In The Supreme Court of Bermuda

No. 2 of 2019

Between:

NICAI LAMBERT

Appellant

And

THE QUEEN

Respondent

JUDGMENT

Date of Hearings: 16 October 2020 and 30 October 2020
Date of Judgment: 15 December 2020

Appellant: Mr. Charles Richardson (Compass Law Chambers)
Respondent: Mr. Michael Taylor (Crown Counsel)

Appeal against Order of Forfeiture under section 51(4) of the Proceeds of Crime Act 1997
Meaning of "Satisfied" as standard of proof – whether there is an elevated standard of proof

JUDGMENT of Shade Subair Williams J

Introduction

1. This is an appeal brought under section 51(4) of the Proceeds of Crime Act 1997 ("the 1997 Act"). The Appellant, Mr. Nicai Lambert, seeks for this Court to quash the ruling of the Senior Magistrate, Mr. Juan Wolffe, wherein he granted the Crown's application for an order of forfeiture ("the forfeiture order") pursuant to section 51(1) of the 1997 Act.

2. Having heard Counsel on their oral and written submissions, I reserved judgment which I now provide with these written reasons.

Summary of the Background Facts

3. On Thursday 16 January 2016 Mr. Lambert attended the LF Wade International Airport ("the Airport") to travel to the Dominican Republic via New York. Having completed the initial check-in process, Mr. Lambert proceeded to the US Customs and Border Protection area where he was questioned about his US Declaration form. The Appellant had falsely declared on the form that he did not have an excess of $10,000.00 in cash in his possession. When queried by US Customs Officer, Mr. David Weems, about the sum of cash he was carrying, Mr. Lambert dishonestly stated and maintained that he only had $5,500.00 on him. It was not until Mr. Lambert was subsequently searched that he admitted his earlier declarations to be untrue.

4. In actual fact, Mr. Lambert had a total cash sum of $67,793.00 ("the $67K") on his person which was later seized pursuant to section 50 of the 1997 Act. There is no contention arising from the Senior Magistrate's finding that: (i) the sum of US$6,193.00 was discovered in a bank pouch in a small suitcase; (ii) the sum of US$20,000.00 was discovered hidden in the foam padding of an "Invicta" make black coloured case which was in a larger suitcase; (iii) the sum of US$1,600.00 was in the Respondent's trouser pockets; and (iv) the sum of US$40,000.00 was wrapped in 2 packages hidden in the Respondent's front waistband.

5. In addition to the said cash, police seized a number of watches and jewelry items from the Appellant. However, unlike the majority portion of the cash discovered, the Senior Magistrate found that the watches and jewelry items had not been concealed by Mr. Lambert. Instead, these items were discovered in plain sight in the Appellant's luggage and the Senior Magistrate concluded that the provenance of the items had not been shown by the evidence to be illegitimate. [See paras 62-63 of the judgment].

6. On 17 June 2016 Mr. Lambert was interviewed under caution by police. In addressing the origins of the cash found in his possession he explained that he had been earning an approximate sum of $400.00 per day as income from driving his taxi car. He professed the $67K to be a year's worth of savings out of these earnings from taxi driving. While Mr. Lambert did not offer much explanation as to why he concealed such a substantial portion of cash from US Customs, he did tell the police that he prefers to keep his earnings in cash because of his general distrust of banks and that he wanted to avoid having to pay a 40% tax levy on the $67K he was travelling with. (Neither party contended that such a tax would have been payable.)

7. On 11 August 2017 the Crown filed a Notice of Application in the Magistrates' Court for the forfeiture of the $67K. However, a near 1 year period consisting of numerous adjournments transpired before the Crown's application for the forfeiture order finally proceeded before the Senior Magistrate in a series of hearings expanding over a 4 month period between 19 July 2018 and 23 November 2018. Over that 4 month period, the Crown relied on the evidence of DC 861 Damon Hollis as its sole witness. DC Hollis' evidence in chief took the form of affidavit evidence with various exhibits marked by his initials. With the agreement of the parties, the affidavit was taken as read and the Senior Magistrate watched the video recordings of the interviews exhibited to DC Hollis' evidence. DC Hollis was then cross-examined on his evidence by the Appellant's then attorney, Mr. Craig Attridge.

8. As the Respondent to the Crown's application in the Magistrates' Court, the Appellant opted against filing any evidence in his defence. Instead, he relied on the Crown's evidence of (i) his statements made to officers of the Bermuda Police Service ("BPS") during the search at the Secondary Area of the US Border Control of the Airport on 16 June 2016 [DH/18] and (ii) his statements made to BPS officers under caution interview on 17 June 2017 [DH/23].

9. At the close of the trial, the Senior Magistrate reserved judgment and later delivered a written decision dated 31 December 2018 wherein he granted the forfeiture order.

The Grounds of Appeal

10. Mr. Richardson advanced three grounds of appeal:

Ground 1:
The learned Magistrate erred in law as it relates to establishing "criminal conduct" per section 3 of POCA 1997, namely that the $67,793 was the proceeds of drug trafficking;

Ground 2:
The learned Magistrate erred in law as it relates to making his decision in part based on the Appellant's "lack of reasonable explanations" for the source of the $67, 793.00. It is the Crown's duty to prove the offence on the balance of probabilities; and

Ground 3:
The learned Magistrate erred in law in drawing the wrong inferences from the Appellant's evidence i.e. his caution interview.

11. The fourth ground of appeal, which had been proposed as a supplement, was withdrawn by Mr. Richardson during the appeal hearing before me on 16 October 2020.

The Relevant Law:

Detention and Seizure of Property and Forfeiture Orders

12. The Senior Magistrate's power to make a forfeiture order is derived from section 51(1)-(2) of the 1997 Act which requires a summary court to be satisfied that the property detained by the police is a direct or indirect representation of proceeds of criminal conduct.

Forfeiture orders and appeals
51 (1) A court of summary jurisdiction may make an order (a "forfeiture order") ordering the forfeiture of any property which has been seized under section 50 if satisfied, on an application

made by a police officer while the property is detained under that section, that the property directly or indirectly represents any person's proceeds of, or benefit from, or is intended by any person for use in, criminal conduct.

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

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

(4) On an application made by an appellant to a court of summary jurisdiction at any time, that court may order the release of so much of any cash to which the forfeiture order relates as it considers appropriate to enable him to meet his legal expenses in connection with the appeal.

13. Drug trafficking is expressly included in the statutory definition of "criminal conduct" at section 3 of the 1997 Act and its meaning is defined as "doing or being concerned… in a drug trafficking offence". A drug trafficking offence is given a specific meaning under the same section and is defined by reference to various offences under the Misuse of Drugs Act 1972, the Criminal Justice (International Co-operation) (Bermuda) Act 1994 and the 1997 Act.

14. Section 51(5) fuels this Court's appellate jurisdiction to re-hear an application for forfeiture:

(5) An appeal under this section shall be by way of rehearing, and the Supreme Court may make such order as it considers appropriate and, in particular, may order the release of the property (or, in the case of cash, any remaining cash) together with any accrued interest in the case of cash.

The Standard of Proof

15. Section 62 governs the position on standard of proof in all civil applications made under the 1997 Act:

"*Civil standard of proof*

62 Any question of fact to be decided by a court in proceedings under this Act, except any question of fact that is for the prosecution to prove in any proceedings for an offence under this Act, shall be decided on the balance of probabilities."

16. Counsel for both parties in this case agreed that the drafting of the 1997 Act was lifted from the Proceeds of Crime Act 2002 in the UK ("the UK Act"). Like section 62 of the 1997 Act, section 241(3) of the UK Act expressly requires the question of unlawful conduct to be determined on a balance of probabilities. Section 241(3) provides:

"(3) The court or sheriff must decide on a balance of probabilities whether it is proved—
(a) that any matters alleged to constitute unlawful conduct have occurred, or
(b) that any person intended to use any property in unlawful conduct."

17. In *M. Jones et al. v The Queen* [2019] SC (Bda) 6 App (17 January 2019) [paras 19-21] I considered, without controversy, the term "satisfied" in the context of the civil standard of a balance of probabilities and section 51(1) of the 1997 Act. Citing the remarks of Omrod LJ who was concerned with a matrimonial matter, I observed:

"…
19. The evidential threshold stated at subsection (1) requires a magistrate to be satisfied that the elements of the section have been proved.

20. In my previous judgment A.R.M.F. v A.J.F. [2018] SC (Bda) 61 Div (23 July 2018) I cited the helpful remarks of Omrod LJ in K v K (Avoidance of Reviewable Disposition) (1983) 4 FLR 31, 36G, CA in outlining what it means for the Court to be satisfied on an application. While the examination of the term 'satisfied' was done in the context of matrimonial matters, I see no reason why its meaning would not parallel with test applicable for civil matters.

21. At page 36 of the English Court of Appeal judgment, Omrod LJ said:

"*…I venture to think that all of us know when we are 'satisfied' of something by evidence in court, or not. Our difficulties begin when we try to say what we mean by being 'satisfied'. It forces people to turn to synonyms, which altar the sense, or to the addition of various adverbial phrases such as 'beyond reasonable doubt' or 'on the balance of probability', which can lead to rather unreal distinctions being drawn. But the question remains, in simple language, 'Am I satisfied?' I think that, if the judge had asked himself that question, he would have arrived at the same answer as that which he actually did.*
The question of what is the meaning of the phrase 'is satisfied' has been litigated over and over again in relation to other sections of various Matrimonial Causes Acts and it has been pronounced upon on a number of occasions by the House of Lords, not in this context but in the context of other sections.
I would briefly refer, because I think it is a helpful case, to Blyth v Blyth [1966] Ac 643, a decision which split the House of Lords three to two, but in the three majority speeches the position is made quite clear. The first is Lord Denning's and he took the view that 'satisfied' was primarily directed to the question of which side the onus of proof lay, but as to what the word 'satisfied' meant, he said at p. 668:
'I hold, therefore, that in this statute' [that is the predecessor to the Matrimonial Causes Act 1973] 'the word "satisfied" does not mean "satisfied beyond reasonable doubt". The legislature is quite capable of putting in the words "beyond reasonable doubt" if it meant it. It did not do so. It simply said on whom the burden of proof rested, leaving it

to the court itself to decide what standard of proof was required in order to be "satisfied".'

