [2007] All ER D 364 (Jul).

personalty found in his possession and/or under his control, but also that he financed the construction of the house at Shawford Estate valued in excess of one million dollars, located on land registered in the name of his mother, the second appellant, and that he purchased a sport fishing boat, and the 4 motor vehicles listed in the freezing order, including the Hummer H3 sport utility vehicle registered in the name of the third appellant.

[49] On the income side of the equation, the evidence of Corporal George was that the first appellant was not registered as a taxpayer or a contributor to social security, and that the last available record of his income, as at the date of hearing of the application to discharge the freezing order, was contained in a letter dated 28th August 2009 addressed to the US Embassy stating that he was employed at Element Agencies as a Tally Clerk at a salary of \$18,434.60 per annum; which employment, if indeed it ever existed, no longer subsisted.

[50] This evidence of apparent wealth of the first appellant, combined with no apparent legitimate source of income being earned by him, leads irresistibly to an inference of substantial income acquired by him from an other-than legitimate source, more specifically, from engagement in unlawful conduct. If there was any innocent explanation for this unaccounted for wealth, then surely it would have been provided with some conviction by the first appellant, whose affidavit evidence was a mishmash of mostly denials and non-admissions devoid of either cogency or consistency and not conducing to any belief in the existence of a legitimate income source to finance his lifestyle of a million dollar home, a sport fishing boat, which was never known to catch any fish, expensive motor vehicles, lavish home furniture and furnishings, expensive and plentiful electronic equipment, lots of jewellery, at least one bank account with over \$100,000.00 credited to him; and there was more.

[51] Combine this already irresistible inference of unlawful conduct from which considerably valuable assets appear to be derived, with the presence of the first appellant more than once on a boat out at sea searched by the coast guard for

illegal drugs, and the fleeing of the occupants of a boat in which 339 kilogrammes of cocaine were found by the coast guard, and with the appellant listed as one of the crew members of the boat who were believed to have fled capture, and the inference transitions from irresistible to inescapable that the first appellant was involved in unlawful conduct relating to trafficking in illicit drugs.

- [52] It is clear from this evidence and the inferences to be drawn from it, that the learned judge was entitled to find that there was at least a good arguable case that the first appellant was engaged in unlawful conduct involving illicit drugs and that the property listed in the freezing order was obtained through this unlawful conduct. The findings of the learned judge having been set aside, however, on account of her having overlooked the appellants' reply submissions, I will myself make the finding that there is at least a good arguable case that the first appellant was engaged in unlawful conduct involving illicit drugs and that the property listed in the freezing order was obtained through this unlawful conduct. The aforesaid property is accordingly property for which a recovery order can be obtained by the Attorney General against the appellants and, consequently, the Attorney General was entitled to seek and obtain a property freezing order in respect of that property.

Risk of dissipation

- [53] The appellants submit that a property freezing order is granted as an interim remedy on an application for a recovery order, designed to prevent the property owner from dissipating the property prior to the grant of a recovery order with respect to the property, so as to preserve the assets pending the determination of the claim for civil recovery. They say that to justify the grant of the freezing order, therefore, it is necessary to establish that there is a real risk of dissipation of the property prior to the hearing and determination of the claim for civil recovery. The appellants submit that no risk of dissipation of the property was ever established by the respondent, whether before the grant of the Freezing Order on 23rd December 2014, or upon the making of the order by the learned judge on 5th January 2020 continuing the Freezing Order. For this reason, they submit that, absent any real risk of dissipation

of the property, the learned judge should have discharged, rather than continued, the property freezing order.

[54] The respondent in answer submits that, as found by the learned judge, POCA (as amended) does not require that there be a risk of dissipation of assets before a freezing order is granted. The respondent cites the English case of **Nuttall v National Crime Agency**,⁹ decided on similarly worded legislation, as authority for this submission.

[55] The respondent submits too that, as found by the learned judge, there was sufficient evidence contained in the affidavits of Corporal George, from which it can be inferred that there was a real risk of dissipation of the property if the freezing order was not granted or continued.

[56] Having regard to the fact that there needs be no more than an arguable case of the risk of dissipation, and having regard to the fact that there is the largely uncontroverted evidence of Corporal George of the FIU that there was a risk of dissipation by the appellants of the property listed in the freezing order, given the activities of and suspicions around the first appellant, and his relationship with the listed properties registered in the names of the second and third appellants, the judge was entitled to find, and I do find, that there was a real risk of dissipation of the property by the appellants. This, for me suffices to justify the grant of the freezing order by a judge in December 2014, and its continuation in January 2020, of the properties listed in the freezing order.

