[2016] JMCA Civ 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 29/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**DELORES ELIZABETH MILLER**	**APPELLANT**
AND	**THE ASSETS RECOVERY AGENCY**	**RESPONDENT**

Nigel Jones and Zavia Mayne instructed by Zavia Mayne & Company for the appellant

Mrs Susan Watson-Bonner and Miss Alethia Whyte for the respondent

3, 4 June, 18 December 2015 and 9 May 2016

PANTON P

[1] I have read in draft the judgment of my brother Dukharan JA. I agree with his reasoning and conclusion and have nothing to add.

DUKHARAN JA

[2] On 18 December 2015, the court made an order dismissing this appeal and affirming the civil recovery order made against the appellant by D O McIntosh J on 17 February 2012, in respect of cash in the sum of US$1,350,300.00. The court also

ordered that the appellant should pay the respondent's costs, such costs to be taxed if not agreed. These are the reasons for this decision, with apologies for the delay in delivering them.

[3] In order to understand how the matter arose, it is necessary to state something of its background. The respondent (the ARA) is a statutory body by virtue of section 3 of the Proceeds of Crime Act (POCA). On 24 September 2007, Beckford J heard an application by the respondent, pursuant to rule 17.1(1)(c) of the Civil Procedure Rules (the CPR), for the detention and custody of cash in the sum of US$1,350,300.00. The cash was found wrapped in newspaper and foil and placed amongst frozen meats in the freezer compartment of a refrigerator during a search of a property occupied by the appellant. The application as granted and it was ordered that the order was to remain in effect "until the trial of these proceedings".

[4] Prior to the granting of that order, the cash was seized under section 75 of the POCA and a first continued detention order of the cash by virtue of section 76 was in effect. The first continued detention was ordered on 27 June 2007 for three months. It is however unclear whether the continued detention was pursuant to section 76(2) – by a Resident Magistrate - or section 76(3) – by a Justice of the Peace - of POCA.

[5] On 30 November 2010, D O McIntosh J, after the parties, through their respective counsel, indicated their agreement on the facts, heard submissions from counsel in respect of issues of law related to the ARA's claim, which was brought by

way of an amended claim form filed on 18 September 2007, against the appellant and three other defendants, for a civil recovery order pursuant to section 57 of POCA, in respect of US$1,350,300.00 and other properties (not in issue on appeal). By a consent order made by G Smith J on 20 August 2009, the amended claim form ordered to be treated as if commenced by way of a fixed date claim form. The evidence in support of the claim was set out in the affidavits of Assistant Superintendent of Police Dean-Roy Bernard and Jorge Da Silva, United States Drug Enforcement Officer.

[6] As it relates to the appellant, learned counsel for the ARA submitted in the court below, in reliance on sections 55-57 of POCA, that the properties subject to the freezing, detention and custody orders are recoverable property within the meaning of POCA. Learned counsel argued that it was irrelevant that the criminal charges under POCA against the appellant have been adjourned, given that in a civil recovery action the court is not concerned to establish criminal guilt. Instead, learned counsel submitted, the concern is with unlawful conduct solely for the purpose of identifying property with a sufficient relationship to that conduct to render it recoverable. The case of **The Queen on the application of the Director of Assets Recovery Agency and Others v Jeffrey David Green and Others** [2005] EWHC 3168 was relied on in support of that argument.

[7] Also, relying on **In the matter of the Director of the Assets Recovery Agency and in the matter of Cecil Stephen Walsh and in the matter of the**

Proceeds of Crime Act 2002 [2004] NIQB 21, learned counsel submitted that, in the absence of legitimate income or capital to support the appellant's asset base and in the light of the affidavit evidence of ASP Bernard and Mr Da Silva it is reasonable on a balance of probabilities that the assets detained are recoverable property, which should be forfeited to the Crown. Learned counsel argued that the appellant, a higgler, could not have amassed the assets detained based on her income and expenses.