...

I do not think one can take it much further than that, save to refer to a dictum which Lord Denning cited in Bater v Bater [1951] P 35, when he referred to a dictum of Lord Stowell which, although the language is not very familiar, I find helpful. It was in a case called Loveden v Loveden (1810) 2 Hagg Con 1:

'The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.'

I do not think I can do better than that." "

Whether there is an Elevated Civil Standard of Proof for Forfeiture Orders

18. In the present case, Mr. Richardson has urged this Court to find that the civil standard of proof (i.e. on a balance of probabilities) does not apply to forfeiture orders in the same way that it does to ordinary civil disputes. He pointed to English case law in an attempt to demonstrate the requirement for a higher tier of the civil threshold of balance of probability. Mr. Taylor, however, maintained that the Parliament never intended for a special interpretation of "satisfied" to be drawn and that the term necessarily referred to the civil standard, 'satisfied on a balance of probabilities', in accordance with section 62 of the 1997 Act.

19. Section 62 has been consistently construed by the Courts of this jurisdiction on its plain and literal interpretation. It provides a clear distinction between the standard of proof in all civil applications under the 1997 Act and the standard of proof to which a prosecutor is bound when prosecuting a criminal offence. This is the statutory basis for the Court's application of the ordinary civil standard of proof in civil recovery and forfeiture appeals in respect of.

20. In *Attorney General and Minister of Legal Affairs v Zirkind* [2016] Bda LR 120 the Honorable Chief Justice, Mr. Ian Kawaley, (as he then was) described the standard of proof required for civil recovery applications as follows [paras 6-7]:

"The standard of proof

6. I also accepted that the civil standard of proof applied. The statute expressly provides for "civil recovery proceedings" and so the starting assumption must obviously be that matters requiring proof must be proven to the civil standard. This finding was significant in the present case where the Crown had been unable to prove that the Respondent was guilty of unlawful conduct in the criminal courts. Eminent authority for the proposition that the fact that no convictions had been obtained anywhere in connection with the property sought to be recovered was irrelevant, was cited: Gale and another v Serious Organised Crime Agency [2011] UKSC 49.

7. In that case, the Crown relied upon evidence used in an unsuccessful criminal prosecution in Portugal to support civil recovery proceedings in England and Wales. Various members of the United Kingdom Supreme Court expressed differing views on one topic. This was whether the presumption of innocence and fair hearing rights of the appellant under the European Convention on Human Rights had been potentially infringed by findings which allegedly impugned his innocence notwithstanding his criminal acquittal. There was apparent unanimity, however, on the proposition that the civil burden of proof applied in the civil recovery proceedings. Lord Phillips concluded his judgment with the following summary of his conclusion on this point which the Applicant's counsel in the present case aptly relied upon as reflecting the Bermudian law position under our own Proceeds of Crime Act: "[55] The starting point in this case is the possession of property by the Appellants for whose provenance they were unable to provide a legitimate explanation. There was an abundance of evidence, set out at length by the judge with great care, which implicated them in criminal activity that provided the explanation for the property that they owned. The judge rightly applied the civil standard of proof, but on my reading of his judgment he would have been satisfied to the criminal standard of the Appellants' wrongdoing. For the reasons that I have given I would dismiss the appeal in relation to the first issue."

21. In *Attorney General et al v Tito Smith* [2018] SC (Bda) 40 Civ (15 May 2018) Mr. Justice Stephen Hellman was also concerned with a civil recovery application pursuant to sections 36A-36.1Y under Part IIIA of the 1997 Act. He too applied the ordinary civil standard of proof and cited the UK Supreme Court's decision in *SOCA v Gale* [paras 2-4]:

2."...Lord Dyson JSC gave a useful overview of the UK scheme in SOCA v Gale *[2011] 1 WLR 2760 at para 123. His observations apply equally to the statutory scheme in Bermuda:*

> *"The essential nature of the proceedings is civil. The respondent to the proceedings is not charged with any offence. He does not acquire a criminal conviction if he is required to deliver up property at the conclusion of the* Part 5 *proceedings. None of the domestic criminal processes are in play. On the contrary, as Kerr LCJ put it in Walsh v Director of the Assets Recovery Agency [2005] NI 383, para 23: 'all the trappings of the proceedings are those normally associated with a civil claim.' These include the express provision that the standard of proof is on the balance of probabilities. The nature of the proceedings is essentially different from that of criminal proceedings. The claim can be brought whether a respondent has been convicted or acquitted, and irrespective of whether any criminal proceedings have been brought at all. This was a factor which weighed with the European Court of Human Rights in Ringvold v Norway , at para 38, when the court was considering whether article 6.2 applied to a claim for compensation by the alleged victim of a sexual offence against the alleged perpetrator. The purpose of Part 5 proceedings is not to determine or punish for any particular offence. Rather it is to ensure that property derived from criminal conduct is taken out of circulation. It is also of importance that* Part 5 *proceedings operate in rem. ..."*

3. As noted by Lord Dyson, the civil standard of proof applies. Section 62 of POCA expressly provides that for any question of fact to be decided by a court under the Act, except any

question of fact that is for the prosecution to prove in any proceedings for an offence under the Act, shall be decided on the balance of probabilities. But as Lord Hoffmann stated in Home Secretary v Rehman [2003] 1 AC 153 at para 55, some things are inherently more likely than others, and cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner.

4. Lord Dyson's observation that civil recovery proceedings are in rem, which is a widely accepted position, was nonetheless obiter. *In Director of ARA v Creaven [2006] 1 WLR 622 at para 22, Stanley Burnton J characterised a claim for a civil recovery order differently as sui generis*, "*a statutory creation of a special kind". However the resolution of that debate lies beyond the scope of this judgment."*

22. The issue of standard of proof was considered by the House of Lords in their unanimous decision in *Home Secretary v Rehman* [2003] 1 AC 153. The facts in *Rehman* arose out of the Secretary of State's refusal of Mr. Rehman's application for indefinite leave to remain in the UK. That refusal was reviewed by the Special Immigration Appeals Commission before it eventually proceeded to the Court of Appeal and then the House of Lords for final determination. In Rehman, the House of Lords rejected the notion of a "high civil balance of probabilities" while at the same time holding that the question of standard of proof did not properly apply to such immigration applications. Thus the remarks in the judgment, helpful as they are, should be taken as *obiter dicta*.

23. Delivering the leading judgment for their Lordships, Lord Hoffman stated [paras 55-58]:

"The standard of proof

55.

I turn next to the Commission's views on the standard of proof. By way of preliminary I feel bound to say that I think that a "high civil balance of probabilities" is an unfortunate mixed metaphor. The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in In re H (Sexual Abuse: Standard of Proof) (Minors) [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.

56.

In any case, I agree with the Court of Appeal that the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact.

The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.

Limitations of the appellate process

57.

This brings me to the limitations inherent in the appellate process. First, the Commission is not the primary decision-maker. Not only is the decision entrusted to the Home Secretary but he also has the advantage of a wide range of advice from people with day-to-day involvement in security matters which the Commission, despite its specialist membership, cannot match. Secondly, as I have just been saying, the question at issue in this case does not involve a yes or no answer as to whether it is more likely than not that someone has done something but an evaluation of risk. In such questions an appellate body traditionally allows a considerable margin to the primary decision-maker. Even if the appellate body prefers a different view, it should not ordinarily interfere with a case in which it considers that the view of the Home Secretary is one which could reasonably be entertained. Such restraint may not be necessary in relation to every issue which the Commission has to decide. As I have mentioned, the approach to whether the rights of an appellant under article 3 are likely to be infringed may be very different. But I think it is required in relation to the question of whether a deportation is in the interests of national security.

58.

I emphasise that the need for restraint is not based upon any limit to the Commission's appellate jurisdiction. The amplitude of that jurisdiction is emphasised by the express power to reverse the exercise of a discretion. The need for restraint flows from a common-sense recognition of the nature of the issue and the differences in the decision-making processes and responsibilities of the Home Secretary and the Commission."

24. I think it helpful to return to Lord Phillips' judgment in *SOCA v Gale*. There, the UK Supreme Court was directly concerned with section 241(3) of the UK Act in an appeal against the judgment of Griffith Williams J who approached the issue of standard of proof in the following way:

"*The burden of proof is on the claimant and the standard of proof they must satisfy is the balance of probabilities. While the claimant alleged serious criminal conduct, the criminal standard of proof does not apply, although 'cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not' – see Secretary of State for the Home Department v Rehman [2003] 1 AC 153 at para 55, per Lord Hoffmann.*"

25. Lord Phillips' (with whom the full Supreme Court appear to have agreed on the subject of the civil standard of proof) said [para 5]:

"5. "Balance of probabilities" is the standard of proof applied in civil proceedings under English law ("the civil standard of proof"). In criminal proceedings guilt has to be proved "beyond reasonable doubt" ("the criminal standard of proof"). In concluding that the property recovered was the product of criminal conduct on the part of the appellants, Griffith Williams J applied the civil standard of proof, albeit that he used language that suggested that the criminal standard might well have been satisfied. It is the appellants' case, advanced without success in the Court of Appeal, that this was contrary to the Human Rights Act 1998 in that it infringed their right to a fair trial under article 6 of the European Convention on Human Rights ("the Convention"). They urge that, despite the language of section 241(3), we should "read down" the subsection so as to accord to it the meaning that the court must decide whether it is proved beyond reasonable doubt that matters alleged to constitute unlawful conduct occurred. Alternatively, they submit that the Court should declare the subsection to be incompatible with the Convention pursuant to section 4 of the Human Rights Act. This is the only issue concerning the recovery order that arises with regard to the recovery order; other issues that were raised below have not been pursued."

26. Lord Phillips found section 241(3) to be clear enough on its face for only a plain and literal interpretation of the section [para 7]:

"Is there scope for reading down?