Failure of the Attorney General to make full and frank disclosure

[57] The appellants argued in the court below, particularly in their submissions filed on 13th December 2018, which they claimed, and I have accepted, that the learned judge did not consider, that the respondent, in applying for the freezing order did not make full and frank disclosure and, in fact, there was material non-disclosure to the

⁹ [2016] EWHC 1911 (Admin).

court which dealt with the application. They contend that the learned judge erred in finding that there was no material non-disclosure or failure by the respondent to make full and frank disclosure, or that any such failure or non-disclosure was not fatal to the continuation of the freezing order. They acknowledge that any such finding by the learned judge would be a discretionary one which, in accordance with **Dufour and Others v Helenair Corporation Ltd and Others**,¹⁰ the Court of Appeal would only reverse if in the exercise of her discretion the judge went outside of the generous ambit within which reasonable disagreement is possible and was plainly wrong.

[58] The respondent submitted that there was no material non-disclosure by the FIU, as the agency of the respondent, in the application for an *ex-parte* property freezing order, or any failure by the respondent to make full and frank disclosure to the court. The respondent submitted further that, to the extent that there was any material non-disclosure or any failure to make full and frank disclosure, it was not of sufficient gravity to justify the discharge of a freezing order in circumstances where it is clearly in the public interest that the subject property be frozen, and remain frozen, so that it can be available to be dealt with in civil recovery proceedings.

[59] In her judgment, the learned judge dealt extensively with the law and facts on disclosure and non-disclosure in the context of *ex-parte* proceedings and *ex-parte* injunctions in particular. Although I have found that that she unintentionally failed to consider the appellants' submissions of 13th December 2018, the learned judge clearly dealt with the relevant facts, all of which were before her, and she referred to several cases (17 to be precise) in which issues of disclosure and non-disclosure were addressed. Indeed, she did refer to several of the cases relied on by the appellants in advancing their submission that there was material non-disclosure. At the end of this fairly extensive treatment of the issue, the learned judge concluded that there was no material non-disclosure on the part of the relevant agency of the

¹⁰ (1996) 52 WIR 188.

Government, namely, the FIU, or no failure by the FIU to make full and frank disclosure to the court, so as to justify discharging the freezing order.

- [60] Without regurgitating the affidavit evidence and judicial dicta addressed by the learned judge (covering 10 out of the 30 pages of her judgment) and taking into consideration the cases referred to by the appellants which were not referred to by the learned judge, I can conclude, without reservation, that there was no non-disclosure by the respondent (through the agency of the FIU) of material information to the judge who made the property freezing order on 23rd December 2014; at least none so significant as to justify the lifting of the freezing order in circumstances where there is clearly a good arguable case that the first appellant engaged in unlawful conduct, likely connected to trafficking in illicit drugs, and that the property frozen by the order of 23rd December 2014 was acquired as a result of the unlawful conduct.

Right not to self-incriminate

- [61] The appellants argued in their tenth ground of appeal and in their submissions in support of this ground, that the learned judge was wrong in law in failing to discharge the freezing order on the basis of the privilege against self-incrimination. They contend that the learned judge failed to take into consideration their reply submissions, which essentially advance that the disclosure obligations under the freezing order may compel the appellants to make disclosures which can later be used in criminal proceedings against them.
- [62] They submitted that the judge erred in ruling that an undertaking given by the FIU in its submissions to the court not to use any information which may be obtained as a result of a discovery order in this matter in any criminal trial concerning the applicants was sufficient to satisfy the court that the appellants' privilege against self-incrimination will be honoured.

- [63] The respondent, in answer, submitted that the learned judge did not err when she accepted the undertaking of the FIU that information disclosed by the appellants by virtue of the freezing order will not be used in any criminal proceedings against them and that, in any event, the information required to be disclosed by the appellants had already been disclosed by the time that the application to discharge the freezing order was made.
- [64] The appellants' argument in their submissions in support of their appeal, that the judge erred in failing to discharge the Freezing Order on the ground of the privilege against self-incrimination because she failed to consider the appellants' submissions as presented in their reply submissions of 13th December 2018, does not advance the appellants' position on this occasion because there was nothing of substance on this issue in the reply submissions.
- [65] The learned judge ruled that it was open to her to accept the respondent's undertaking not to use any information disclosed by the appellants by virtue of the freezing order in any criminal proceedings against any of them. The learned judge also ruled that, in any event, there was sufficient disclosure from the appellants as it relates to the assets forming part of the case so as not to require any further disclosure.
- [66] I consider that it was within the judge's jurisdiction and discretion to accept the undertaking of an agency acting on behalf of the Attorney General of the Commonwealth of Dominica not to use information obtained from the appellants' discharge of their disclosure obligations under the freezing order in any criminal proceedings against any of the appellants. The learned judge having exercised her jurisdiction and discretion to accept the undertaking of the principal law officer of the Commonwealth of Dominica, I can find no fault with her decision to do so.
- [67] As to the judge's apparent willingness to accept the position of the respondent that, in any event, disclosure had already been made by the appellants, it cannot speak