[8] In response, learned counsel for the appellant asserted that on 27 June 2007, the Resident Magistrate Court issued an order for the detention and forfeiture of the US$1,350,300.00 pursuant to section 76 of POCA. Under section 76, learned counsel submitted that the detention of cash seized may be extended for a period of three months from the date of the order, but not beyond a period of two years beginning from the date of the first order. Accordingly, he argued, given that the ARA has failed to have the order of 27 June 2007 extended and the period of two years has elapsed, the appellant is entitled to the return of the cash, which should not be forfeited.

[9] Learned counsel further argued that in the light of the charges for money laundering having been adjourned sine die, there was no evidence linking the money or the appellant to any criminal conduct or activity. Accordingly, he submitted that there was a single issue to be determined by the court, that is, "whether the property is [sic] the subject of the claim is 'recoverable property'". In reliance on section 57 of POCA and the approach set out by Sullivan J in **The Queen in the application of the**

Director of Assets Recovery Agency and Others v Jeffrey David Green and Others (which was approved by the Court of Appeal in **R v W (N) and others** [2009] 1 WLR 965), learned counsel argued that the ARA failed to satisfy the court that the property owned by the appellant was acquired through unlawful conduct and that, consequently, she ought not to be called upon to justify her lifestyle.

[10] D O McIntosh J found that the issue to be determined by the court was "whether the properties seized are recoverable property that is 'property obtained through unlawful conduct'" (paragraph 58 of the judgment). In deciding this question, he recognized that he had to examine the evidence and, in so doing, he found that (a) the appellant lied about the identity of her sons and their occupation; (b) there was an absence of any evidence that she worked to earn the money (as a higgler or otherwise); and (c) the fact that the seized properties were all in her possession "must lend to one inevitable conclusion". He took note of the fact that the appellant gave inconsistent accounts of how she came to be in possession of US$1,350,300.00, in that, she initially stated that the money belonged to her son, who resided in the USA and was a construction worker and then later she claimed the money represented her earnings as a higgler.

[11] The learned judge, at paragraph [69] of his judgment, stated that it was "incumbent on [the appellant] to demonstrate evidentially how [she] lawfully came in possession of the assets seized". He found that the appellant only stated that she

worked as a higgler, but has amassed thousands of United States dollars, without more. Accordingly, D O McIntosh J found that "[t]he only reasonable and inescapable inference based on all the evidence is that the properties seized are properties obtained through unlawful conduct and are therefore Recoverable Properties" (paragraph 70 of the judgment). The claim by the appellant, he acknowledged, appeared to be in respect of the monies seized by virtue of section 76 of POCA.

[12] D O McIntosh J found, at paragraph [71], that there was no evidence before him that would warrant the court refusing a recovery order pursuant to section 58 of POCA. He also acknowledged that mere lifestyle was not sufficient to conclude that money was obtained by unlawful conduct, and as such the lifestyle of the appellant was one of the many factors the court considered in making a recovery order. Accordingly, having been satisfied that the ARA proved its case, he made a recovery order in respect of US$1,350,300.00, among other properties.

The appeal

[13] It is against that order that the appellant appealed. In a notice of appeal filed on 2 March 2012, the appellant stated the grounds of appeal as follows:

> "a) The application for the forfeiture of the funds found on the [appellant's] premises had lapsed by virtue of the fact that the procedure set out under Section 76 had been breached.

b) The evidential burden on the [ARA] to establish 'unlawful conduct' on the part of the Appellant had not been established.

c) The Learned Trial Judge erred in law in relying mainly on the lies told by the Appellant as a basis for his findings.

d) The Learned Trial Judge failed to appreciate that although the facts were not in issue there was still a duty on his part to evaluate the worth of the evidence in the affidavits filed which consisted mainly of 'hearsay evidence'."

[14] In light of the grounds of appeal and the submissions of counsel for the parties, the issues to be addressed by this court are as follows:

1. Whether the Supreme Court had jurisdiction to hear the recovery order proceedings in respect of the cash sum of US$1,350,300.00, given proceedings for its seizure and detention had been made pursuant to section 76 of POCA.

2. Whether the learned judge could be faulted for his decision, in respect of the agreed evidence, to grant a recovery order in respect of the cash sum of US$1,350,300.00.