7.The Secretary of State, represented by Mr Eadie QC, has intervened because of the possibility of a declaration of incompatibility. The Secretary of State has supported the respondent, SOCA, in relation to the first issue. Mr Eadie has submitted, however, that regardless of the merits of the human rights challenge there a clear, advised expression of Parliamentary intent lying at the heart of the statutory scheme. This submission runs counter to an obiter view that I expressed at para 24 in R v Briggs-Price [2009] UKHL 19; [2009] AC 1026, when dealing with analogous provisions of the Drug Trafficking Act 1994. Lord Rodger of Earlsferry expressed the same view at para 79. I see the force in Mr Eadie's argument and, if necessary, it will be necessary to reconsider the views that I and Lord Rodger expressed…."

27. As for the alternative complaint that the application of a civil standard of proof is incompatible with the European Convention on Human Rights, Lord Clarke (with whom Lords Phillips, Mance, Judge and Reed agreed) stated [para 57]:

"57.As to the standard of proof, I agree with Lord Phillips that the Strasbourg jurisprudence does not support the proposition (ie the second proposition in para 43 above) that in no case can confiscation be ordered unless it is proved to the criminal standard that the defendant committed the offences from which the property is said to have been derived. I agree with his conclusion and reasons summarised in para 54 to the effect that the commission of criminal conduct from which the property the appellants held was

derived had to be established according to the civil and not the criminal standard of proof. I also agree with his conclusion in para 55 that there was ample evidence upon which the judge could find that the civil standard of proof was satisfied."

28. Supported by Lords Mance, Judge and Reed the President, Lord Phillips, concluded that the civil standard of proof applied [paras 54]:

"54.The views on standard of proof expressed in Briggs-Price by members of the House were obiter but the application of the common ground in the views of Lord Phillips, Lord Brown and Lord Mance leads to the following conclusion. The commission by the appellants in the present case of criminal conduct from which the property that they held was derived had to be established according to the civil and not the criminal standard of proof. For the reasons that I have given that remains my conclusion. It is a conclusion which, prior to Geerings, appeared to be firmly founded on the decision of the Privy Council in McIntosh v Lord Advocate [2001] UKPC D1; [2003] 1 AC 1078. In my view that foundation is unshaken.

55.The starting point in this case is the possession of property by the appellants for whose provenance they were unable to provide a legitimate explanation. There was an abundance of evidence, set out at length by the judge with great care, which implicated them in criminal activity that provided the explanation for the property that they owned. The judge rightly applied the civil standard of proof, but on my reading of his judgment he would have been satisfied to the criminal standard of the appellants' wrongdoing. For the reasons that I have given I would dismiss the appeal in relation to the first issue."

29. Mr. Richardson, however, relied on the earlier remarks of Lord Steyn in *R (on the application of McCann and others) v Manchester Crown Court* [2002] UKHL 39 as a reinforcement of his contention that civil applications under the 1997 Act had to be decided on a heightened standard of proof. In that case, the House of Lords was concerned with a consolidated appeal of two Magistrate Court cases.

30. In the first case, an application was made against three teenage brothers for an anti-social behavior order pursuant to section 1 of the Crime and Disorder Act 1998. Such applications are made where it appears that a person has acted in an anti-social manner that caused or was likely to cause harassment, alarm or distress. An order will then be made where it is necessary to do so in order to protect persons in that locality from further such acts. In *McCann et al* the stipendiary magistrate granted anti-social behavior orders which prohibited the brothers from re-entering the particular area of the city where they resided.

31. The defendant brothers unsuccessfully appealed to the Crown Court where the judge held the proceedings to be civil rather than criminal. The judge accordingly found that Article 6(2) under the European Convention on Human Rights did not apply. Article 6(2) affords every person charged with a criminal offence the presumption of innocence until proven guilty as part of the general right to a fair trial. The Crown Court judge also determined that the rules of evidence applicable to criminal prosecutions did not apply to civil proceedings for an anti-social behavior order.

32. Notwithstanding, the Crown Court adjudged that the correct standard of proof to be applied was "satisfied so that it was sure" but dismissed the appeal on the basis that the evidence met that threshold. The defendants then initiated judicial review proceedings to quash the judge's decision. The Divisional Court dismissed the application and the Court of Appeal upheld that decision. That was the first case for appeal before the House of Lords.

33. The second appeal case also arose on an application by the local authority to a magistrate for an antisocial behavior order. In this second case, the evidence was primarily hearsay evidence which could only be admissible in civil proceedings. However, the defendant challenged that admissibility of the evidence and the district judge stated a case for the Divisional Court on these points. Relying on the position taken by the Divisional Court in the first case, it was held that the proceedings were civil and that the hearsay evidence was therefore admissible. On further appeal, the Court of Appeal held that the House of Lords had no jurisdiction to hear this second matter since it was initiated by the civil process of complaint. However, the House of Lords granted the appellant leave to appeal.

34. Against this background, Mr. Richardson highlighted the following passage from the judgment of Lord Steyn [para 37]:

"*XI The standard of proof*

37. Having concluded that the relevant proceedings are civil, in principle it follows that the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply. However, I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would be necessary: In re H (Minors) (Sexual Abuse: Standard of Proof) [1886] AC 563, 586d-h, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard. If the House takes this view it will be sufficient for the magistrates, when applying section 1(1)(a) to be sure that the defendant has acted in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself. The inquiry under section 1(1)(b), namely that such an order is necessary to protect persons from further anti-social acts by him, does not involve a standard of proof: it is an exercise of judgment or evaluation. This approach should facilitate correct decision-making and should ensure consistency and predictability in this corner of the law. In coming to this conclusion I bear in mind that the use of hearsay evidence depending on its logical probativeness is quite capable of satisfying the requirements of section 1(1)."

35. I would first observe that in *McCann et al,* unlike in the present case, the English Courts were concerned with a statutory order pursuant to section 1 of the Crime and Disorder Act 1998. Section 1 is unrelated to any express statutory provision directing the Courts on the standard of proof to be applied. So, the House of Lords were not interpreting any statutory provision

akin to section 62 of the 1997 Act or section 241(3) of the UK Act. Secondly, I would find that in *McCann et al*, the Courts were concerned with assessing the evidence of the criminal-like conduct of the defendants. In forfeiture and civil recovery applications, the Court is more concerned with the provenance of the property for seizure and the relationship between that property and criminal conduct. For these reasons, I would distinguish McCann from the matter presently before me.

36. Mr. Richardson also placed the first instance English High Court judgment in *SOCA v Namli et al* [2013] EWHC 1200 (QB) before this Court. In that case, the Serious Organised Crime Agency ("SOCA") brought a claim for a civil recovery order under the UK Act in respect of approximately US $7,000,000.00 held in a bank account in London. Addressing the position on standard of proof, Males J said [para 17]:

"*17. The standard of proof of these matters is the balance of probabilities. However, in view of the serious nature of an allegation of unlawful conduct, and the serious consequences which follow from such a finding, the courts have repeatedly emphasised that careful and critical consideration must be given to the evidence relied on, and that cogent evidence will be required in order for such an allegation to be established: see for example Serious Organised Crime Agency v Gale [2009] EWHC 1015 (QB) at [9] and Serious Organised Crime Agency v Pelekanos [2009] EWHC 2307 (QB) at [19] to [21], applying in this context what was said by Lord Carswell in In re D [2008] UKHL 33, [2008] 1 WLR 1499 at [27] and [28]*."

37. In the above passage Males J cited the judgment of Griffith Williams J in *SOCO v Gale*. However, he also addressed his mind to the Supreme Court's judgment on appeal from the Court of Appeal [29-41]:

"*29. The Supreme Court held that the requirement for proof to the civil standard was not incompatible with Article 6.2 and that no "reading down" was necessary: [2011] UKSC 49, [2011] 1 WLR 2760. After an extensive view of the Strasbourg cases, Lord Phillips held at [44] that:*

> "*If confiscation proceedings do not involve a criminal charge, but are subject to the civil standard of proof, I see no reason in principle why confiscation should not be based on evidence that satisfies the civil standard, notwithstanding that it has proved insufficiently compelling to found a conviction on application of the criminal standard. At all events, in so far as other Strasbourg jurisprudence supports the first proposition [i.e. that where a defendant has been tried and acquitted of an offence no claim can be based upon an assertion that he committed that offence], it is only in circumstances where there is a procedural link between the criminal prosecution and the subsequent confiscation proceedings. There was no such link in the present case. The acquittal was in Portugal and the confiscation proceedings here in England. Furthermore, the evidence in the latter ranged much wider than the evidence that was relied on in the Portuguese prosecution*."

30. There are two strands to this reasoning. The first is that civil recovery proceedings with their lower civil standard of proof do not involve a criminal charge, so that a finding that there has been unlawful conduct does not contradict an acquittal in criminal proceedings: see also

[19] where Lord Phillips emphasised that failure to satisfy the criminal standard of proof "does not demonstrate that the defendant did not commit the criminal act", but only that "the evidence against him was insufficient to discharge the enhanced burden of proof". The second is that there was no "procedural link" between the foreign criminal proceedings and the English civil recovery proceedings. That conclusion was also stated at [35]:

> *"On no view does this jurisprudence support Mr Mitchell's submission that the appellant's acquittal in Portugal precludes the English court in proceedings under POCA from considering the evidence that formed the basis of the charges in Portugal. The link between the Portuguese criminal proceedings and the English civil proceedings, which Strasbourg would appear to consider so critical, is not there."*

31. As I read Lord Phillips' judgment, although both strands of reasoning are present, the absence of such a "procedural link" was itself sufficient for his decision that there was no impediment in the civil recovery proceedings to a finding that unlawful conduct had been committed, notwithstanding the acquittal in Portugal. His reference to the court not being precluded from "considering the evidence that formed the basis of the charges in Portugal" shows that this is so even if the evidence in the two proceedings is the same, and that it is open to the English court to reach a different conclusion from the foreign court. However, his final comment in [44] to the effect that the evidence in the English proceedings had ranged more widely than the evidence in the Portuguese prosecution makes it even clearer that it is both permissible and necessary for the English court to consider the evidence before it as a whole and reach its own conclusion. There may be evidence tending to prove the defendant's guilt, which is available in the civil recovery proceedings, but was not before the foreign court.