well of the first appellant for him, in his counter to that, to say that five and a half years since being obligated by the court to make certain disclosures, that he had not in fact complied with the court's order. The precise language of his submission of 3rd June 2020 is that 'the first appellant had not complied with any disclosure obligations'. But, in any event, the satisfaction of the court below, and indeed of this court, that the making of the freezing order did not violate the appellants' privilege against self-incrimination is based not on the fact of disclosure having already been made by the appellants, but on the court's acceptance of the undertaking of the Attorney General.

- [68] On this issue, I take the view that the judge's failure to have considered the appellants' reply submissions would not have vitiated the exercise of her discretion in finding that the appellants' right or privilege not to self-incriminate was not breached or violated by their disclosure obligations under the freezing order. In any event, exercising the discretion afresh, I would myself have made, and do now make, the same finding that the appellants' right or privilege not to self-incriminate was not breached or violated by their disclosure obligations under the freezing order.

Extraterritorial reach of the freezing order

- [69] The appellants took issue with the extraterritorial reach of the freezing order, whereby they were required to disclose to the FIU details of any property which they owned outside of the Commonwealth of Dominica. They submitted that the freezing order should have been discharged because it should not in law have been given that extraterritorial reach by the court because the respondent had not satisfied the requirements for an extraterritorial extension of the Freezing Order.
- [70] The primary significance of the extraterritorial reach, at least on the facts and circumstances of the present case, is the obligation that it places on the appellants to disclose to the FIU the details of any property which they own outside of the Commonwealth of Dominica, so that the respondent can include such property in

the civil recovery order which the Attorney General is intending to obtain from the court in respect of the appellants' property.

[71] As it stands, though, the respondent has stated in their submissions to this Court that they have already obtained the disclosure which they required, whilst the appellants have stated that five and a half years on, between the making of the freezing order in December 2014 and the filing of their reply submissions for this appeal in June 2020, they have not made any disclosure. For whichever, or both, of these reasons, it would appear that the extraterritorial reach of the freezing order is no longer necessary, if ever it was, and it can be excised from the order without affecting its efficacy.

[72] The appeal should, therefore, be allowed with respect only to the continuation of the extraterritorial reach of the freezing order, so that the freezing order will continue, but for the obligation which it placed on the appellants to disclose to the FIU details of any property that they own outside of the Commonwealth of Dominica, and so that no restrictions are placed on the appellants with respect to any properties which they may own outside of the Commonwealth of Dominica.

Conclusion

[73] For the reasons given in paragraph 12 of this judgment, I will set aside the learned judge's decision to dismiss the appellants' applications to discharge the freezing order, but, in the exercise of this Court's own discretion, I will dismiss the applications filed by the appellants on 27th January 2015 to discharge the freezing order granted by Wallbank J [Ag.] on 23rd December 2014. For the reasons given in paragraphs 69 to 72, however, I will discharge the disclosure obligations contained in paragraphs 11(1), 12(1) and 13(1) of Wallbank J's freezing order.

[74] No order was made by the learned judge in the court below on the issue of costs. Indeed, there was no mention of costs in the judgment. In the notice of appeal, the appellants mentioned "Costs" as the second of the two powers this Court was being

asked to exercise in respect of the appeal. No submissions were, however, made on either side on the issue of costs. Of course, the general rule, legislated in rule 64.6(1) of the **Civil Procedure Rules, 2000** is that the unsuccessful party is ordered to pay the costs of the successful party. This would mean that in this appeal, where the respondent largely prevailed, the respondent should get its costs. Given the nature of this matter, though, and its lethargic movement through the court system over a period of about 7 years, with hardly any of this delay attributable to the appellants, I believe that it would be a travesty of justice if the appellants were to be required to pay costs to the Government, as the respondent in this appeal (represented of course by the Attorney General). On the flip side though, it would not be justifiable to order the respondent, who was the successful party in the appeal, to pay the appellants' costs. It would be best, therefore, in the interest of justice, that there be no order as to costs.

[75] In the all the circumstances, I make the following orders:

- (1) The appeal is dismissed, save that the disclosure obligations contained in paragraphs 11(1), 12(1) and 13(1) of the freezing order made on 23rd December 2014 (which obligations were continued by the learned judge in her order dated 5th January 2020) are hereby discharged.
- (2) There is no order as to costs.