Issue one

Whether the Supreme Court had jurisdiction to hear the recovery order proceedings in respect of the sum of US$1,350,300.00, given proceedings for its seizure and detention had been made pursuant to section 76 of the POCA

Submissions

[15] The appellant, through her counsel, submitted that where the ARA invokes section 76 of POCA, it cannot by virtue of section 79 apply to the Supreme Court for a forfeiture order. Learned counsel submitted that once section 76 is invoked and the ARA elects to bring forfeiture proceedings, it must do so in the Resident Magistrate's Court.

[16] Counsel for the ARA argued that no application for forfeiture of US$1,350,300.00 was filed and that what existed up to the time of the custody and detention order dated 24 September 2007 was an order for continued detention pursuant to section 76(3) of POCA.

Analysis

[17] There is no dispute on the facts that, on 26 June 2007, cash in the sum of US$1,350,300.00 was seized from the appellant (by virtue of section 75 of POCA) and that, on 27 June 2007, a first order for the continued detention (for three months) was granted pursuant to section 76. There is also no contention that on 18 September 2007, the respondent filed an application for detention and custody orders in respect of US$1,350,300.00 pursuant to rule 17.1(1)(c) of the CPR, which was granted on 24

September 2007. Also, on 18 September 2007, the respondent filed an amended claim form, supported by amended particulars of claim, in which it sought recovery of US$1,350,300.00, *inter alia*, against the appellant and three other defendants.

[18] In examining this issue, it is prudent to set out the relevant provisions of POCA. Section 75(1) provides:

> "(1) An authorized officer may seize any cash if the officer has reasonable grounds for suspecting that the cash is—
>
> (a) recoverable property; or
>
> …"

Section 76 states as follows:

> "(1) While the authorized officer continues to have reasonable grounds under section 75(1)…, cash seized under that section may be detained initially for a period of seventy-two hours.
>
> (2) The period for which cash or any part thereof may be detained under subsection (1) may be extended by an order made by a Resident Magistrate's Court:
>
> Provided that no such order shall authorize the detention of any of the cash—
>
> (a) beyond the end of the period of three months beginning with the date of the order, in the case of an order first extending the period; or
>
> (b) in the case of a further order under this section, beyond the end of the period of two years beginning with the date of the first order.

(3) A Justice of the Peace may also exercise the power of a Resident Magistrate's Court to make an order first extending the period mentioned in subsection (1).

…"

Section 79 states that:

"(1) While cash is detained under section 76, the authorized officer may make an application to the Resident Magistrate's Court for the forfeiture of the whole or any part of the cash.

…"

[19] It is clear from the reading of section 79(1), that where cash is detained under section 76, as was done in the instant case, the authorised officer has the discretion to make an application to the Resident Magistrate's Court for the forfeiture of the whole or any part of the cash so detained. The section, contrary to what counsel for the appellant submitted, does not impose an obligation on the authorised officer to make an application for forfeiture where cash is detained under section 76. Further, it must be noted that Part IV of POCA provides the ARA with an alternative to section 79, which is to commence recovery proceedings under section 57.

[20] Having said that, it must be noted that the ARA, in the case at bar, did not seek to exercise its discretion to apply for forfeiture of US$1,350,300.00 under section 79, but instead, while the first continued detention order, pursuant to 76 of POCA, of that sum was in existence, it sought to invoke the jurisdiction of the Supreme Court, by way of rule 17.1(1)(c) of the CPR, for the detention and custody order which was granted on

24 September 2007. That order was to remain in existence "until the trial of these proceedings".

[21] Rule 17.1(1)(c) empowers the Supreme Court to grant interim remedies such as an order "for the detention, custody or preservation of relevant property". Relevant property, pursuant to rule 17.1(2) "means property which is the subject of a claim or as to which any question may arise on a claim".

[22] The cash of US$1,350,300.00 was the subject of the amended claim form filed on 18 September 2007, the ARA having exercised its discretion to commence proceedings in the Supreme Court for recovery of property, being cash of US$1,350,300.00, among other properties, pursuant to section 57 of POCA.

[23] Section 57 provides that "[t]he enforcing authority may take proceedings in the [Supreme] Court against any person who the enforcing authority believes holds recoverable property", which, by section 84(1), are "[p]roperty obtained through unlawful conduct". The power, conferred on the enforcing authority is "exercisable in relation to any property (including cash), whether or not any proceedings have been brought for an offence in connection with the property" (section 56(2) of POCA).