32. All of the other judges expressed their agreement with Lord Phillips, but three of them (in a seven judge court) made additional observations on which the defendants rely. Lord Clarke said at [60]:

> *"... I note that in the recent case of R (Adams) v. Secretary of State for Justice (JUSTICE intervening) [2011] 2 WLR 1180, where some of these issues were touched on, Lord Hope of Craighead DPSC, said at para 111, that the principle that is applied in Strasbourg is that it is not open to a state to undermine the effect of an acquittal. It appears to me that that is indeed the underlying principle and that if, as here and indeed in Adams, the effect of the acquittal is not undermined there should be no question of holding that there is any conflict with the presumption of innocence enshrined in article 6.2 of the European Convention on Human Rights."*

33. Lord Brown said at [115] that:

> *"Obviously, in all proceedings following an acquittal the court should be astute to ensure that nothing that it says or decides is calculated to cast the least doubt upon the correctness of the acquittal. But the point to be emphasised, is that the acquittal is correct because, and only because, the prosecution failed in the criminal proceedings to establish beyond reasonable doubt that the defendant was guilty. Not having been proved guilty to the criminal standard, the defendant is not thereafter to be branded a criminal and no criminal*

penalty can properly be exacted from him. But, contrary to widespread popular misconception, acquittal does not prove the defendant innocent."

34. Finally, Lord Dyson referred to Strasbourg cases suggesting that even if the nature of the civil proceedings was not itself such as to give rise to the necessary "procedural link", that link "can be created by the language in which the decision in the civil proceedings is expressed": see [135]. In view of that concern, he continued as follows at [138]:

"It seems, therefore, that the necessary link can be created by this route only if the court in the civil proceedings bases its decision adverse to the defendant using language which casts doubt on the correctness of an acquittal. The rationale must be that in such a case, the court has chosen to reach its decision by explicitly finding that a criminal charge has been committed. If it chooses to reach its decision in that way, then the protections afforded by article 6.2 should be available as if the civil proceedings were criminal proceedings. But if the decision in the civil proceedings is based on reasoning and language which goes no further than is necessary for the purpose of determining the issue before that court and without making implications of criminal liability, then the necessary link will not have been created. ... The fact that the findings of fact in the compensation proceedings may implicitly cast doubt on the acquittal is not enough to import article 6.2. What is required is that the decision in the compensation proceedings contains a 'statement imputing criminal liability' (emphasis added) (Y v. Norway, para 42) for article 6.2 to be imported."

35. Evidently there are some fine, but nevertheless real, distinctions to be borne in mind here. To the extent that the Supreme Court's reasoning depends on the distinction between the criminal and the civil standard of proof, it may be said that in practice there will often be little difference between a conclusion that criminal conduct is proved to the criminal standard (so that the tribunal of fact is, "sure" or is satisfied "beyond reasonable doubt") and a conclusion reached on the balance of probabilities but only after careful and critical consideration and requiring "cogent" evidence. Gale itself illustrates the narrowness of the distinction in view of Griffith Williams J's conclusion that he was "in no doubt" about the defendant's drug trafficking. Nevertheless, the conceptual distinction exists.

36. The other members of the Supreme Court did not in terms adopt Lord Dyson's reservation as to the way in which judgments in civil recovery proceedings should be expressed. Indeed Lord Phillips observed at [55], without criticism, that "the judge rightly applied the civil standard of proof, but on my reading of his judgment he would have been satisfied to the criminal standard of the appellants' wrongdoing". It must follow that despite Lord Dyson's understandable caution, it is permissible for a judge in the civil recovery proceedings to express a conclusion in strong terms, provided that he applies the civil standard of proof, namely the balance of probabilities. If that were not so, the result of the appeal would have had to be different. This is not, in my respectful view, surprising. It would be strange if as a matter of law a judge dealing with civil recovery proceedings were prohibited from expressing a factual conclusion in strong terms even in a case where the evidence justified that conclusion.

37. The importance of not undermining the effect of an acquittal has been referred to in other cases. In Serious Organised Crime Agency v. Hymans [2011] EWHC 3332 (QB), after

referring to the observation by Lords Clarke, Brown and Dyson cited above, Kenneth Parker J said at [18]:

"... a court should not decide a civil case using language which casts doubt on the correctness of an acquittal. This will not happen if the court's language and reasoning goes no further than is necessary for the purpose of determining the issue before the court and without making implications of criminal liability. The fact that the findings may implicitly cast doubt on the acquittal is not sufficient to bring Article 6(2) into play. It is clear that a finding to the civil standard that unlawful conduct has been committed by a respondent who was acquitted of the very same conduct in criminal proceedings, will not undermine the effect of that acquittal."

38. Serious Organised Crime Agency v. Coghlan [2012] EWHC 429 (QB) at [14(3)] is to the same effect.

39. However, in neither of these cases did the defendant actually have the benefit of an acquittal. Rather criminal proceedings charging drug offences had been stayed as an abuse of process: see Hymans at [24], [25] and [60] and Coghlan at [25] and [93]. Accordingly, although the defendant could say that he had never been convicted, he had not actually been acquitted either. Therefore the question of what was the effect in law of any acquittal did not arise. It is, however, notable that although Kenneth Parker J was careful to state at [60] that he reached his conclusion on the balance of probabilities, he also said that on the evidence before him he had "no hesitation" in finding that the defendant had been "a professional, large-scale and sophisticated drug dealer".

40. In the present case the defendants rely also on the decision of Tugendhat J in Director of Assets Recovery Agency v. Virtosu [2008] EWHC 149 (QB), [2009] 1 WLR 2808. That was a case in which the defendant had been convicted of people trafficking in France. Tugendhat J held that the conviction, at any rate when (as in that case) the judgment contained a statement of the facts found to be proved, was evidence of the truth of those facts, and of the fact that such conduct was unlawful under French law. The judgment was not conclusive, but depending on the circumstances it might not be easy for the person convicted abroad to persuade the English court that SOCA (or in that case the predecessor of SOCA) had failed to discharge its burden of proving on the balance of probabilities that unlawful conduct had occurred. The defendants seek to apply this same reasoning to an acquittal abroad. In my judgment, such an acquittal is capable of constituting evidence in civil recovery proceedings, but since the burden of proof is on SOCA throughout I doubt whether it is necessary or helpful to say that it gives rise to any rebuttable presumption, or to rely on Virtosu for that point. I note that Virtosu was not cited in Gale, or in the later cases which followed Gale referred to above.

41. In the light of this review of the authorities I would summarise the position as follows:

(1) An acquittal whether here or abroad is not conclusive as to the defendant's innocence. To hold that it was would be contrary to the binding authority of Gale.

(2) In civil recovery proceedings the court must reach a conclusion on the balance of probabilities. That will generally require cogent evidence, and if appropriate a conclusion may be stated in strong terms, but the finding remains a finding on the balance of probabilities.

(3) An acquittal is evidence on which the defendant can rely. As with all evidence, its weight is a matter to be determined, taking account of the circumstances and of the evidence as a whole. The acquittal does not have the status of a formal presumption, but this does not matter as the burden remains on SOCA to prove its case.

(4) The weight to be given to an acquittal may be affected by the reason for the acquittal in question. If the defendant was acquitted for reasons not directly related to the merits of the case against him, for example because of shortcomings in prosecution disclosure, the acquittal itself may carry very little weight. Conversely, if the foreign court were to find that the facts alleged against the defendant were proved but that they did not amount to an offence under the relevant foreign law, the acquittal would be likely to demonstrate without more ado that SOCA could not satisfy the "dual criminality" test.

(5) In general, however, it is not appropriate for the English court to attempt to scrutinise or find fault with the reasoning of the foreign court, or to criticise the conclusions which it reached on the evidence before it, in assessing the weight to be given to the foreign acquittal. Rather, the approach of the English court in civil recovery proceedings should be to consider all of the evidence adduced before it, including the fact of the foreign acquittal, in order to determine whether SOCA is able to establish on the balance of probabilities the unlawful conduct which it alleges. That evidence may and often will be different from the evidence which was before the foreign court. The fact that the defendant was acquitted in criminal proceedings may cause the court to pause and think again before concluding that the defendant's conduct was criminal, but should not ultimately deter it from doing so, if that is the right conclusion on the evidence.

38. The judgment of Mr. Justice Males in *SOCA v Namli et al* was heard on appeal before the English Court of Appeal constituted by Vice President, Lord Justice Maurice Kay, Lord Justice Tomlinson and Lord Justice Christopher Clarke. It is noteworthy, that no criticism was made by their Lordships of Males J's analysis of SOCA v Gale or the question of burden of proof.
39. Mr. Taylor, opposing the notion of a heightened or hybrid standard of proof, referred this Court to another English High Court judgment where Hallet J sat on appeal of a confiscation order made by the lower court under section 43 of the Drug Trafficking Act. In his judgment, he held [paras 30-31]:

"[30] I reject Mr. Owen's submission, therefore, that the court should have applied a standard of proof akin to the criminal standard. I am not persuaded that proceedings which relate solely to the forfeiture of even a sum of money as large as this require HM Customs & Excise to prove the drugs connection to the criminal standard or, as Mr. Owen put it, something very close. Nor am I persuaded that forfeiture proceedings of this kind fall into the category envisaged by Lord Nicholls where the allegation made is so inherently improbable that more cogent evidence is required than may normally be the case. I am satisfied that the test properly applied to these proceedings was whether or not the court was satisfied that it was more probable than not that the money represented the direct or indirect proceeds of drugs trafficking or was intended for use in drugs trafficking.

[31] I am satisfied that the approach adopted by Judge Adele Williams in this case to the standard of proof was an eminently sensible and fair one. As she put it, the court would apply the civil standard but with great care. If any gloss was needed on the words of the statute- and

I, for my part, am not persuaded that on the facts of this case it was- that gloss must have operated to the benefit of Mr. Butt. The court was plainly conscious of the consequence of a forfeiture order when such a considerable sum of money was at stake."

