In The Supreme Court of Bermuda

CIVIL JURISDICTION
2019: No. 496

IN THE MATTER OF SECTION 36X OF THE PROCEEDS OF CRIME ACT 1997
AND IN THE MATTER OF ORDER 115B OF THE RULES OF THE SUPREME COURT 1985

BETWEEN:

ATTORNEY GENERAL AND MINISTER OF LEGAL AFFAIRS ENFORCEMENT

Applicant

-and-

KENITH CLIFTON BULFORD

Respondents

Before:	**Hon. Chief Justice Hargun**
Appearances:	**Ms S. Dill-Francois, Deputy Solicitor General, Attorney-General's Chambers, for the Applicant**
	Mr Jerome Lynch QC and Ms Sara Tucker, Trott & Duncan Limited, for the Respondent
Dates of Hearing:	**2-3 March 2021**
Date of Judgment:	**7 April 2021**

JUDGMENT

Application for a recovery order; whether seized cash is recoverable property; relevance test to be applied.

Introduction

1. By Originating Summons dated 30 January 2020, the Attorney General and the Minister of Legal Affairs, as the Enforcement Authority under the Proceeds of Crime Act 1997 ("**POCA**"), seeks a recovery order under section 36X of the POCA, with respect to US $314,950 seized from Ms Melina Bean and Ms Wanda Bowen, hidden in eight pairs of new men's shoes in their possession. The Respondent, who maintains that he is the rightful owner of the property, resists the application.

2. By way of brief background, on Tuesday, 5 March 2013, Ms Bean and Ms Bowen attended the LF Wade International Airport in order to board British Airways Flight 2232 to London Gatwick Airport. Upon searching their luggage, the Bermuda Police Service ("**BPS**") noted that each of the women's suitcases contained four pairs of new men's shoes. Officers examined one pair of shoes and noticed that it had a strong smell of glue, and that the shoe had new stitching on the inside of the sole.

3. Subsequently, all eight pairs of shoes were examined, and each shoe was found to contain three separate packages. Each package was wrapped in a cling film, bound in tape, and hidden in the shoe sole, with each shoe containing approximately US $20,000. The total amount recovered was US $314,950 ("**the Funds**").

4. On the same evening, the Respondent also attended the airport to travel on the same British Airways flights to London, Gatwick. He accepted being the owner of the seized cash and stated that the purpose of conveying US $314,950 in cash to the United Kingdom was because he intended to use the cash to permanently settle in the United Kingdom. As a result, Ms Bean, Ms Bowen and the Respondent were all arrested on 5 March 2013 on suspicion of money-laundering.

5. On 14 October 2013, Ms Bowen pleaded guilty to money-laundering in respect of the Funds. During Ms Bowen's sentencing, the Crown requested both incarceration and a forfeiture order for the assets seized. The Crown, with the consent of the Defence counsel, obtained an order of forfeiture under section 48A of the POCA. Hellman J, with the consent of Ms Bowen, ordered that the Funds be forfeited to the Crown and deposited into the Confiscated Assets Fund.

6. The Crown after taking possession of the sums, then tried the Respondent on 4 May 2015, on two counts of money-laundering offences in respect of the Funds and the additional amount of US $10,040 found on the Respondent. On 18 May 2015, the Respondent was found not guilty by a unanimous jury verdict of possessing the proceeds of crime, contrary to section 45 of POCA.

7. On 19 May 2015, the BPS returned the sum of US $10,040 under Count 2, to the Respondent but refused to deliver the sum under Count 1, being the sum of US $314,950 on the basis that those funds were already the subject of a Forfeiture Order made by Hellman J on 10 January 2018.

8. By Judgment dated 13 December 2020, the Court held that the Respondent should have been given notice so as to allow him to make any representations to the Court he considered appropriate in relation to the application by the Crown that the sum of US $314,950 should be forfeited. Accordingly, the Court ordered that the original order made by Hellman J on 10 January 2014 be set aside. The Court also reiterated that it was open to the Enforcement Authority to make the necessary application under section 36A if the Enforcement Authority continued to take that view that the Funds constituted the proceeds of wrongful conduct.

9. On 30 January 2020, the Enforcement Authority filed the Originating Summons seeking a Recovery Order in respect of the Funds under section 36X of POCA.

Legal framework and relevant principles

10. The relevant statutory provisions applicable in this case are to be found in sections 36A, 36B and 36C of POCA and they provide:

> ***Civil recovery proceedings***
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> *36A (1) The enforcement authority may recover, in civil proceedings before the Supreme Court, property which is, or represents, property obtained through unlawful conduct.*
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> *(2) The powers conferred by this Part are exercisable in relation to any property whether or not any proceedings have been brought for an offence in connection with the property.*
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> *(3) Proceedings for a recovery order may be taken by the enforcement authority against any person who the authority is satisfied holds recoverable property.*
> *(4) The enforcement authority shall serve the originating summons—*
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> > *(a) on the respondent; and*
> >
> > *(b) unless the court dispenses with service, on any other person who the enforcement authority thinks holds any associated property which the authority wishes to be subject to a recovery order, wherever domiciled, resident or present.*
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> *…*
>
> ***Unlawful conduct***
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> *36B (1) Conduct is unlawful conduct if it is unlawful under the criminal law of Bermuda.*

(2) Conduct which—

(a) occurs in a country outside Bermuda and is unlawful under the criminal law of that country; and

(b) if it occurred in Bermuda, would be unlawful under the criminal law of Bermuda, is also unlawful conduct.