[24] It would therefore follow, I believe, that the enforcing authority, who in the instant case is the ARA, had the discretion to take recovery proceedings by virtue of section 57 against the appellant in respect of any property, including the cash of

US$1,350,300.00, if it believed such property is recoverable property. The ARA, accordingly, exercised its discretion under section 57 and rightly so.

[25] Accordingly, in light of the reasoning outlined above, I would think that the appellant must fail in respect of issue one.

Issue two

Whether the learned judge could be faulted for his decision, in respect of the agreed evidence, to grant a recovery order in respect of the cash sum of US$1,350,300.00

[26] In looking at whether the decision of D O McIntosh J may be impugned, I propose to consider the following sub-issues:

(a) Whether there was sufficient admissible evidence to find on a balance of probabilities that the cash sum of US$1,350,300.00 was obtained by unlawful conduct and thus recoverable property.

(b) Whether the learned judge was entitled to place significant weight on the lies told by the appellant as a basis for his findings.

Sub-issue (a) - Whether there was sufficient admissible evidence to find on a balance of probabilities that the cash sum of US$1,350,300.00 was obtained by unlawful conduct and thus recoverable property

Submissions

[27] The appellant, through her counsel, complained that McIntosh J made a recovery order for the US$1,350,300.00 found in her possession without the ARA establishing that the said cash was recoverable property. Learned counsel argued that, in determining whether a property is recoverable property, the court must satisfy itself on a balance of probabilities that "there is a connection between the property and the unlawful conduct that is either directly or indirectly". The ARA merely identified properties in the possession of the appellant and the other defendants and attempted to lead evidence that the 1st defendant was involved in drug trafficking without making any connection between the two. Reliance was placed on **Olupitan and Anor v The Director of the Assets Recovery Agency** [2008] EWCA Civ 104.

[28] Learned counsel further submitted that there was no proper evidence before the learned judge of any unlawful conduct in relation to the appellant and the other defendants and that, insofar as there was "evidence" of unlawful conduct attributable to the 1st defendant, it was hearsay evidence which should not have been considered by him. The ARA's case, learned counsel argued, rested essentially on the affidavit evidence of ASP Bernard and Mr Da Silva, which, though it was agreed between counsel and the facts were not in issue, did not alter the standard to be satisfied in terms of the evidence being adduced. Rule 30.3(1) of the CPR, it was submitted, provides that "[t]he general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge".

[29] The evidence of ASP Bernard, insofar as evidence related to the alleged unlawful conduct on the part of the 1st defendant, it was submitted, relied on information obtained from third parties and/or secondary sources. Further, the information contained in the exhibits to support ASP Bernard's assertion of unlawful conduct in respect of that defendant did not comply with section 31G of the Evidence Act.

[30] The appellant's counsel also submitted that the information contained in the affidavit of Mr Da Silva is hearsay, given that he did not purport to make any of the statements concerning the aliases of the 1st defendant of his own knowledge.

[31] Learned counsel further submitted that, "[i]t is of no moment that an objection was not raised at the trial of this matter to the evidence of Mr. Da Silva or to certain aspects of ASP Dean Roy Bernard's evidence; the objection can be raised as a ground of appeal". Reliance was placed on the statement of Roskill LJ in **Ali v The State** PCA No 39/1987 delivered on 16 February 1989.

[32] The ARA through its counsel submitted, in reliance on section 55 of the POCA and **The Director of Assets Recovery Agency and Others v Jeffrey David Green and Others**, that the court in civil recovery proceedings is not concerned to establish criminal guilt, but with unlawful conduct for the sole purpose of identifying property with sufficient relationship to that conduct to render it recoverable. The appellant, it was argued, admitted that the US$1,350,300.00 for the most part came from one of

the other defendants (her son) and it is irrelevant whether the charges against her were adjourned sine die.