Analysis and Decision:

40. On the Appellant's first ground of appeal he challenges the Senior Magistrate's factual findings that the $67,793.00 cash sum seized from Mr. Lambert represented proceeds of criminal conduct: *videlicet* drug trafficking. These findings were partly based on a mathematical analysis of the Appellant's income and financial liabilities over an 18 month period leading up to 16 June 2016. Mr. Wolffe also drew various inferences from the evidence before him which supported his final findings.

41. I should note that Mr. Richardson was clear in his assurances to this Court that there would be no need for me to review any of the evidence presented to Mr. Wolffe because the Appellant fully accepts Mr. Wolffe's narration of the evidence. Mr. Taylor expressed a similar view. As such, neither Mr. Richardson nor Mr. Taylor referred me to any portion of the appeal record or the evidence presented at the Magistrates' Court trial, save that Mr. Taylor referred minimally to the witness statement of US Customs and Border Protection Officer, Mr. David Weems, dated 16 June 2016 [page 115 of the Record of Appeal].

42. Notwithstanding, I have ineluctably examined the full record of the evidence adduced. I have had particular regard to the transcript of the Appellant's 71 minute caution interview of 17 June 2016 with DS 2210 Paul Ridley and DC 537 Patrick Rock. This was exhibited to DC Hollis' affidavit evidence [DH/23]. As this is a statutory rehearing of the forfeiture application on the evidence submitted before the magistrate, it is incumbent on this Court to independently assess that same evidence through higher powered lenses, in the context of the grounds of appeal.

43. It is sensible to start with the calculations of the Appellant's legitimate earnings and expenses. The Appellant's case was that the $67K was the fruits of one year's worth of savings and that his sole source of income is legitimately derived from his work as a taxi driver. Against no contention between the parties, the Senior Magistrate accepted that the Respondent lawfully owned the taxi under registration number T1345 ("Taxi 13") as per the terms of a 2006 bank loan from Bank of N.T. Butterfield ("BNTB"). Mr. Wolffe also found that the Appellant owned a second taxi under registration number T1645 ("Taxi 16") in respect of which he purchased a taxi permit from Mr. Nadanja Bailey.

44. Mr. Wolffe found it indisputable on the evidence that the Appellant had legitimately earned at least $130,380.00 over the 18 month period preceding the 16 June 2016 seizure. This was the record of total money deposited by Ms. Maverneen Fox of Executive Transport into the Appellant's account. Neither party caviled about these findings.

45. In his judgment, Mr. Wolffe found [paras 40-42]:

"*40. I therefore find as a fact that at least in the eighteen (18) month's prior to the Respondent's arrest and seizure of the Property that the Respondent legitimately earned at least $130,380 from driving taxi for Executive Transport, and that it is likely that he earned more legitimate income from "street jobs" driving taxi. One would be naïve though to conclude that because the Respondent was earning a legitimate income from driving taxi that this is proof positive that he was not also obtaining proceeds from criminal conduct. Those in the illegal drug market are often engaged in legitimate employment and are able to show legitimate income earned, but this may often be an attempt to distract the authorities from detecting illegitimate streams of income derived from criminal conduct…*

41. Firstly, by sheer mathematical calculations, questions surface about the amount of disposable cash available from the Respondent to meet his expenses. The documentation from HSBC shows that for eighteen (18) months prior to his arrest on 16th June 2016 i.e. between January 2015 and June 2016 a total of $150,882.00 was withdrawn from the Respondent's account (Exhibit DH/32), and that $130,380 were funds that were legitimately directly deposited by Ms Fox. The Respondent also stated that in May 2016 i.e. one month before his arrest in June 2016 that he had finished paying off the substantial sum of $120,000 to Mr. Bailey for a taxi after making installment payments in the eighteen (18) months prior. That is, the same eighteen (18) month period that Executive Transport directly deposited $130,380.00 into his account. Unless there were other legitimate streams of income earned by the Respondent in the eighteen (18) months prior to his arrest this would mean that the vast majority of the $150,882 withdrawn from his HSBC account was used to pay Mr. Bailey $120,000 for the taxi. It stands to reason that if most of the $150,882.00 was used to pay for Mr. Bailey's taxi then there should be an explanation from the Respondent as to how he met his other expenses (including taking various sums of money to Dominican Republic and sending funds via Western Union) over that eighteen (18) month period, and most importantly, how he was still able to save $67,793. If indeed his "street jobs" would have allowed him to meet his other expenses and also save $67,793 then it would have been beneficial for the Respondent to particularize the total amount that he actually earned from "street jobs". He did not provide a reasonable explanation about this, and the problem is compounded by the fact that the Respondent did not provide any documentation as to the $120,000 that he paid to Mr. Bailey. I find it bizarre that there are no receipts from the Respondent or Mr. Bailey as to the payment of such a large sum of money.

42. From this, I draw the inference and find that in at least the eighteen (18) months preceding his arrest on 16th June 2016 that the Respondent must have obtained other sums of money to augment his legitimately earned income from driving taxi."

46. Mr. Wolffe accepted the evidence under Exhibits DH/32 and DH/33. Exhibit DH/32 is a spreadsheet of the Appellant's HSBC bank account transactions from 13 January 2016 to 17 June 2016[1]. The total sum of withdrawals for this period is $39,010.00. Exhibit DH/33 is another spreadsheet of the Appellant's HSBC bank transactions but covers the period starting on 16 January 2015 through to December 2015. The total sum of withdrawals for this period is $111,872.00. Collectively, Exhibits DH/32 and DH/33 cover the 18 month period preceding

[1] DC Hollis appears to have erred in deposing that Exhibit DH/32 shows transactions covering the period for January to August 2016.

16 June 2016 showing an accumulated withdrawal sum of $150,882.00 from the Appellant's HSBC savings account.

47. These exhibits also disclose that a total sum of $130,381.00[2] in deposits made by Ms. Maverneen Fox of Executive Transport were made during the same 18 month period. The cash deposits for this 18 month period is shown on these exhibits to total $6,242.11. The Appellant explained that he generally kept his US currency earnings at his residence. He said he would immediately withdraw the Executive Transport deposits from his account and hold on to any other American money. In relation to his 'street work' cash in Bermudian currency, the Appellant explained that he sometimes deposits these sums into his bank account [page 12 of the record of interview]:

"*Bermudian, when I get Bermudian* [currency] *it's just from the street, you know, jobs off the street. It's just that's what goes to the bank sometimes, you know?*"

48. The Senior Magistrate did not make an express finding in his judgment in respect of the legitimacy of any portion of the total sum of cash deposits for the 18 month period he examined. Thus, the sum of money which fairly represents the cash sums earned from taxi driving must now be considered, at least broadly. The Appellant stated in his caution interview that his daily earnings came to $400.00. He said that he works 14-15 hours a day starting around 6:30am and finishing up at about 10:00pm. However, he also clarified that this estimation comprised of both his 'corporate work' and his 'street work' [page 12 of the record of interview]:

"*No, but I don't get cash a day, I (inaudible) say $400 cash a day. 'Cause remember I do corporate work, which is different than the street work. Street work, like, for me to go to Hamilton Princess, get a job to the airport. Right, that goes in my pocket. My corporate work goes into my account*."

49. In calculating the $400.00 per day sum according to a 5-day working week I find that the Appellant was making approximately $8,000.00 per month i.e. $144,000.00 over the 18 month period. On the Appellant's case, he was legitimately earning more than the $130,381.00 deposited Executive Transport. Therefore, I consider it fair to add the full $6,242.11 cash deposit total to the sum of $130,381.00 so to gain a more likely approximation of the legitimate earnings held in the Appellant's HSBC account over the 18 month period. This brings me to the figure of $143,882.11. Further, I would include the $700.00 deposit by Ms. L'Tanya Lambert, a likely relative, in the pool of legitimate income held in the Appellant's HSBC account. This would raise the legitimate total to $144,582.11. (As an aside, it is unclear to me why the reported sum of cash deposits plus the reported sum of deposits by Ms. Fox plus the deposits by Ms. Lambert do not equal the total deposited sum reported in Exhibits DH/32 and DH/33. The difference, in any event, is minimal.)

50. So within the 18 month snap shot period, the Appellant saw deposits of up to $144,582.11 but withdrew an accumulated sum of $150,882.00. I have reviewed Exhibit DH/32. There, it is

[2] This is a $1.00 difference from the calculations stated in the Senior Magistrate's judgment.

reported that as at 14 June 2016 the Appellant's HSBC account balance was $18.95[3]. This means that he must be deemed to have had available income in the sum of $6,318.84 from the period preceding the 18 month timeframe in order to have withdrawn up to $150,882.00 during that period. For the sake of caution in favour of the Appellant's case, I would treat the $6,318.84 as money saved. This would once again elevate the legitimate total bringing me to the sum of $150,900.95. This is an $18.95 difference from the total withdrawal sum of $150,882.00 for that 18 month period. For these reasons, I would find that all of the monies held in the Appellant's HSBC account should be deemed as legitimate and lawful income.

51. However, Exhibit DH/34 discloses additional income in the Appellant's Clarien Bank ("Clarien") account for a near 6 month period between 29 January 2016 and 10 August 2016. This income, totaling $13,335.00, is unaccounted for by the evidence of the Appellant's earnings. After all, it is clear on the evidence that Ms. Fox of Executive Transport only deposited monies into the Appellant's HSBC account. (In her witness statement dated 1 July 2016 under Exhibit DH/28 she said *inter alia*; "*When I pay Nicai I pay him in a direct deposit from my US Dollar account to his HSBC US Dollar account*"). This means that the cash sums deposited in the Clarien account were being deposited by the Appellant himself or another party. The Appellant, of course, would say that he deposited these sums and that they were part of his savings. However, having generously assessed the funds in the Appellant's HSBC account, I find that it is mathematically unlikely, if not implausible, that those monies were derived from the Appellant's earnings as taxi driver.

52. Further, the account activity, on any standard of assessment, is highly suspicious. The Clarien account is a US dollar savings account; yet from 29 January 2016 through to 10 August 2016 the Appellant was routinely withdrawing substantial sums of money in US currency. The only reasonable inferences which may be drawn from this is that the Appellant was most determined to herd large sums of cash in US currency in his hand.