[76] **BAPTISTE JA:** This appeal arises out of a trial judge's dismissal of two applications to discharge an interim property freezing order obtained by the Attorney General. I would dismiss the appeal largely for the reasons articulated by Michel JA. I would, however, also have dismissed the ground of appeal that the learned judge failed to consider the appellants' reply submissions of 13th December 2018 - found in the Record of Appeal at pages 101 to 558. Accordingly, I will only deal with that ground.

[77] The appellants' counsel, Mrs. Dyer-Munro pointed to paragraphs 7, 8 and 9 of the decision, where the learned judge stated that the appellants relied on the following: submissions dated 6th November 2018; amended submissions dated 30th November 2018 and submissions in response to the respondent's speaking notes filed on 10th May 2019. The respondent relied on submissions in response to the appellants' submissions filed on 13th December 2018 and speaking notes submitted on 29th March 2019.

[78] Mrs. Dyer-Munro argued that the appellants were also relying on their submissions filed on 13th December 2018, but these submissions were not referred to by the learned judge as relied upon by them, nor referred to in the body of the ruling. Learned counsel posited that the submissions contained further arguments regarding full and frank disclosure, as well as cases distinguishing those referred to by the respondents but which the learned judge did not consider. The submissions raised legal arguments on the issue of arguability as being two-fold and requiring a two-pronged consideration. Learned counsel contended that the learned judge did not consider that test when referring to the submissions on the risk of dissipation. In the circumstances, learned counsel submitted that the appeal should be allowed.

[79] The legal principles governing the contention that a judge failed to take evidence or submissions into account falls to be considered. A convenient starting point is Lord Simon's dictum in **Watt (Or Thomas) v Thomas**.¹¹ His Lordship stated:

"The trial judge has come to certain conclusions of fact; your Lordships are entitled and bound, unless there is compelling reason to the contrary, to assume that he has taken the whole of the evidence into his consideration. If his conclusion is inconsistent with the evidence of certain witnesses, ...it is not proper or necessary inference that he has forgotten or ignored them; ...".

This important observation is subject to the qualification, 'unless there is compelling reason to the contrary'. This position was re-affirmed in **Montgomery v**

¹¹ [1947] A.C. 484 pg. 492.

Lanarkshire Health Board.¹² Nevertheless, it is clear that the wider principle is that there is no requirement for the fact-finder to refer to or discuss every point in the evidence.¹³

[80] Griffiths LJ addressed the issue in **Eagil Trust Co. Ltd v Piggot-Brown and another**¹⁴ in strident terms :

“I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis upon which he has acted...”

[81] The question whether a judge has failed to take something into account is not to be answered by an over-zealous dissection of the language of the judgment.¹⁵ An appellate court should be mindful of the warning of Lord Hoffmann that it should resist the temptation to subvert the principle that it should not substitute its own discretion for that of the trial judge by a narrow textual analysis which enables the court to say that he misdirected himself.¹⁶

[82] In **Housen v Nikolaisen**,¹⁷ the Supreme Court of Canada explained that an omission is only a material error if it gives rise to a reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. The court noted that the full evidentiary record was before the judge and absence proof that omission in her reasons was due to her misapprehension or neglect, of the evidence, we can presume that she reviewed the evidence in its entirety and based her factual findings on this review. The mere fact that a trial judge did not discuss a certain point or certain evidence in depth is not a sufficient ground for appellate interference.

¹² [2015] UKSC 11, at para. 102.

¹³ *Correia v University Hospital of North Staffordshire NHS Trust* [2017] EWCA Civ 356 at para. 41.

¹⁴ [1985] 3 ALL ER 119 at 122.

¹⁵ *Ming Siu Hung and others v J F Ming Inc and another* [2021] UKPC 1 at para. 22.

¹⁶ *Pigłowska v Pigłowski* [1999] 1 WLR 1360, at 1372.

¹⁷ 2002 SCC 33 at para. 72.