[33] Learned counsel also relied on **The Director of the Assets Recovery Agency and in the matter of Cecil Stephen Walsh** to show that "it is not essential for the Agency to establish the precise form of unlawful conduct as a result of which the property in question was acquired and that the court may be asked to draw appropriate inferences from the unlawful conduct established by the Agency combined with the absence of legitimate capital and income". It was also submitted, in reliance on the statement of Latham LJ in **R v Iiham Anwoir and others** [2008] 4 All ER 582, paragraph 21, that there were two ways to prove that property was derived from crime - "(a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kind is unlawful, or (b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime".

[34] Accordingly, learned counsel argued that there was evidence of the ARA that one of the defendants was engaged in the illicit drug trade, which was not objected to by the appellant. Learned counsel submitted that it is usual and customary for parties in civil proceedings to agree facts and where those facts are agreed they need not be proven. It was further argued that counsel for the appellant, in the court below, at no

time during the proceedings, sought to withdraw his consent to the agreed facts and accordingly should now be estopped from relying on the point of hearsay.

Analysis

[35] Section 57 of POCA, as stated above, allows the ARA to take proceedings in the Supreme Court against any person it believes to be in possession of recoverable property, which is property that was obtained by unlawful conduct. Section 55(1) provides:

> "'property obtained through unlawful conduct' is property obtained directly or indirectly by or in return for or in connection with unlawful conduct, and for the purpose of deciding whether any person obtains property through unlawful conduct —
>
> (a) it is immaterial whether or not any money, goods or services were provided in order to put the person in position in a position to carry out the conduct;
>
> **(b) it is not necessary to show the particulars of the conduct;...**" (emphasis mine)

[36] Section 55(1) also defines unlawful conduct as:

> "(a) conduct that occurs in, and is unlawful under the criminal law of, Jamaica; or
>
> (b) conduct that—
>
> (i) occurs in a country outside of Jamaica and is unlawful under the criminal law of that country; and

(ii) if it occurred in Jamaica would be unlawful under the criminal law of Jamaica."

[37] The effect of section 55 is that the ARA must provide evidence before the Supreme Court that the property is recoverable property by demonstrating that such property was obtained directly or indirectly by unlawful conduct. However, it is not essential for the ARA to establish the precise particulars of the unlawful conduct (see also **Director of Assets Recovery Agency and Others v Jeffrey David Green and Others**). Further, section 57 empowers the ARA to take civil recovery proceedings if it believes that property constitutes recoverable property.

[38] Learned counsel for the ARA submitted, relying on **The Director of Assets Recovery Agency and In the matter of Cecil Walsh**, and I accept, that "the court may be asked to draw appropriate inferences from the unlawful conduct established by the Agency combined with the absence of legitimate capital and income".

[39] This court in **Sandra Marie Cavallier v Commissioner of Customs** [2010] JMCA Civ 26, at paragraph [26], held that, in deciding whether there was sufficient evidence that the money found in the appellant's possession was recoverable property for the purpose of forfeiture proceedings, the Resident Magistrate was entitled to arrive at the conclusion that the money was recoverable property in light of the circumstances in which the cash was found and the untruthful explanations concerning the source or

use of those funds (see also **Leroy Smith v Commissioner of Customs** [2014] JMCA Civ 10).

[40] I find there was ample evidence in this case for the learned judge, on a balance of probabilities, to have found that the cash sum of US$1,350,300.00 in the appellant's possession was derived from some unlawful conduct. These included the following:

(a) the manner in which the cash sum was concealed (in a freezer compartment of a refrigerator located at the appellant's premises wrapped in newspaper and foil amongst frozen meat);

(b) the appellant admitted (in her voluntary statement dated 26 June 2007) that she hid the money in the refrigerator, but provided no explanation for doing so;

(c) the appellant did not provide a reasonable explanation for the provenance of the cash or what it was to be used for;

(d) the appellant admitted (in her voluntary statement dated 26 June 2007) that a significant portion of the cash belonged to her son (for whom it was believed that a fictitious name was advanced), who was a

construction worker in the USA and who she did not know to be involved in any other business;

(e) the appellant (in her voluntary statement) stated she was a higgler and bus operator, whose income on a good day of sale was $10,000.00 to $12,000.00 per day (as a higgler) and $14,000.00 per day as a bus operator;

(f) the appellant claimed part of the money belonged to her but failed to identify the specific amount;

(g) the appellant (in her voluntary statement) was unable to explain why she did not deposit the money in the bank, given the fact that she was the holder of numerous bank accounts.