53. I reject the Appellant's explanation that these systematic withdrawals were born out of his distrust of banks. In relation to the closure of his BNTB account, the transcript of the caution interview disclosed the following exchange with the Appellant [page 32]:

"*DS 2210: ... But I was talking about the finances, and we're talking about banks and BNTB, The Bank of Butterfield. I know that you used to hold an account at Butterfield where there's an existing loan, and they closed you down. And the reason why they closed you down was, I don't know if you know this, but because of the activity…*

NL: Didn't know

DS 2210: It was because that you were going in, putting money down, Bermuda currency…

NL: Taking it out

[3] On 17 June 2016 Ms. Fox of Executive Transport deposited $1,878.00 bringing his balance to $1,896.95.

DS 2210: …and taking it straight out. Now on its own you might think, "Okay, well, that's one of those things," you go to, you go to DR. But when we look at your, and we've only had, had a quick snapshot of your account activity, but it's happening not in one bank, but it's happening in all three banks. So somebody might look from the outside and say, "There are three accounts using all three for different, at different times to conduct these in and out transfers to spread the risk, so to speak. Would you have anything to say about that?

NL: No"

54. Notwithstanding, the Appellant did not present himself as someone who avoided the use of banks. He was clearly an active customer of the banking system. He had (i) a checking account and a separate US dollar account at Clarien Bank; (ii) a US dollar account and a Bermuda dollar savings account at HSBC Bank and (iii) a BNTB account from which his loan payments were made. In addition to receiving deposits from Ms. Fox of Executive Transport, the Appellant himself told police that he would deposit his Bermuda cash into his bank account. This is evidenced by his multiple cash deposits into both his HSBC account and his Clarien account in addition to his reliance on bank loans. It is thus, crystal clear on the evidence that the Appellant's excessive cash withdrawals were motivated by his drive to have large sums of US currency on him.

55. The Appellant was questioned by police on his US currency withdrawals [page 29 of the record of interview]:

"DS 2210: Which brings me onto the banks themselves. So the banks themselves, if they think that there's something suspicious going on they will tell us.

NL: Yeah

DS 2210: And they have, all three banks have reported on you on suspicious activity. And that is, and we call it the classic 'red flag money laundering', where somebody is coming in, depositing money and immediately taking it out in US currency. Now you've given us an explanation of that, but some of the values that we're looking at is over months we're talking about tens of thousands in US dollars. So now I use that to say, in the past you've, you've gone to DR between four and ten thousand dollars, never, never any more than that. But the reports that we've received from the bank shows that in actual fact you are exchanging much more than that. More than the 10,000 that you go via the US. So is there an explanation to this?

NL: (No audible response)

DS 2210: The banks are saying, "This guy's exchanging a ton of money," you're saying, "Well, I'm going to DR six times a year, and I'm only doing anything more than ten." Something's not right here.

NL: Yeah(?), it's what I got home, it's what I had home.

DS 2210: Right. Is there any time that you would exchange money and not take it to DR?

NL: Yeah (inaudible) what I had home

DS 2210: Yeah

NL: Yeah"

56. The following is a synopsis of the Appellant's bank activity from his Clarien account:

(i) withdrew $400 on 4 February 2016 from the $500 deposit made a week prior on 29 January 2016 (Immigration records show that the Appellant was in Bermuda during this time up until14 February 2016 when he departed for Miami);

(ii) eleven days later on 15 February 2016 withdrew $1,014.14 (in US currency) depleting the $1000.00 sum which had been deposited earlier that same day or during the latter part of the previous day (Immigration records show that the Appellant was overseas during this time, having left Bermuda for Miami on 14 February 2016);

(iii) withdrew $700 on 18 March 2016 after two deposits of $400.00 and $300.00 had been made on 11 March 2016 and 14 March 2016 respectively (these transfers were made by unidentified bank accounts) (Immigration records show that the Appellant was in Bermuda during this time up until 10 April 2016 when he departed for Miami);

(iv) three days later on 21 March 2016 withdrew $2,434.43 (in US currency) which was one dollar less than the sum of $2,435.43 which had been deposited earlier that same day (Immigration records show that the Appellant was in Bermuda during this time up until 10 April 2016 when he departed for Miami);

(v) less than two weeks later on 5 April 2016 withdrew $1,698.64 (in US currency) which was just over one dollar less than the sum of $1,700.00 which had been deposited earlier that same day (Immigration records show that the Appellant was in Bermuda during this time up until 10 April 2016 when he departed for Miami);

(vi) less than one week later on 11 April 2016 withdrew $1,000.00 (in US currency) depleting the $1,000.00 deposit made earlier that same day or during the latter part of the previous day (Immigration records show that the Appellant was overseas during this time, having left Bermuda for Miami on 10 April 2016);

(vii) on 13 June 2016 withdrew $3000.00 from the $4000.00 deposit made earlier that same day (the Appellant was in Bermuda during this time and was due to depart Bermuda for the Dominican Republic via New York on 16 June 2016);

(viii) on 4 July 2016 withdrew a further sum of $1060.00 (the Appellant was in Bermuda during this time);

(ix) on 10 August 2016 withdrew the sum of $2000.00 cash which had been deposited two days prior on 8 August 2016 (the Appellant was in Bermuda during this time);

57. On 7 July 2017, DC Hollis deposed that there was no further activity on this account and that the final account balance was $2.39 on 10 August 2016. One can only infer that these monies were subsequently taken overseas with him to the US. For example, between 18 March and 11 April the Appellant had withdrawn up to $5,833.07 from his Clarien account. This is to be considered with the evidence of his departure from Bermuda on 10 April 2016 when he travelled to Miami. Further, the Appellant, himself told police that he would usually travel with $4,000.00 - 5,000.00. In my judgment, it was clearly established on the evidence that the Appellant was systematically withdrawing thousands of dollars from his Clarien account and was travelling overseas to Miami with those monies.

58. Notwithstanding, the question of the legitimacy of the source of the monies in his possession must be further explored. I shall thus address my mind to the Appellant's financial liabilities and expenditures. This evidence is mostly contained in the Appellant's 17 June 2016 caution interview which was exhibited to the affidavit evidence of DC Hollis. I have also looked at the exhibit documents produced by DC Hollis.

59. The Appellant stated in his caution interview that he lives with his mother and her partner rent-free at the family homestead in Sandys Parish. His regular expenses consist of (i) a monthly sum of $350.00 for his wife's rental obligations in Santiago De Los Caballeros (i.e. $6,300.00 over 18 months); (ii) $100 per month for groceries (i.e. $1,800.00 over 18 months); and (iii) vehicle-related expenses such as gas and annual insurance fees. To the Appellant's favour, I would generously estimate the gas and annual insurance expenses applying the minimal sum of $2,000.00 per annum (i.e. $3,000.00 over 18 months). So, over an 18 month period these regular expenses would have totaled $11,100.00.

60. Additionally, the Appellant stated that he purchased the permit for Taxi 13 for the sum of $140,000.00 approximately 20 years prior to his caution interview. This was aided by a bank loan from Butterfield N.T. Bank ("BNTB") for which he makes regular payments. The Appellant stated in his police interview that he is up to date with these loan repayments and that the remaining loan balance was in the region of $70,000.00. I have reviewed the Chattel Mortgage dated 14 June 2006 in respect of BNTB's loan to the Appellant for the said permit. The loan sum stated is $120,503.00. On DC Hollis' evidence, on 18 January 2008 the loan sum increased by $59,010.00 to facilitate the Appellant's purchase of a new vehicle and the Appellant was delinquent in his loan repayments in 2014. The regular monthly sum payable was $2,400.00. I have reviewed the exhibit of the ledger of loan repayments [DH/27 at page 211 of the Record]. This shows that the total sum of $35,837.76 was paid on the BNTB loan (late fees inclusive) in the 18 months leading up to 16 June 2016. Had the Appellant been up to date with his repayments in the preceding 18 months, he would have paid no less than $43,200.00. This is a shortfall of $7,362.24.

61. When asked by police if he had any other outstanding bank loans, the Appellant stated that the bank repossessed property on Rosemount Avenue which he purchased some 8 years prior for the approximate sum of $700,000.00. He said that the bank resold this property for a sum less

than what he had currently owed on the mortgage. According to the Appellant, the loan for Taxi 13 and the mortgage was at some point consolidated into one loan from HSBC leaving the Appellant responsible for the monthly sum of $3,500.00. This means that over an 18 month period the Appellant would have paid the sum of $63,000.00 in bank loan repayments. However, I have seen no evidence of actual loan repayments beyond the said sum of $35,837.76. The shortfall would therefore be $27,162.24 from the sum of $63,000.00.

62. The Appellant had also recently purchased the permit for Taxi 16 from Mr. Bailey for the sum of $120,000.00 through cash installments. He told police that he had already settled $100,000.00 out of the $120,000.00 sum. The record of the questioning about this loan repayment in its pertinent part is as follows:

DS 2210: Okay, it shows that your cash is going somewhere, because at the moment I've just got this vision of, you know, all this cash, some going to DR, but, you know, there's still an awful lot that is unaccounted for, in my mind, at least.

NL: Yeah, yeah, well, yeah.

DS 2210: So, and when you pay this guy, would you pay him on the drip, as I call it, would you give him five grand here, five grand there? Or would it be lumps of five…

NL: No, it, it varies

DS 2210: Yeah. When's the last time you paid the guy?

NL: It's been a couple of months now, been a while.

DS 2210: Right. Is there any written agreement that you have?

NL: No

DS 2210: So if I'm going to spend $120 grand on something, I'm gonna ensure that that guy that if I'm paying him, I'm going to have a payment plan, and I'm gonna note down all the times I've given him… Because if he turns round and says, "Hey you haven't given me a 100 grand, mate," what have you got other than each other's word that you shelved out 100 grand?

NL: Well, I have the, you know, the paperwork, the permit and stuff.

…

DS 2210: Okay and in that paperwork does it show an agreement of 120 grand?

NL: No

DS 2210: Okay. That's what I'm saying, that's what I mean, how, other than the permit how can you show that this permit cost you 120 grand and that you forked out for it, you paid him…?