- [83] The validity of a finding of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must consider all the material evidence although it need not all be discussed in his judgment. The weight which he ascribes to it is pre-eminently a matter for him, subject only to the requirement that his findings be such as might reasonably be made. An appellate court could therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.¹⁸
- [84] The authorities demonstrate the formidable nature of the task attendant upon an invitation to the Court to upset a judgment on the ground that the judge did not expressly deal with each and every point or, as here, did not take the reply submissions into account. The courts have made the position clear by the use of emphatic and strident language such as: the Court is 'entitled and bound... to assume...' that he has done so; and 'I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel.' The strong presumption that the trial judge considered the reply submissions presented on the appellants behalf has not been displaced in this case.
- [85] On the appellants case, the learned judge mentioned the appellants' submissions as well as the respondent 's submission and the speaking notes, but not the appellants' reply submissions. It is interesting to note the matters that Mrs. Dyer-Munro said were raised in the reply submissions: further arguments on matters on full and frank disclosure, cases which were distinguished, and legal arguments on the issue of arguability as requiring a two pronged consideration, which were not considered by the learned judge when referring to the submissions on the risk of dissipation. In cases regarding freezing orders, matters such as full and frank disclosure and the risk of dissipation of assets are to the fore and the judge would

¹⁸ per Lord Reed, para. 57 of *Henderson v Foxworth Investments Limited* [2014] UKSC 41.

have been quite cognisant of the submissions on these issues as well as the relevant law.

[86] In advancing the position that the learned judge did not take the reply submissions into account, Mrs. Dyer-Munro seems to have embarked upon an impermissible, over-zealous dissection of the language of the judgment and conducted a narrow textual analysis which enabled her to advance the view that the learned judge ignored it. The position is that the learned judge had the entire record before her and in the absence of compelling evidence to the contrary, consistent with the authorities, the assumption is made that she took the reply submissions into account. It cannot be implied that by not mentioning the reply submission, the learned judge must have forgotten or ignored it. The judgment does not lend itself or give rise to a reasoned belief that the learned judge forgot or ignored the reply submissions. It was clear what were the judge's decision on the critical issues and why she reached her conclusion. The judge's decision was rationally supportable.

[87] For all the reasons indicated, I do not accept learned counsel's contention that the learned judge did not consider the reply submissions. Accordingly, I would also dismiss that ground of appeal.

[88] **WEBSTER JA [AG.]:** I have read in draft the judgment of my brother, Michel JA and I agree that the appeal should be dismissed. However, I wish to express myself differently on the learned judge's failure to refer to the reply submissions filed by the appellant on 13th December 2018.

[89] The general rule is that in delivering a judgment a trial judge is not obliged to refer to all the evidence in the trial and all the submissions of counsel. What is important is that the judge should deliver a clear and well-reasoned decision by which the parties can be certain why they won or lost and which will enable an appellate court to

decide whether the judgment is sustainable. This point has been made by this and other appellate courts on numerous occasions, the most recent being **Wakeem Guishard v The Attorney General of the Virgin Islands**¹⁹ delivered on 2nd October 2020²⁰ where Farara JA [Ag.] made the following observation at paragraph 47:

“In reviewing the learned Master’s assessment and decision on this limb of damages, I am cognisant that a judge is not required in his decision to slavishly recite or regurgitate each and every fact or factor from the evidence which has been alluded to or relied upon by the parties in their submissions, nor is a judge required to state every principle of law upon which the parties have relied in their argument. It is also not the task of a judge to conduct a detailed analysis of all the evidence he has heard or which has presented at the trial or relied on in the submissions made by the parties. What is of the utmost importance is for the judge to render a decision which is clear and well-reasoned, and upon which the parties can be certain as to why they won or lost, and which will enable an appellate court to decide whether or not the decision is sustainable. In **Re F (Children)** Sir James Munby P formulated this important principle in this way:

“Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure, the task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all evidence and submissions he had heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in *SP v EB* [2014] EWHC 3964 (Fam), 1 FLR 228, para 29, there is no need for the judge to “incant mechanically” passages from the authorities, the evidence or the submissions, as if he were “a pilot going through the pre-flight checklist.”

[90] I agree with these principles and would add the further principle that can be extracted from them is that it is only when the trial judge’s failure to deal with material facts or legal submissions can be shown to have led to or contributed to an error in the findings that the appellate court should set aside the findings. The same principle applies where there is excessive delay in the delivery of judgments – the appellate

¹⁹[2020] ECSCJ No. 327, (delivered 2nd October 2020).

court will not set aside the judge's findings in the delayed judgment unless it is satisfied that the delay caused or contributed to the erroneous findings by the trial judge.²¹

[91] I have reviewed the trial judge's judgment and I am satisfied that notwithstanding her failure to deal with the reply submissions, the judgment is comprehensible and her findings are clear.

[92] Michel JA carried out a thorough analysis of the judgment and dealt with the main issues arising from the grounds of appeal. He found that the judge's findings on the issues were sustainable and therefore made findings that are substantially the same as those made by the judge. I agree with his findings and conclusions and I would also dismiss the appeal with no order as to costs.

By the Court

Chief Registrar

²¹ Cobham v Frett [2001] 1 WLR 1775, per Lord Scott of Foscote at page 1783.