(3) The court shall decide whether it is proved—

(a) that any matters alleged to constitute unlawful conduct have occurred; or

(b) that any person has obtained any property through such unlawful conduct.

Property obtained through unlawful conduct

36C (1) A person obtains property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct.

(2) In deciding whether any property was obtained through unlawful conduct—

(a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct;

(b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.

11. These provisions in the POCA were considered in detail in the judgment of Hellman J in *Attorney General (Enforcement Authority) v Tito Jermaine Smith* [2016] Bda 492 where the learned Judge considered the guidance given by Lord Dyson JSC in *Serious Organised Crime Agency v Gale* [2011] UKSC 49. At paragraph 123 Lord Dyson held:

> *"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] NICA 6, [2005] NI 383, at 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 ECtHR 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. The governing concept is that of "recoverable property" which represents both property obtained directly by unlawful conduct and also property which represents the original property."*

12. It follows from the guidance given by Lord Dyson that;

    (a) The recovery proceedings under section 36X of POCA are in the nature of civil proceedings despite the fact that they deal with unlawful conduct which is criminal in nature.

(b) Given that the recovery proceedings are in the nature of civil proceedings, it follows that the standard of proof required to establish an entitlement to a recovery order is on a balance of probabilities. The Court is not concerned with the criminal standard of beyond a reasonable doubt despite the fact that the court is required to decide whether it is proved that any matters alleged to constitute unlawful conduct have occurred; or that any person has obtained any property through such unlawful conduct.

(c) The claim for recovery order can be brought, as is the case here, despite the fact that the Respondent has been acquitted of all relevant criminal charges. Indeed, there is no requirement that any criminal proceedings need to be brought against the respondent at all.

(d) The purpose of recovery proceedings is not to determine whether the respondent has committed any criminal offences or to punish the respondent in respect of them. The primary purpose of these proceedings is to ensure that property derived from criminal conduct is taken out of circulation. As was held by Newman J in *R (on the application of the Director of the Asset Recovery Agency) v Ashton (Paul)* [2006] EWHC 1064 (Admin) the intent of these provisions is to seek "*to enforce a measure of recovery for the benefit of the state. It was seeking to make a recovery for the state and in the public interest of the state, so that the proceeds of crime should not be at large in society for the benefit of those who happen to be in possession of them at the time*."

(e) The recovery proceedings are not in personam proceedings against the respondent but rather are in the nature of in rem proceedings in relation to the property sought to be recovered.

13. In relation to the proof of "unlawful conduct", it is not necessary for the applicant to establish that a specific criminal offence has been committed. As was held by Moore-Bick LJ in *Director of Asset Recovery Agency v Szepietowski* [2007] EWCA Civ 766 at [106-

107] it is sufficient to prove that specific property was obtained by or in return for a criminal offence of an identifiable kind:

> *106. When deciding what the Director must prove it important to bear in mind that the right to recover property does not depend on the commission of unlawful conduct by the current holder. All that is required is that the property itself be tainted because it, or other property which it represents, was obtained by unlawful conduct. Section 304 allows property to be followed into different hands and although section 308(1) of the Act protects a bona fide purchaser for value without notice, it is not difficult to think of circumstances in which property might be recoverable from someone who is himself entirely innocent. It is important, therefore, that the Director should be required to establish clearly that the property which she seeks to recover, or other property which it represents, was indeed obtained by unlawful conduct.*
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> *107. In order to do that it is sufficient, in my view, for the Director to prove that a criminal offence was committed, even if it is impossible to identify precisely when or by whom or in what circumstances, and that the property was obtained by or in return for it. In my view Sullivan J. was right, therefore, to hold that in order to succeed the Director need not prove the commission of any specific criminal offence, in the sense of proving that a particular person committed a particular offence on a particular occasion. Nonetheless, I think it is necessary for her to prove that specific property was obtained by or in return for a criminal offence of an identifiable kind (robbery, theft, fraud or whatever) or, if she relies on section 242(2), by or in return for one or other of a number of offences of an identifiable kind."*

14. In considering whether an offence of an identifiable kind (robbery, theft, fraud or whatever) has been established on a balance of probabilities, the court is entitled to apply a commonsense approach and draw reasonable inferences. The court may draw all reasonable inferences from the fact that the manner in which the respondent chose to store

his accumulated cash and from the failure of the respondent to keep any business records. This was so held by King J in *The Director of the Assets Recovery Agency v Jackson* [2007] EWHC 255 (QB) at [115,118-119]:

> *"115. I also echo what Langley J said on the emphasis to be put on the qualifying adverb "solely" in the context of proof of obtaining property through unlawful conduct, by reference to a comparison between lifestyle and identifiable sources of income. Such a comparison will not in itself be sufficient but as in Olupitan so in the present case the claimant is entitled to ask the court to look at the totality of the evidence and the whole picture which emerges. As Langley J said at paragraph 23 "it is one thing to point to unexplained lifestyle, it may be another, if an explanation is offered but rejected as untruthful and taken with other evidence"*
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> *...*
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> *118.I also consider that the court is entitled to take a common sense approach to the inferences to be drawn from the manner in which the Respondent chose to store his accumulated cash and from the failure of the respondent to keep any business records in the context of the evidence as a whole.*
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> *...*
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> *119.Equally, as the Receiver said in evidence, one would expect any successful law abiding businessman to keep some sort of record no matter how simple, of what he was buying, what he was selling and the amounts of his overheads – if only to work out the sort of profit he was making and which were his most profitable items. The criminal dealer in, for example, illicit drugs will of course eschew any record by which his activities might be detectable".*

Factual case of the Applicant

15. The Applicant relies upon the affidavit sworn by DC Shannon Trott on 16 December 2019 in support of the application for a property freezing order under section 36H of POCA. In that affidavit, DC Trott relies upon the following facts and circumstances in support of the Applicant's case that the funds are the proceeds of wrongful conduct.

    (a) The Respondent accepted being the owner of the seized cash from Ms Bowen on 5 March 2013, and since that time Ms Bowen was convicted, on her own admission, on 14 October 2013 of money laundering offences and sentenced to two years imprisonment.

    (b) The money was wrapped in cling film, bound in tape and hidden in the sole of shoes, which gives the inference that it was done in such a way as to avoid detection. Such actions give the impression that the Funds were obtained via unlawful means, and such, this was a way in which to move it across international borders.

    (c) The Respondent claims that the Funds were intended to be used for him to settle in the United Kingdom. However, the Respondent himself was not in possession of the Funds, which would likely have been the case if the Funds were legitimate. Instead, the Respondent chose to engage couriers to carry the Funds which supports the inference that the Funds were obtained via unlawful means.

    (d) The Funds were transported via cash and not via bank transfer which one would expect to occur for legitimate sums in that amount. The Respondent was the holder of a Bermuda bank account and any legitimately obtained money could have been transferred or wired through the banking system. This supports the notion that the Respondent did not want the funds to be detected due to the fact that they were not legitimate.

(e) The Respondent did not declare any of the cash that he intended to take from this jurisdiction as the amount far exceeded the allowed allowance of $10,000. This supports the notion that the Respondent intended to conceal the Funds, which suggests that the Funds were obtained through illegitimate means.

(f) There were no small denominations of notes in the bundles of cash found, which one would expect to occur if the Funds were indeed the proceeds from games of Crown & Anchor. Further, the currency of Funds was in the United States currency which is unlikely to occur if the funds were indeed obtained from games of Crown & Anchor.

(g) The female carriers did not provide an explanation for the cash found at the first available opportunity. The couriers could have easily explained that the cash was for the Respondent and was being used for his relocation to the United Kingdom. A reasonable inference to be drawn is that this was not the true reason for the Funds being exported from Bermuda.

(h) The Respondent was traveling at the same time as Ms Bowen and Ms Bean and it is to be reasonably inferred that he was ensuring that the process of exporting the Funds undetected would go as planned.

(i) The Respondent did not at any time provide any evidence to show that he planned to settle in the United Kingdom. In fact, the Respondent did not have in his possession any British currency. He was only in possession of the US currency, and a reasonable inference to be drawn is that the Funds were not intended for relocation to the United Kingdom but for an unlawful purpose.

16. The Applicant also relied upon the affidavit of Acting Inspector David Bhagwan dated 23 February 2021 sworn in support of this application. AI Bhagwan relies on his earlier statement of 4 October 2014, at the time when he was attached to the Drugs and Financial Crime Unit of the Serious Crime Division and remained with that unit until 2018. He states

that he has been accepted as a drugs and money laundering expert before the courts in Bermuda and that to keep his expert training current, and to ensure that he remains up-to-date on the drug and bulk cash trafficking trends, he continues to network with other drug experts namely Homeland Security Investigators, Drug Enforcement Administration (DEA), Royal Canadian Mounted Police (RCMP) as well as several Caribbean police services. In relation to this application for recovery order, AI Bhagwan's evidence is as follows:

(a) Persons who are involved in the sales and distribution of drugs, utilise various layers to conceal their cash. They usually invest in real estate, give loans with minimum interest rate of return, and persuade a legitimate business entity to conceal their cash. These schemes are utilised as a front to make drug dealers' cash to be legitimate and to get them into the financial system. This is done for a small percent of fees of payment to the legitimate business entity.