NL: Well, I just take him as a nice guy, so…yeah, I've known him for a while, so…

63. DC Hollis swore on affidavit evidence that he telephoned Mr. Bailey on 27 June 2017 who confirmed that around May 2016, after receiving the final installment of payment from the Appellant, he sold Taxi 16 and his permit to the Appellant. Mr. Bailey told DC Hollis that the Appellant had paid him a total of $120,000.00 in cash installments over the previous 18 months but that he had since destroyed his receipts of the transactions. This is blatantly inconsistent with the Appellant's account to police where it was suggested that full payment had not yet been made and that no supporting documentation for the payments was made on account of the amity in their relationship. DC Hollis produced documentation to show that since May 2016, the Appellant has been the lawful owner of Taxi 16 and that his license was current through to September 2017. Based on this corroborating evidence, I find that the Senior Magistrate was correct to include the full payment sum of $120,000.00 in his deliberations on the Appellant's financial position.

64. It is also common ground on the evidence that the Appellant regularly travelled to the US before the cash seizure in June 2016. In his interview he said that he had most recently used a Clarien Bank credit card to purchase a cheap American Airlines ticket to the Dominican Republic. He explained that he used the credit card to accumulate [air mile] points and that his ticket cost only $1,100.00. When asked how many times he had traveled to the Dominican Republic over the previous 12 months he said; "six, probably…basically every six to eight weeks I go down there". I have had regard to exhibit DH/37 which contains the 14 December 2016 witness statement of Mr. Shawn Furbert in his capacity of a Senior Immigration Officer and Inspector for the Ministry of Home Affairs. In that statement, Mr. Furbert reported, *inter alia*, that from 5 February 2015 through to 14 May 2016 the Appellant made 9 round trips between the US (Miami and New York) and Bermuda. (I should note that I accept the Appellant's contention that he travelled further on to the Dominican Republic when he flew to the US. On this point I would refer to Mr. Attridge's cross-examination of the DC Hollis who conceded to having seen multiple stamps on the Appellant's passport from the Immigration Department in the Dominican Republic).

65. The Appellant described his most recent ticket price of $1,100.00 in favourable terms. In formulating the average cost of his airfare for the 9+1 (i.e. the cost of the airfare to travel on 16 June 2016) trips, I will err cautiously by calculating his tickets at the lowest likely cost of $1000.00 per airline ticket. This brings me to a total sum of $10,000.00 spent on airfare alone over the preceding 18 month period. The Appellant clearly stated in the caution interview that he travelled with approximately $4,000.00-$6,000.00 on him per trip. The only reasonable inference available to me is that he spent most or all of this money that he traveled with. Using the median sum of $5,000.00 and adding that to the $10, 000.00 cost of 18 months of air fare, I find that over the same 18 month period, the Appellant's 9 trips would have cost at least $50,000.00.

66. The Appellant made it known to the police that his wife and three children (two biological children and one step-child) are financially dependent on him and that he supports his family by sending money to his wife by Western Union when he is not in the Dominican Republic. Additionally, the Appellant revealed that he purchases clothing for his wife to resell in the Dominican Republic. On his initial statement to police it seemed as if he was explaining that he purchases this clothing in Miami and New York and then travels with it thereafter to the Dominican Republic [page 24 of the record of interview]: "*Well, she well, I, usually when I make a trip I go either Miami or New York, I buy clothes for her to sell down there. She sells her clothes and, you know, and she helps with stuff around the house and I, that's why I send money to her to, whatever, like, you know*…" However, further into the caution interview, the Appellant said that he purchases this clothing online via Amazon and ships it to New York where he stops to visit a long term girlfriend before returning to his wife in the Dominican Republic. The Appellant was tasked to provide proof of these purchases on Amazon but did not do so.

67. According to the Appellant, he sent sums of money to his wife and others (girlfriends and to his wife's cousin, Victor A.M. Rosario) when he was not overseas. I have reviewed DH/36 which is a record of Western Union transfers sent by the Appellant. On the face of DH/36 it appears that between 18 January 2016 and 6 April 2016 (which is the date range of transfers within the 18 month period preceding 16 June 2016) the Appellant transferred the total sum of $6,094.25 via Western Union. **(**It is noted in the judgment of the Senior Magistrate that DC Hollis initially calculated the total sum of Western Union transfers to come to $60,592.00 before conceding under cross-examination that the correct sum was $31,369.77. In any event, I am not concerned with the overall total sum of Western Union expenditures as I have focused my mind to the 18 month period preceding the 16 June 2016.

68. When asked by police if he has any bank loans in the Dominican Republic, the Appellant explained that he purchased a car there and that the car vendor was also the lender. No further details about this were elicited by the police during the caution interview. I would therefore avoid altogether any speculation on the expense of a car loan in the Dominican Republic.

69. So, by way of recap I have found in respect of the 18 month period leading up 16 June 2016 that the Appellant legitimately gained **$150,900.95**. During this same 18 month period he made the following expenditures:

(i)	$11,100.00	(Regular bills including his wife's rent in the Dominican Republic)
(ii)	$35,837.76	(BNTB loan repayments)
(iii)	$120,000.00	(Purchase of Taxi 16 and permit)
(iv)	$50,000.00	(Travel)
(v)	$6,094.25	(Western Union)
Expenditure Total:		**$223,032.01**

70. This leaves the differential sum of $72, 131.06 unaccounted for. This could not be rectified even if I found that the $13,335.00 in the Appellant's Clarien account was legitimately sourced. I am thus satisfied that the differential sum of $72, 131.06 represents the proceeds of criminal

conduct. I have found that the said $13,335.00 is also directly or indirectly the proceeds of criminal conduct. The total of these two sums is $85,466.06. This exceeds the sum of cash seized on 16 June 2016 so I am firm in my conclusion that the $67,793.00 forfeited from the Appellant is a portion of the criminal proceeds he had in his possession.

71. The surrounding evidence of the Appellant's comportment with his funds supports the Senior Magistrate's findings in relation to drug trafficking. In his judgment, the Senior Magistrate held [para 53-54]:

"*However, I do place reliance on the evidence of DC Hollis and I find as a fact that:*

(i) Drug traffickers' favoured currency of choice is the US dollar. The $67,793 was in US currency in various denominations.

(ii) The use of couriers is one of the methods used by drug traffickers to take their proceeds from the sale of drugs out of Bermuda, and that the strapping of money to the courier's body and the hiding of money in the courier's luggage are methods of concealment employed by drug traffickers. By virtue of the large amount of money in this case and the manner in which it was concealed on the Respondent's body it is clear that the Respondent was couriering the $67, 793 for himself or for another.

(iii) Drug traffickers prefer couriers who have no obvious connections to criminality to courier their money. On the surface the Respondent has legitimate employment and income from owning and driving taxi, but as I found earlier his income derived from taxi driving does not appear to match up with his expenditure.

(iv) *New York and the Dominican Republic are source countries for the supply of controlled drugs in Bermuda*."

72. These findings are supported by the unchallenged evidence of DC Hollis who swore [para 88 h)-i)]:

"…
h) That it is within my knowledge and belief that Bermuda is not a drug producing country (Cannabis plants aside) and the majority of drugs sold in Bermuda are imported. Payment from this particular criminal conduct or [sic] intended for use in criminal conduct is required. The drug traffickers favoured currency of choice is the US dollar and couriers is one of the many methods used. That couriers are preferred that are outside of criminality without obvious connections to crime who will courier money from Bermuda either 'strapped' to their bodies or deposited into their luggage amongst clothing, for reward.

i) That is within my knowledge and belief that New York and the Dominican Republic are source countries for the supply of Controlled drugs to Bermuda."

73. Based on the evidence before the Court, I see no flaw in the Senior Magistrate's reasoning that the criminal conduct was drug trafficking. Based on all of the evidence which includes the

evidence of the Appellant's dishonest replies to US Customs, I find that the Appellant's expensive and frequent travel habits to the US and to the Dominican Republic were more about his drug trafficking ventures than his will to see his wife and children. The Appellant sought to explain his purpose for spending time in the US (beyond a mere layover en route to the Dominican Republic) by his assertion that he had a shipping address for his Amazon purchases there. He said he would also visit his long-term girlfriend in New York. However, in my judgment, it is not believable that the Appellant, having regard to his legitimate earnings, regularly traveled to Miami for the sole purpose of collecting an Amazon shipment of clothing. Whether he collected Amazon shipments in Miami or not, he was clearly travelling to Miami and the Dominican Republic every 4-6 weeks with illegitimate gains which were both proceeds of drug trafficking and which were also intended for use in criminal conduct in the form of drug trafficking.

74. Looking at this picture as a whole (i.e. several tens of thousands of dollars illegitimately sourced; routine withdrawals of large sums of US currency; monthly travel to the US with sums less than those withdrawn from the Bermuda banks; concealed cash found on the Appellant on 16 June 2016 together with his dishonest replies to US Customs) I am satisfied that the evidence establishes at a very high balance of probabilities that the cash seized from the Appellant on 16 June 2016 was criminal proceeds related to drug trafficking. That is to say that although any one of these facts might not singularly point to a proven case, together the evidence strikes with the force of a strong and sturdy fist.

75. Mr. Richardson argued in support of his second ground of appeal that the Senior Magistrate erred in law by drawing adverse inferences from the Appellant's failure to provide reasonable explanations for the source of the cash seized, in answer to the Crown's case. Mr. Richardson combined this ground of complaint during his oral arguments with his third and final ground of appeal that the Senior Magistrate erred in law by drawing wrongful inferences from the evidence of the Appellant's caution interview. I will therefore address these complaints simultaneously.

76. Behind these two grounds of appeal, Mr. Richardson contends that the Senior Magistrate ought to have applied an elevated civil threshold in assessing whether the Crown had proven its case on a balance of probabilities. However section 62 of the 1997 Act can only be construed on its plain and literal wording. Had Parliament intended the standard of proof to go beyond the ordinary civil standard, it would have so enacted. Instead, section 62 provides an express distinction between the standard required for a prosecution of a criminal offence and the standard of proof to which civil claims under the 1997 Act are held.