[41] The learned judge also reminded himself of section 58 of POCA, which provides:

> "(1) If in proceedings under this Part the [Supreme] Court is satisfied that any property is recoverable, the Court shall make an order under this section (hereinafter called a recovery order).
>
> (2) …
>
> (3) If each of the conditions in subsection (4) is met, the Court shall not make in a recovery order any provision in respect of recoverable property unless it is just and equitable to do so.

(4) The conditions referred to in subsection (3) are that-

(a) the respondent obtained the recoverable property in good faith;

(b) the respondent took steps after obtaining the property, which he would not have taken if he had not obtained it, or he took steps before obtaining the property, which he would not have taken if he had not believed he was going to obtain it;

(c) when the respondent took the steps mentioned in paragraph (b), he had no notice that the property was recoverable; and

(d) if a recovery order were made in respect of the property, the order would, by reason of the steps mention in paragraph (b), be detrimental to the respondent."

He accordingly stated at paragraph [71] of the judgment, with which I entirely agree, that there was no evidence that the conditions under section 58(4) of the POCA were satisfied so as to prevent him from making a recovery order.

[42] As it relates to the issue of hearsay relative to the facts to which the parties agreed, the learned authors of Phipson on Evidence, 14th edition, paragraphs 24-06 to 24-07, stated that admissions for the purpose of dispensing with proof at trial, which is

distinguishable from those tendered in evidence, may be made by agreement before or at the trial of the parties.

[43] I find it is not in dispute that the parties agreed that the facts were not in issue, as stated by the learned judge at paragraph [1] of his judgment, and I believe it is reasonable to infer that it was their intention to dispense with proof of those facts. The admissibility of those facts was not brought into issue. Accordingly, the appellant should be precluded from seeking to now challenge some aspects of the evidence of ASP Bernard and Mr Da Silva on the basis that the requisite proof for admissibility of such evidence had not been satisfied. It must be noted that the appellant, in the court below, had the benefit of legal representation by counsel, the affidavits were disclosed in advance and no objection was raised that the evidence contained therein was inadmissible as hearsay.

[44] Under rule 10.5(1) of the CPR the defence must "set out all the facts on which the defendant relies to dispute the claim". Rule 10.5(3)(c) further places an obligation on the defendant to say in the defence (or affidavit):

> "which (if any) of the allegations in the claim form or particulars of claim are admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove."

[45] It should be mentioned that the appellant in her defence, filed on 20 February 2008 (consent given, on 1 November 2007, for filing defence out of time), did not put

the ARA to prove any of the allegations contained in its amended claim form or particulars of claim filed on 18 September 2007. She also failed to put the ARA to prove the allegations stated in the several affidavits of ASP Bernard and the affidavit of Jorge Da Silva. Instead, the appellant, through her counsel, agreed to the facts which is permissible in civil proceedings to facilitate matters being "dealt with expeditiously and fairly" (rule 1.1(2)(d) of the CPR).

[46] Accordingly, it was for the learned judge, in assessing the evidence based on the agreed facts by the parties, to assign the weight he deemed appropriate to those facts depending on all the circumstances of the case and arrive at the factual conclusion he did (see the persuasive decision in **Guyana Bank for Trade and Industry v Desiree Alleyne** [2011] CCJ 5 (AJ)). He therefore cannot be faulted unless it can be shown that his decision was palpably wrong, that is, that the decision is so against the evidence as to be unreasonable and insupportable (**R v Joseph Lao** (1973) 12 JLR 1238 and **Industrial Chemical Co (Jamaica) Ltd v Ellis** (1986) 35 WIR 303).

[47] I find it rather unfortunate that the issue of hearsay is now being raised by counsel for the appellant. Learned counsel for the ARA did not take a preliminary objection to the issue being raised on appeal though not pleaded in the court below. However, I am of the view that this court should not allow the appellant, who had the benefit of legal representation, and who opted to waive putting the ARA to proof to now

seek to impugn the decision of the learned judge for having relied on evidence agreed by the parties.

[48] **Ali v The State** PCA No 39/1987, delivered on 16 February 1989, I find, affords no assistance to the appellant in the instant case. It was a murder case where the jury was allowed to hear damning hearsay evidence "from a witness who could not have been called to give direct evidence against the appellant" (she being his wife), because of counsel's failure to object to the evidence being adduced and the trial judge's failure to intervene. There Lordships expressed concern that in the absence of the appropriate warning by the trial judge, although they found that there was undoubtedly strong evidence against the appellant, they could not have been certain that the jury may not have been influenced by the inadmissible evidence and found that there was no risk of miscarriage of justice.

[49] The instant case is a civil matter, where the appellant deliberately, through her counsel, agreed that the facts were not in issue and accordingly failed to put the ARA to proof as required by rule 10.5(3)(c) of the CPR. Unlike in **Ali v The State** where the witness was not compellable, it was quite possible that had the ARA been so put to proof, it could have taken the necessary steps to satisfy section 31G of the Evidence Act and to rectify any defect in the evidence of Mr Da Silva.

[50] Notwithstanding, I agree with learned counsel for the appellant that the computer printouts, referred to in the affidavits of ASP Bernard, relating to the 1st

defendant's criminal conduct, were inadmissible evidence pursuant to section 31G of the Evidence Act. Now, even if I were to agree further with learned counsel for the appellant that the learned judge ought not to have considered such evidence, because the accuracy and reliability of same was not proved, I hasten to say that the absence of evidence proving the criminal guilt of the 1st defendant would not undermine the finding of the learned judge. The court in deciding whether property is recoverable property need not be satisfied that the unlawful conduct was of a particular kind. I also reiterate that the facts were not put in issue in the court below, as the appellant has sought to do before this court.

[51] I find, even if a portion of the ASP Bernard's evidence was inadmissible and should not have been considered by the learned judge, there was still sufficient evidence for him to have found that the cash was obtained by unlawful conduct.

[52] Having said that, I will now consider sub-issue (b).

Sub-issue (b) - Whether the learned judge was entitled to place significant weight on the lies told by the appellant as a basis for his findings

Submissions

[53] It was submitted by learned counsel for the appellant that D O McIntosh J was not entitled to rely on the alleged lies spoken by the appellant in the absence of other evidence which supported a causal link between the properties in her possession and/or any evidence of unlawful conduct. Reliance was placed on the statement of Waller LJ, in

The Director of The Assets Recovery Agency v Szepietowski & Ors [2007] EWCA Civ 766, that "if there is some evidence that property was obtained though unlawful conduct, consideration needs to be given to any untruthful explanation" and that such untruthful explanation "may add strength to the arguability of the case".

[54] Learned counsel for the ARA submitted that the learned judge had sufficient independent evidence that US$1,350,300.00 was obtained by unlawful conduct in addition to the lies told by the appellant as it related to the cash. She relied on the case **Cavallier v Commissioner of Customs**.

Analysis

[55] As stated above, I find that there was sufficient evidence, on a balance of probabilities, that US$1,350,300.00 was obtained by unlawful conduct, given the circumstances in which the cash was found and the absence of legitimate income to amass such cash. I further find that D O McIntosh J was entitled to place significant weight on "the lies and failure [of the appellant] to offer an explanation" when arriving at the conclusion that the cash is recoverable property (see paragraph [21] of **Leroy Smith v Commissioner of Customs**). As stated in **The Director of Assets Recovery Agency v Szepietowski**, untruthful explanations "may add strength to the arguability of the case".

[56] In light of the foregoing reasoning, I find that it cannot be said, in this case, that the learned judge was palpably wrong in making a recovery order in respect of US$1,350,300.00.

[57] I cannot help but mention that I find it rather curious that the appellant did not seek to impugn the learned judge's decision to grant a recovery order in respect of the real and personal properties (vehicles and cash in the bank) held solely by her or jointly with the other defendants.

[58] It is for these reasons that I agreed to dismiss the appeal and affirm the judgment of D O McIntosh J.

PHILLIPS JA

[59] I have read the draft judgment of Dukharan JA and agree with his reasoning and conclusion. I have nothing to add.