(b) Persons involved in the sales and distribution of drugs and who therefore need to conceal the origins of their money, will routinely recruit individuals to provide assistance, not only in bringing controlled drugs into Bermuda but also to assist in the movement of money which is ultimately used to pay for the shipments of drugs. These individuals are referred to as "Smurfs".

(c) During his narcotics training, and his recent networking, it reiterated the point that people recruit mules for traffic or move drugs or bulk cash, usually recruit another person, or they will use themselves as a shadow person on the same flight or journey. They do so without handling the drug or bulk cash, and their purpose is to ensure that there is a safe delivery of the drugs or bulk cash at safe destination.

(d) England is not a drug producing nation and does not produce cocaine. However, the most recent United Nations Global Drugs report stated that people utilised the trans-Atlantic passage to sail their vessels with large amount of cocaine and

utilised England as a trans-shipment point to secure their cocaine and other drugs. The drugs are then distributed to other European countries.

(e) Based on his experience, it is his professional opinion that the cash seized during this investigation along with its packaging and concealment methods, is consistent with persons involved in the sale and distribution of drugs attempting to export their bulk cash.

(f) It is his belief that the US $314,950 seized in this case was not intended for circulation in the United Kingdom, but for onward delivery to the Caribbean. It is his opinion that the seized cash are monies derived from the sales and distribution of controlled drugs and represent the Respondent's criminal proceeds.

17. Detective Sergeant Paul Ridley also gave evidence and filed his affidavit sworn on the 22 February 2021. In summary his evidence is as follows:

(a) He was one of the officers involved in the arrests of the Respondent, Ms Bowen and Ms Bean, on Tuesday, 5 March 2013 and following their arrests, he conveyed all three persons to the Airport Police Station.

(b) The Respondent maintains that he was the owner of the Funds in question and that he was relocating to the United Kingdom. However, the Respondent's British Airway itinerary was a return ticket which showed that he was due to return to Bermuda aboard flight 2233 on 11 April 2013.

(c) Further, he was involved in the search of his luggage, which only amounted to a few holiday clothes.

(d) He was also involved in the search of his apartment, which showed no sign of the person preparing to relocate to a different country. During his search, he

located a navy blue anti-ballistic stab proof vest. The apartment was also benefited by CCTV and at some of the windows were secured by steel bars.

18. Inspector Alexander Rollin also gave expert evidence by way of an affidavit sworn on 22 February 2021. Inspector Rollin's evidence in support of the Applicant's application is as follows:

    (a) Between 2009 and 2013, he was attached to the Gang Targeting Unit, in the Public Prosecution Department of the BPS. He has provided expert evidence in the area of gang rivalries, gang associations and geographical location of gang boundaries within Bermuda. As part of his affidavit evidence he refers to his witness statements dated 20 October 2010 and 30 August 2012.

    (b) In his witness statement dated 20 October 2010, Inspector Rollin states that the M.O.B. gang are a western gang that have influence throughout the western end of the island. Their territory begins at Somerset Bridge and extends westwards. The M.O.B. gang are known for selling controlled drugs, weapon offences, acts of violence and firearm related crimes. M.O.B. gang members are known to congregate at Woody's Drive Inn, Charing Cross Bar, Cambridge Road, Naval Field, Hook and Lather Lane and Somerset Cricket Club.

    (c) He further states in his witness statement dated 20 October 2010 that "*I have known [the Respondent] for approximately five (5) years. My patrols while working western division, Police Support Unit and Gang Targeting Unit have led me to observe and encounter [the Respondent]. I consider [the Respondent] to be a member of the M.O.B. gang. I view [the Respondent] as a high ranking member of the M.O.B. gang. He would be considered a "shot caller". This is somebody who maintains a relatively clean record and does not become involved in the handling of controlled drugs or debts involved in numerous acts of violence. I see him most of the time standing on Somerset Road in the area*

of the Naval Field. He is there almost daily basis. When seen, [the Respondent] is in the company of other M.O.B. members."

(d) In his witness statement dated 30 August 2012, Inspector Rollin states that he has been a member of the Gang Targeting Unit since December 2009, and his duties involve collecting intelligence on gang members and gang locations. He gathers this intelligence from utilising the following sources:

i. **Personal observation -** This will be a daily street patrols around known gang locations. These patrols run through all hours of the day.

ii. **Interaction -** On his patrols it was part of his duties to stop and speak with persons gathered in gang areas. The personal interaction builds rapport and allows him to better understand the gang members.

iii. **Social Media -** He has access to social media sites that allow him to see gang members socializing in public. These will be photographs that gang members have had taken of them or themselves posted on the Internet.

iv. **Police Computer System AS400 -** This is the system designed to store and update all incidents that police deal with. Officers are able to track people to name searches as well as input intelligence on individuals into the system.

v. **Police Intelligence Database** - This is a secure database that not all officers have access to. Intelligence must be requested from the secure location from an intelligence officer.

vi. **Sources** - This will include reliable sources who would be aware of the criminal underworld. Some sources would not be reliable and any information received would be scrutinized.

19. In his witness statement dated 30 August 2012, Inspector Rollin confirms his expert opinion expressed in his earlier witness statement of 20 October 2010, that the Respondent is a high ranking member of M.O.B. In forming that expert opinion, Inspector Rollin states that he has relied upon the following sources:

    i. He has relied upon the printout from the AS400 computer for the last two years of incidents giving details on sightings of the Respondent, locations where seen and who he was seen with. A number of entries show that the Respondent was in the company of gang members of M.O.B. (without identifying the members concerned). An overwhelming majority of the entries show that the Respondent was seen in the area of Cambridge Road, Sandys, which Inspector Rollin explains is known to be a location where members of the M.O.B. congregate as well as sell and use controlled drugs. He says that since May 2012, Cambridge Road, Sandys, has been under the sanction of section 101 of the Criminal Code. It was recognized that this was an area for anti-social and gang activity and has had a number of persons banned from that area.

    ii. His personal observations of the Respondent.

    iii. Information submitted and accessible by all Police Officers.

    iv. Intelligence available on a secure Police Database.

    v. Reliable and unreliable sources known to Inspector Rollin.

20. Mr. Lynch QC, for the Respondent, criticised Inspector Rollin's witness statement of 20 October 2010, on the basis that Inspector Rollin has done nothing in his accompanying

affidavit to set out how he comes to be of the opinion that he is. In that regard he relied upon certain observations of the Privy Council in *Myers v The Queen* (Bermuda) 2015 UKPC 40, at paragraphs 67 and 68:

> *"67. In the present cases the evidence of Sergeant Rollin appears to have been very largely based on his own observations. To the extent that his evidence of places of association, the culture of the gangs, or the signs which they used was supported by the observations of others, that appears to have been general evidence based on the accumulated information collected by his unit, from a multitude of sources, and legitimately given. If in another case the assertion that a particular person, and especially the defendant, was a member of a gang, were to depend on particular sightings of him in the company of other known members, that might in some instances pass the point at which it was no longer a matter of general study or accumulated knowledge, but required proof according to the ordinary rules. That is one reason why it is essential that a witness such as Sergeant Rollin sets out from the beginning the sources on which he has relied: see below. Moreover, if there is a challenge to one or more particular observations of a defendant, fairness is likely to require that the first-hand evidence of them is called, so that they can properly be tested. In such a case, section 93 would be likely to lead to the exclusion of non-direct evidence in any event. Evidence of a specific alleged trigger event or events is another instance of something which is not part of a general body of learning, but specific to the case; hearsay evidence is not admissible, and the case of Cox affords an example: see paras 16 and 49 above. No doubt if an assertion of fact falls on the particular, rather than the general, side of the line, it might be provable by admissible hearsay under section 75 or 76 of the Police and Criminal Evidence Act, if the conditions required by those provisions are met.*
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> *The presentation of "gang evidence"*
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> *68. In its judgment in the case of Cox, the Court of Appeal offered at para 40 some valuable advice as to the presentation of evidence of this kind. The Board endorses*

this helpful approach, and would expand a little upon it. As part of the duty of an expert witness to the court, a police officer tendering the kind of evidence called in these cases must make full disclosure of the nature of his material. His duty involves at least the following.

(a) He must set out his qualifications to give expert evidence, by training and experience.

(b) He must state not only his conclusions but also how he has arrived at them; if they are based on his own observations or contacts with particular persons, he must say so; if they are based on information provided by other officers he must show how it is collected and exchanged and, if recorded, how; if they are based on informers, he must at least acknowledge that such is one source, although of course he need not name them.

(c) In relation to primary conclusions in relation to the defendant or other key persons, he must go beyond a mere general statement that he has sources of kinds A, B and C, but must say whence the particular information he is advancing has come; an example would be observations of a defendant in the company of others known to be members of a gang."

21. It seems to the Court that Inspector Rollin has provided sufficient facts to indicate how he has formed the opinion expressed in the affidavit. Inspector Rollin states that (i) he has known the Respondent for approximately five years; (ii) whilst on patrols he has observed the Respondent; and (iii) he sees the Respondent daily mostly standing on Somerset Road in the area of Naval Field in the company of other M.O.B. members. It seems to the Court that this is an adequate explanation of how he has formed the opinion expressed in his witness statement of 20 October 2010 (see paragraph 68 (b) of *Myers v The Queen*). It was

of course open to Mr. Lynch QC to cross-examine Inspector Rollin in order to test the validity of the opinion expressed in his witness statement.

22. Inspector Rollin's witness statement of 19 July 1976, makes it clear that he is not solely relying upon his personal observations of the Respondent in company with other gang members but also upon other sources. In support of his opinion he has additionally taken into account (i) information submitted and accessible by all Police Officers (Police computer system AS400); (ii) intelligence available on a secure police database; and (iii) reliable and unreliable sources known to Inspector Rollin. In the Court's view, consistent with paragraphs 67 and 68 of *Myers v The Queen*, Inspector Rollin is entitled to have regard to these sources in forming his opinion. *Myers v The Queen*, at paragraph 67, seems to recognise that he may rely upon intelligence sources without naming them.

23. Mr. Lynch QC also criticises the deletions on the printout of AS400 names of persons who are said to be members of the M.O.B. I accept that if the names had not been deleted it would obviously have provided additional information to the Respondent to test the opinion evidence of Inspector Rollin. The issue which the Court has to decide is whether on the basis of the totality of the sources relied upon by Inspector Rollin, the Court is prepared to accept his opinion as establishing the fact asserted on a balance of probabilities.

24. The Applicant also relies upon the Respondent's conviction, on his own admission, of possessing a controlled drug (cocaine) in 2010. The Respondent was also charged with having in his possession equipment fit and intended for use in connection with the misuse of a controlled drug contrary to section 9 (2) of the Misuse of Drugs Act 1972. The Respondent was acquitted of that offence on the basis that the statutory provision does not extend to equipment for storage of drugs. However, as noted in the judgment of the Chief Justice [2010] SC (Bda) 17 App (31 March 2010), the equipment concerned was five pieces of PVC pipe, which were found under the bed in a locked room occupied by the Respondent. The evidence was that the PVC pipes were large and about 3 to 4 feet long, and had caps, enabling them to be sealed. They were subsequently examined by the

Government analyst, who washed out the insides of four of them with the solvent, and found traces of cocaine in three of them.

Evidence adduced on behalf of the Respondent

25. The Respondent, in his affidavit sworn on 16 November 2020, relies upon the following facts and circumstances in resisting this application for a recovery by the Applicant:

    (d) The Respondent confirms that he was the owner of the monies found in eight pairs of shoes in the possession of Ms Bowen and Ms Bean on 5 March 2013, when they intended to board British Airways flight to London Gatwick Airport.

    (e) He confirms that, with the assistance of another person, he inserted US $314,950 in the soles of eight pairs of shoes found to be in the possession of Ms Bowen and Ms Bean. The Respondent stated in cross-examination that he personally wrapped some of the cash in cling film, bound in tape, and hid it in the soles of the shoes.

    (f) The Respondent maintains that Ms Bowen pleaded guilty to the act of money-laundering for her own reasons on 14 and October 2013, and there was no trial in her matter.

    (g) The Respondent states that the cash in the soles of the eight pairs of shoes seized comes largely, if not exclusively, from the profits he has made running Crown & Anchor gambling tables over Cup Match and Cricket County Games. He explains that he was able to make exceptional profits on his Crown & Anchor tables because he operated either with no limits on the amount which could be placed on a bet or very high limits. He told the Court that over the years he had experienced net profits of approximately $40,000 to $50,000 per day over the Cup Match holiday.

(h) The Respondent kept all the profits from the operation of Crown & Anchor gambling tables in a safe place at home, and did not deposit them in a bank account, or at least any appreciable amount. The Respondent explained that it was most convenient to keep the profits from the Crown & Anchor tables at home as he needed funds for the "float" on an ongoing basis. He also explained that he was concerned that, given his experiences with the BPS, any funds so deposited might be frozen by the bank concerned. He says that he was in fear that due to his relationship with the BPS that a red flag would be raised if he deposited the sums into a local account.

(i) The Respondent maintains that his experience with the BPS in Bermuda has not been ideal. He says that he has long felt victimised by their deliberate and unwarranted efforts to vilify him in the community as a gang member and even a leader of a gang. This was the primary reason why he decided to leave Bermuda and to relocate to the United Kingdom. The Respondent gave evidence that he has never been a member of any gang and he has not engaged in drug dealing or money-laundering.

(j) The sum of US $314,950 represents sums he has saved over the years from his Crown & Anchor business. The majority of his money is made off foreign visitors as they gamble in US dollars. When he counts his money at the end of any one event he separates the Bermudan bills from the American and he secures the American as savings and typically would spend the Bermudian or reinvest in his tables.

(k) The Respondent was also registered as a part-time fisherman and operated a fishing boat with his uncle. This was again a cash business. Any profits made from the fishing business were split 60% to the Respondent and 40% to his uncle. In relation to the fishing business, the Respondent and his uncle established a banking account with the Bank of Butterfield. On the application form the Respondent stated that they anticipated paying into the bank account

in the approximate sum of $5000 per month and that they anticipated withdrawing from the account the approximate sum of $2000 per month.

(l) The Respondent maintained no written account of his business operations running the Crown & Anchor gambling tables. He only has receipts of payments showing that he was entitled to operate gambling tables. Beyond that there is no contemporaneous documentation at all showing what profits, if any, the Respondent made from the Crown & Anchor gambling tables.

(m) The Respondent maintained no written account of his fishing business and is unable to produce any contemporaneous documentation showing what profits, if any, the Respondent and his uncle made from the fishing business. The Respondent produced a licence issued by the Department of Environmental and Natural Resources permitting him to sell fish. He also produced a large number of copies of Form 3, issued by the Department of Environmental Protection, attesting to how much fish by weight was landed in the fishing boat licenced in the name of the Respondent.

26. Mr Cavon Steede gave evidence on behalf of the Respondent and stated:

(a) He is the co-owner of 14/68 Entertainment Ltd. and has been an operator of Crown & Anchor in Bermuda for approximately 35 years.

(b) The Respondent typically holds two spots for Crown & Anchor as the Respondent typically operates the largest table. He gave evidence that the he would class the Respondent's table as a cash cow or high roller table as he operates in no limits table and is very popular amongst the guests.

(c) If there are no betting limits on the table, then the profits can be significantly higher. He has heard of tables taking $100,000 to $150,000 over two days of Cup Match. He says that the table operators do not have to fill out any forms or

paperwork documenting their earnings or disclosing their revenue. There are no reporting requirements and no tax or Government fees to be levied against takings.

(d) In cross-examination, Mr Steede stated that he deposited his takings from the Crown & Anchor gambling tables in his account at a bank in Bermuda. He explained that prior to the anti-money-laundering legislation there were no issues relating to the banks accepting takings from gambling tables. However, since the legislation, the table operators have created contracts between the table operators and the event organisers and those contracts are submitted to the bank if any issues are raised by the bank. He has experienced no difficulties in depositing takings from the gambling to in an account with a local bank.

27. Mr Martin Belboda also gave evidence on behalf of the Respondent and stated:

(a) He confirmed the evidence given by Mr Steede to the effect that the Respondent operated a no limits Crown & Anchor tables and it was possible to earn the level of profits related to by Mr. Steede.

(b) In cross-examination, he stated that he did not use bank accounts to deposit takings from the Crown & Anchor gambling tables as he found it convenient to keep the monies at home and the fact that the banks are not paying any interest on the amounts deposited with them.

Discussion

28. The Court is faced with having to decide, on a balance of probabilities, between two strikingly dissimilar explanations as to the source of the US $314,950 seized from Ms Bowen and Ms Bean on 5 March 2013 at LF Wade International Airport. The Applicant maintains that the cash found in the soles of the eight pairs of shoes represents the proceeds from the Respondent's wrongful conduct, namely, drug dealing and money-laundering. The Respondent, on the other hand, argues that the sum of US $314,950 represents his

savings over a period of years, from profits generated by his Crown & Anchor gambling operations. I accept that at the end of the day it is a matter of the Court drawing reasonable and commonsense inferences from the facts and circumstances produced in evidence.

29. In favour of the explanation contended for by the Respondent, the Court has heard sworn evidence of the Respondent himself that the sum of US $314,950 represented the profits which the Respondent made from operating the Crown & Anchor tables at Cup Match and at County Games over many years. In support of this contention the Respondent has produced contemporaneous documentation showing that he was authorised to operate Crown & Anchor tables at these events over many years. He has also produced documentation showing that he made the requisite payments in order to secure the concession to operate the gambling tables.

30. The Respondent's contention is also supported by the evidence of Mr Steede and Mr Belboda, who gave evidence that the Respondent was well known amongst the Crown & Anchor fraternity as operating "No Limits" table. They gave evidence that if there are no betting limits on the table, then the profits can be significantly higher and can reach $100,000 to $150,000 over two days of Cup Match.

31. On the other hand the explanation contended for by the Applicant is supported by the extraordinary fact that the Respondent was a party to an attempt to export US $314,950 in a manner which he must have appreciated was not lawful. It is beyond any reasonable argument that the Respondent must appreciated that he was, at the very least, under an obligation to report and declare to the authorities the amount of cash he was seeking to export to the United Kingdom. Hiding substantial amounts of cash in the soles of eight pairs of shoes for the purposes of exporting that cash to another jurisdiction is strong evidence that the Respondent did not want the transfer of the funds to be detected by the authorities.

32. The Respondent must have appreciated that if the hidden cash was discovered by law enforcement agencies, there was a serious risk that the cash would be confiscated. Yet, the

Respondent was prepared to risk of confiscation of the entire cash rather than employing the conventional means of an international bank transfer.

33. Furthermore, the Respondent asserts that he was taking the substantial amount of cash to settle permanently in the United Kingdom. However, the Respondent must have appreciated that this extraordinary means of exporting cash would mean that it would be difficult to deposit the cash in the UK banking system.

34. The extraordinary mode of exporting this cash employed by the Respondent is, on a commonsense basis, a strong indicator that the cash was not derived from lawful sources.

35. Secondly, the conventional method of transferring large sums of money is by international bank transfers. The Respondent was not unfamiliar with banking system and transfers. The Respondent operated a business account with his uncle at the Bank of Butterfield. The Respondent's explanation for not using the conventional method of international bank transfer is that, given his difficult relationship with the BPS, he was concerned that, since he was a marked man, any deposit with the bank might be unfairly frozen. On account of the risk that the account might be frozen, the Respondent embarked on an enterprise of transporting cash hidden in the soles of eight pairs of shoes, with the attendant risk that, if discovered, the entirety of the cash was likely to be forfeited.

36. The Court heard evidence from Mr Steede that there are no insuperable difficulties in setting up a local bank account to accept cash from the earnings from Crown & Anchor gambling tables. The local banks require to be shown a contract between the operator and the event organizers that the account holder is entitled to operate gambling tables. It was Mr Steede's evidence that he regularly deposited his takings from the Crown & Anchor tables with one of the local banks.

37. In this connection, it is not clear to the Court, if the sum of US $314,950 was derived from lawful sources, why it was necessary to engage/ask Ms Bowen and Ms Bean to carry the

cash hidden in the soles of eight pairs of shoes. The Respondent has not explained, if that was the case, why he did not personally carry the shoes containing the cash.

38. Thirdly, the cash found in the soles of the shoes comprised US dollar bills in denominations of $100 and $50. The sum of US $314,950 was an exceptionally large sum in US currency and was likely to take a very long time to accumulate. It is of course impossible to confirm this fact as the Court has no independent evidence or any accounts, or contemporaneous documentation relating to earnings, if any, from the operation of the Crown & Anchor gambling tables. It appears that, other than licences to operate the tables, nothing in relation to the business of operating Crown & Anchor tables, was committed to in writing. Ms Dill-Francois, for the Enforcement Authority, submits that operating gambling tables is an established means of money-laundering. Through the operation of the Crown & Anchor gambling tables proceeds of unlawful conduct (such as drug dealing) can be converted into cash which is no longer connected with the earlier unlawful conduct.

39. Fourthly, it is the expert evidence of Acting Inspector Bhagwan that based on his experience, the cash seized during this investigation, its packaging and concealment methods, is consistent with people who are involved in the sales and distribution of drugs trying to export their cash. He says that it is his belief that the US $314,950 seized in this case was intended for the Caribbean as payment for future deliveries of drugs (cocaine) to Bermuda.

40. There is no reason why this court should not accept the evidence of AI Bhagwan, who gives credible opinion evidence as to how the funds, hidden in the soles of the shoes, are likely to be used in the Caribbean. He also gives credible opinion evidence of the source of these funds and expressly states that it is his opinion "*that the seized cash are monies derived from the sales and distribution of controlled drugs and represent the [Respondent's] criminal proceeds*." On a balance of probabilities the Court prefers the expert evidence of AI Bhagwan where it differs from the evidence of the Respondent.

41. Fifthly, there is evidence of Inspector Rollin who says that, in his expert opinion, the Respondent is a member of the M.O.B. gang. Mr. Lynch QC took objection to his evidence, which I have dealt with at paragraph 21 above. The Court considers that there is no compelling reason why his opinion evidence should not be accepted in these proceedings and prefers the expert evidence of Inspector Rollin where it differs from the evidence from the Respondent.

42. Finally, there is the evidence of DS Ridley who states that whilst the Respondent maintains that he was traveling to London for permanent settlement in the United Kingdom, the British Airways show that he had a return ticket and was due back in Bermuda in five weeks' time.

43. DS Ridley also searched at the Respondent's luggage, which only amounted to a few holiday clothes. DS Ridley was also involved in the search of the Respondent's apartment, which, according to DS Ridley, showed no sign of a person preparing to relocate to a different country.

44. DS Ridley also gave evidence that during his search of the apartment, he located a navy blue anti-ballistic stab proof vest. The apartment was also monitored by CCTV and some of the windows were secured by steel bars. I have found no sufficient reason why I should not accept the evidence tendered by DS Ridley.

45. In conclusion, having analysed the issues, as set out above the Court accepts that the balance of the evidence is decidedly in favour of the contention of the Applicant that the cash seized on 5 March 2013 at the LF Wade International Airport is the proceeds of unlawful conduct, namely drug dealing and/or money-laundering and decidedly against the explanation advanced on behalf of the Respondent in this Court.

46. In all the circumstances, the Court is satisfied that the sum of US $314,950, seized from Ms Bowen and Ms Bean on 5 March 2013 at LF Wade International Airport is recoverable property in that it represents the proceeds of dealing in controlled drugs and/or money-

laundering. The Court holds that, on a balance of probabilities, this finding is more probable than the alternative explanation advanced on behalf of the Respondent. The Court makes a recovery order accordingly.

47. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 7th day of April 2021

NARINDER K HARGUN

CHIEF JUSTICE