77. While I was directed to various authorities, each of the cases concerned with the civil recovery procedure stood on the shoulders of the UK Supreme Court's decision in *SOCA v Gale.* (I have already distinguished *McCann et al*, where the English Courts were concerned with statutory anti-social behavior orders which were not governed by any express statutory provision directing the Courts on the standard of proof to be applied. I also distinguished the anti-social

behavior orders from forfeiture and civil recovery orders on the basis that the latter is concerned with the provenance of the property for seizure and the relationship between that property and criminal conduct. This is in contrast to anti-social behavior orders which are consequential solely to the personal conduct of a respondent.)

78. In Lord Phillips leading judgment [para 55] in *SOCA v Gale* he held that the first instance judge rightly applied the civil standard of proof in respect of a civil recovery application under the UK Act. Lord Phillips then, by mere remark, observed that in that particular case, the judge would have also been satisfied to the criminal standard of the Appellants' wrongdoing. Lord Phillips was not suggesting that the criminal standard or any elevated civil standard was to be applied in civil recovery proceedings. He was simply commenting about the trial judge's view of the strength of the evidence in that case. This point of view, no doubt, is supported by Kawaley CJ's approach in *Zirkind* and Hellman J's approach in *Tito Smith*, since both of the learned judges cited *SOCO v Gale* and went on to apply the ordinary civil standard to the evidence relevant to the civil recovery claims before them.

79. Males J in *SOCO v Namli* provided an instructive narrative and analysis of *SOCO v Gale* at both the High Court and Supreme Court level. Citing from Griffith Williams J's judgment, he held that the standard of proof to be applied was on the balance of probabilities. However, Mr. Richardson would take out his brightest marker to the following infamous portion of the High Court judgment: "*However, in view of the serious nature of an allegation of unlawful conduct, and the serious consequences which follow from such a finding, the courts have repeatedly emphasised that careful and critical consideration must be given to the evidence relied on, and that cogent evidence will be required in order for such an allegation to be established*."

80. Griffith Williams J cited from the unanimous House of Lords judgment in *Home Secretary v Rehman* in the making of this statement. In *Rehman*, Lord Hoffman approvingly referred to Lord Nicholls of Birkenhead's holdings in the *re H (Sexual Abuse: Standard of Proof) (Minors)* case. Lord Nicholls remarks on the standard of proof are the seeds which sprouted from the reasoning behind Griffith Williams J's employment of the term "cogent evidence". Lord Hoffman, having approved of Lord Nicholls explanation, said this in Rehman [para 55]:

"55…. *But, as Lord Nicholls of Birkenhead explained in In re H (Sexual Abuse: Standard of Proof) (Minors) [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not*."

81. Following the reasoning given by Lord Hoffman, the question of proof remains on a balance of probability. However, proving probability will be more difficult in some cases than others. So in a case involving a Respondent who has never had any legitimate source of income and who has a long history of culpable involvement in drug related offences, it would not likely be particularly difficult to establish that large sums of cash found concealed in his possession are

proceeds of criminal conduct. On the other hand, in a case involving a person who has for decades been gainfully employed in a lucrative post with no apparent affiliation with unlawful activity, more cogent evidence may likely be required to satisfy the Court that monies held in his bank and investment accounts are the proceeds of criminal conduct. I have given the Appellant in this case the benefit of the latter category.

82. As Lord Brown observed in *SOCA v Gale*, civil recovery proceedings do not involve a criminal charge and a defendant cannot resultantly be branded a criminal. This is why the UK Supreme Court concluded that a finding that there has been unlawful conduct does not contradict an acquittal in criminal proceedings. Furthermore, in civil recovery proceedings, civil procedure and civil rules of evidence apply as opposed to the criminal law. This starts from the pre-trial process for the filing of evidence and extends to the rules of disclosure, as was contended by Mr. Attridge in the Magistrates' Court proceedings in this case. So where evidence may be excluded in a criminal trial as inadmissible hearsay, that same evidence may be produced in civil recovery proceedings if it would otherwise be admissible in any other ordinary civil hearing. This is why the right to silence and protection from adverse inferences in criminal proceedings does not equally arise in the assessment of evidence in civil claims under the 1997 Act. I am, therefore, bound to reject Mr. Richardson's invitation for this Court to direct itself according to criminal rules of evidence in assessing the Senior Magistrate's approach to the evidence. In my judgment, the Senior Magistrate was entitled to draw inferences from the Appellant's failure to provide explanations in answer to the Crown's evidence which were well within his knowledge.
83. Having said all of that, I would also accept, as did Males J in *SOCA v Namli*, that in practice the evidence underlying a balance of probabilities-conclusion in favour of a forfeiture order will most often be capable of also meeting the criminal standard of proof in cases where "cogent" evidence has been carefully and critically considered. Indeed, in this case I too am left "in no doubt" that the monies seized from the Appellant on 16 June 2016 were directly or indirectly the proceeds of criminal conduct and that the criminal conduct concerned was drug trafficking. I say this only because it is permissible for me to express my conclusions in such strong terms even though the standard of proof to which the Crown is held to task is on the balance of probabilities.

84. For all of these reasons, I would dismiss grounds 1, 2 and 3.

Postscript: Delay in the Prosecution and Hearing of this Appeal

85. It has taken nearly two years for this appeal to be heard. As such, a chronology of these proceedings is warranted.

86. On 25 January 2019 the Appellant filed its Notice of Appeal. By way of a Consent Order signed by the Honourable Chief Justice, Mr. Narinder Hargun, a sum of $10,000.00 was released from the monies forfeited pursuant to section 51(4) of the 1997 Act.

87. The Record of Appeal was sent to the Supreme Court on 4 July 2019. On 29 August 2019, the Appellant filed a summons for directions which was made returnable before me on 10 October

2019. However, on that date Mr. Taylor appeared on behalf of the Crown but Mr. Richardson failed to appear. I directed for Mr. Richardson to be served with a copy of my Order adjourning the directions hearing to 24 October 2019.

88. On 22 October 2019 Mr. Richardson's assistant sent an electronic copy of his written submissions to the Court. When the matter came back before me on 24 October 2019 I directed for the Crown to file written submissions within a 3 week period and I gave the parties leave to sequentially file affidavit evidence within three 14 day periods. The substantive hearing of the appeal was then fixed for 5 February 2020.

89. The Crown filed its written submissions on 31 January 2020. No evidence was filed by either party. On 5 February 2020 the matter came before Pettingill AJ. On Pettingill AJ's note of the hearing, Mr. Richardson did not appear. Mr. Richardson instead sent his administrative assistant to the Court to seek an adjournment of the hearing, without prior notice by correspondence to the Court. The reasons for the adjournment application are not noted on the Court file. However, Pettingill AJ adjourned the appeal to 27 February 2020.

90. By email dated 24 February 2020, a Court administrator wrote to the parties to advise that the new appeal fixture for 27 February 2020 would be relisted for mention to 12 March 2020 due to Mr. Richardson's involvement in a murder trial.

91. On 12 March 2020 the matter appeared before me but Mr. Richardson, once again, did not appear before the Court. I directed for the appeal to be heard on 10 June and Mr. Taylor undertook to inform Mr. Richardson accordingly, which he did by email of the same date copied to the Court.

92. I will take notice of the months of Supreme Court closure which shortly followed thereafter due to the COVID-19 pandemic. By a Court Notice of Hearing dated 18 September 2020 the parties were directed to reappear before the Court on 1 October 2020 for mention. On that date Mr. Richardson did not appear but sent his administrative assistant to attend before the Court in his stead. I then fixed the appeal to be heard on 7 October 2020 and issued a strong warning to Mr. Richardson's assistant that the matter ought not to be further adjourned.

93. Brazenly, Mr. Richardson did not forewarn the Court of his non-appearance on 7 October and his request for yet another adjournment through holding Counsel, Mr. Paul Wilson. Mr. Wilson helplessly informed the Court that he had no instructions whatsoever and that he was simply sent before the Court to seek an adjournment. I refused the application for the adjournment and dismissed the appeal for want of prosecution, save that I granted liberty to the Appellant to file within one business day a summons application supported by affidavit evidence seeking for me to set aside the order of dismissal. The Court was subsequently informed that Mr. Richardson was at that time required to appear before a single Justice of the Court of Appeal.

94. This matter was relisted before me on the following day, 8 October 2020. Mr. Richardson offered his apology and I confirmed the appeal hearing date for Friday 16 October when the matter finally proceeded before me and concluded on 30 October 2020.

95. Against this background I would highlight the following unacceptable delays:

    (i) It took nearly 6 months for the Magistrates' Court to produce the Record of Appeal;

    (ii) It took over 3 months for this matter to come before me on the first appearance after the Magistrates' Court had sent the Record of Appeal to the Supreme Court; and

    (iii) Mr. Richardson was discourteous to the Court in his failure to appear before the Court on four separate occasions i.e. 10 October 2019; 5 February 2020; 12 March 2020; and 7 October 2020.

96. That being said, I would observe that the delay in (i) above may be partly explained by the volume of the Record of appeal which spanned nearly 500 pages. In respect of (ii), I would urge the administrative arms of the Supreme Court to ensure that the first appearance of any criminal appeal from the Magistrates' Court (or any application related to criminal conduct such as applications pursuant to the Proceeds of Crime Act 1997) be listed for a first hearing within 4 weeks of the Registry's receipt of the Appeal Record unless it is impracticable to do so.
97. Finally, I would strongly discourage Counsel from engaging in the practice of absenting from the Court when required to appear. Where another attorney is sent to hold for the Counsel of record, that holding attorney is expected to be adequately instructed and in a position to carry out the role expected by the Court for that appearance. More so, where an adjournment is sought, Counsel are required to comply with the practice outlined in my earlier judgment in *Paul Douglas Martin v United States of America* [2020] SC Bda 13 App [paras 15-17].

Conclusion

98. The appeal is dismissed on all grounds of appeal.

99. Unless either party files a Form 31TC within the next 28 days to be heard on the issue of costs, I make no order as to costs.

Tuesday 15 December 2020

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT