# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**

**2016: No. 492**

**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 AUTHORITY)**

**Applicant**

**-and-**

**TITO JERMAINE SMITH**

**Respondent**

## JUDGMENT

**(In Court)**

*Application for recovery order – whether laches – whether seized cash is recoverable property*

Date of hearing: 11th April 2018
Date of judgment: 15th May 2018

Ms Shakira J Dill-Francois, Deputy Solicitor General, for the Applicant
Ms Susan Mulligan, Christopher's, for the Respondent

## Introduction

1. By a summons dated 4th January 2017, and amended on 9th May 2017, the Applicant seeks a recovery order under section 36X of the Proceeds of Crime Act 1997 ("POCA") with respect to $33,770.00 seized from the bedroom of the Respondent, Tito Smith, during a police search of his home at the Basement Floor Apartment, 29 Curving Avenue, Pembroke ("the Apartment") on 9th May 2002. Mr Smith resists the application. Proceedings of this type are known as civil recovery proceedings. I am grateful for the able submissions of both counsel: Shakira Dill-Francois for the Applicant and Susan Mulligan for the Respondent.

## Statutory scheme

2. The statutory scheme for civil recovery proceedings is contained within Part IIIA of POCA (sections 36A – 36.1Y). It is based upon the statutory scheme in Part 5, Chapter 2 of the Proceeds of Crime Act 2002 ("POCA UK") in the United Kingdom but has been customised for Bermuda. 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.

5. Section 36A provides in material part:

"*(1) The enforcement authority may recover, in civil proceedings before the Supreme Court, property which is, or represents, property obtained through unlawful conduct.*

*(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.*

*(3) Proceedings for a recovery order may be taken by the enforcement authority against any person who the authority is satisfied holds recoverable property.*"

6. Section 36A contains a number of terms which are defined elsewhere in POCA.

(1) "The meaning of "*the enforcement authority*" is addressed in section 36F. Section 36F(1) provides that there shall be an enforcement authority which shall be designated by the Minister for the purposes of Part IIIA. Section 36F(2) provides that the Minister may by order designate a public authority as the enforcement authority. Section 7(1) provides that "*Minister*" means the Minister responsible for justice. The Minister charged with this responsibility is the Minister of Legal Affairs, which is a position held *ex officio* by the Attorney General, ie the Applicant. Section 29 of the Proceeds of Crime Amendment (No. 2) Act 2013 provides that until the enforcement authority has been designated under section 36F, the Minister shall exercise the powers and perform the functions conferred on the enforcement authority for the purposes of Part IIIA.

(2) "*Property*" is defined in section 4(1) to mean money and all other property, movable or immovable.

(3) "*Holds … property*" is defined in section 4(2)(a), which provides that property is held by any person if he holds any interest in it.

(4) "*Unlawful conduct*" is defined in section 36B, which provides in material part that conduct is unlawful conduct if it is unlawful under the criminal law of Bermuda.

(5) "*Property obtained through unlawful conduct*" is defined in section 36C, which provides in material part that 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.

(6) "*Recoverable property*" is defined in section 7(1), which provides in material part that recoverable property means property obtained through unlawful conduct. The definition is repeated in section 36.1J.

7. Recoverable property is thus defined to include property that was obtained by unlawful conduct which took place before the civil recovery provisions in

POCA came into force. As stated in Bennion on Statutory Interpretation, Sixth Edition, at 291, in a passage which was approved by the Privy Council in Spread Trustee Co Ltd v Hutchison [2012] AC 194 at para 65: "*Unless the contrary intention appears, an enactment is presumed not to have a retrospective operation.*" However Part IIIA of POCA does not offend against this presumption as it does not alter the mutual rights and obligations of citizens arising out of events which took place before it was enacted. In the words of Willes J in Phillips v Eyre (1870) LR 6 QB 1 at 23, it does not "*change the character of past transactions carried on upon the faith of the then existing law*". I reject the objection to the contrary made by Mr Smith in his affidavit, but not pursued by Ms Mulligan at the hearing. The property, as at the date at which a recovery order is made, is or represents property obtained through unlawful conduct. The unlawful conduct through which the property was obtained was unlawful when the obtaining took place.

8. Section 36X provides in material part:

> "*(1) If in proceedings under this Part the court is satisfied that any property is recoverable, the court shall make a recovery order.*
>
> *(2) The recovery order shall vest the recoverable property in the trustee for civil recovery.*"

9. Section 36Y(1) provides that the trustee for civil recovery is a suitably qualified person nominated by the enforcement authority, and appointed by the court to give effect to a recovery order.

10. The most straightforward civil recovery cases concern property obtained by the unlawful conduct of the respondent. But POCA also contains rules for following and tracing recoverable property where the recoverable property has been disposed of.

    (1) "*Following*", which is dealt with in section 36.1J, is where the applicant seeks to recover property obtained through unlawful conduct after it has been disposed of by the person through whose conduct it

was obtained or by someone through whose hands it subsequently passed. Eg a diamond ring which a thief has passed on to someone fencing stolen goods.

(2) "*Tracing*", which is dealt with in section 36.1K, is where the applicant seeks to recover property which represents the property obtained through unlawful conduct, eg a house which a drug dealer has purchased with the proceeds of drug dealing.

11. But the fact that POCA contains provisions for following and tracing property does not mean that *only* property which can be followed or traced is recoverable. I reject Ms Mulligan's submission to the contrary.

12. Part VI of POCA (sections 50 – 52A) provides a summary procedure for the seizure and detention (section 50) and forfeiture (section 51) of property in the Magistrates' Court. It is based on the cash forfeiture scheme in Part 5, Chapter 3 of POCA UK. But unlike the UK scheme, the scheme in Bermuda is not limited to cash but covers any property that directly or indirectly represents any person's proceeds of, or benefit from, or is intended by any person for use in, criminal conduct.

13. Section 36.1I(2) provides that proceedings for a recovery order may not be taken in respect of cash seized and detained in accordance with section 50 unless the proceedings are also taken in respect of property other than cash which is property of the same person. There is no requirement that cash seized under some other enactment should be dealt with under Part VI rather than Part IIIA. I reject Ms Mulligan's submission to the contrary.

14. Section 28A(2) of the Limitation Act provides that proceedings under Part IIIA of POCA for a recovery order shall not be brought after the expiration of 20 years from the date on which the enforcement authority's cause of action accrued. Section 28A(3) provides that, where there has been no application for interlocutory relief prior to the issue of an originating summons, proceedings are brought when the originating summons is issued. Section 28A(4)(a) provides in material part that in the case of proceedings

for a recovery order in respect of property obtained through unlawful conduct the cause of action accrues when the property is so obtained.

**Delay**

15. Ms Mulligan submitted that an application for a recovery order was subject to the equitable doctrine of laches. Laches is: "*a general equitable defence which bars the grant of equitable relief when the claimant has been guilty of undue delay in asserting his rights*". See the judgment of the Court of Appeal of England and Wales, given by Patten LJ, in Lester v Woodgate [2010] EWCA Civ 199; [2010] 2 P & CR 21.

16. In order to establish a defence of laches, the person raising it must show (i) unreasonable delay in the commencement of proceedings, and (ii) that in all the circumstances the consequences of the delay renders the grant of relief unjust. See the judgment of the Court of Appeal, given by Baker JA (as he then was), in Terceira v Terceira [2011] Bda LR 67 at para 35. Where the conduct relied on consists of no more than undue delay, it operates only to bar the grant of equitable relief. See the judgment of Patten LJ in Lester v Woodgate at para 22.

17. As Patten LJ stated in Lester v Woodgate at para 21, the word "*laches*" is sometimes used in another sense:

> "*To denote the type of passive conduct which can amount to acquiescence and so found an estoppel when it can be shown that the party standing by has induced the would-be defendant to believe that his rights will not be enforced and that other party has, as a consequence, acted in a way which would make the subsequent enforcement of those rights unconscionable.*"

18. Although Patten LJ refers to passive conduct, that conduct must amount to doing something rather than nothing. See Snell's Equity, 33rd Edition, at para 18-041:

"*Acquiescence primarily means conduct from which it can be inferred that a party has waived his rights. Duke of Leeds v Earl of Amherst (1846) 2 Ph 117 at 123. Mere inactivity is insufficient, for 'quiescence is not acquiescence'. Lamare v Dixon (1873) LR 6 HL 414 at 422, per Lord Chelmsford.*"

19. The distinction between laches based simply on delay and laches based on acquiescence has two significant practical consequences. Laches based on acquiescence, unlike laches based simply on delay:

    (1) May be invoked to defeat legal as well as equitable rights. See the judgment of the Court of Appeal of England and Wales, given by Nourse LJ, in Gafford v Graham and Another (1999) 77 P & CR 73 at 80 – 81.

    (2) May be invoked even where a statutory limitation period applies. See the judgment of the Court of Appeal of England and Wales given by Wilmer LJ in In re Pauling's Settlement Trusts [1964] Ch 303 at 353, affirming on this point the judgment at first instance of Wilberforce J (as he then was), reported in 1962 1 WLR 86, at 115(2) and 115 – 116(3).

20. In summary, laches based simply on delay cannot defeat a claim for a recovery order as the claim is not equitable and is subject to a limitation period. However laches based on acquiescence can in principle do so where by reason of the applicant's conduct it would be unconscionable for the applicant to seek a recovery order.

21. Delay could in principle breach section 6(8) of the Constitution, which provides that when a court is determining a civil right or obligation, the case shall be given a fair hearing within a reasonable time. In Director of ARA v Satnam Singh [2004] EWHC 2335 (Admin) at para 38 – 40, McCombe J accepted that article 6(1) of the European Convention on Human Rights, which also guarantees a fair hearing within a reasonable time, was engaged by an application for a recovery order. But as the Respondent's case was not

argued on that ground it would be inappropriate for me consider it further on this application.

**Evidence**

22. The primary facts upon which the civil recovery proceedings are based are not disputed. The question is what inferences the Court can properly draw from them. For the Applicant, I read affidavits and exhibits and heard oral evidence from DC Gaskin and DS Hayden Small. For Mr Smith, I read an affidavit and heard oral evidence from Mr Small.

23. DC Gaskin's affidavit evidence was as follows. On 9th May 2002 at 6.20 am, he was on duty in plain clothes when he attended the Apartment with four other officers and a police dog. He was in possession of two search warrants in relation to the Apartment. One had been issued under section 464(1) of the Criminal Code and the other had been issued under section 25(3) of the Misuse of Drugs Act 1972 ("the MDA").

24. Copies of both warrants were produced in evidence. The MDA warrant was dated 8th May 2002. It stated that the Justice of the Peace and Magistrate who issued the warrant was satisfied upon information laid on oath by DC Gaskin that there were reasonable grounds for suspecting that certain "*articles liable to seizure*" to which the MDA applied were in the premises occupied by Mr Smith at the Apartment. The warrant authorised DC Gaskin to search the Apartment and any person found there, and if there were reasonable grounds for suspecting that an offence under the MDA had been committed in relation to any such article found in the premises or in the possession of any such person, to seize and detain such articles.

25. Section 25(7)(b) of the MDA provided that "*articles liable to seizure*" means, *inter alia*, any controlled drug in respect of which an offence is being or has been committed, and any money or thing liable to forfeiture under the Act. Section 37(1)(b) provided that a court may order to be forfeited to the

Crown any money or other property received or possessed by any person as the result or product of an offence under the Act.

26. DC Gaskin stated that he knocked on the door of the Apartment and that a woman came to the door. He identified himself to her as a police officer and asked her, "*Is this Tito Smith's residence?*" to which she replied, "Y*es, I am his mother*". She advised that he was presently overseas in Barbados, having left the island on 29th April, and was due to return on 17th May.

27. DC Gaskin informed the mother, who identified herself as Sheila Smith, that he was in possession of warrants to search the Apartment. After examining the warrants, Ms Smith led the officers to a bedroom on the eastern side of the Apartment, and said, "*This is Tito's room*".

28. There was a bed on the north side of the bedroom. The headboard was against the northern wall. To the east of the bed was a white dresser. In the centre of the eastern wall was a short passage several feet long by several feet wide leading to the back door. There was no door between the western, ie bedroom, end of the passage and the bedroom. On the northern side of the passage, built in to the wall, was a closet. On the southern side of the passage was a bathroom. To enter or exit the rest of the Apartment via the back door it was necessary to go through Mr Smith's bedroom.

29. During the search, the officers found and seized the following items:

    (1) In the closet, a pair of brown Rompe Huevos boots. They were one of several pieces of men's footwear found in the closet, most of them sneakers. Some of the pairs appeared to be brand new. However the Rompe Huevos boots were the only pieces of footwear to be seized.

        (a) Inside the left boot were two brown paper twists.

            (i) In one of the twists were six white rock-like substances.

            (ii) In the other twist were three smaller brown and red paper twists, each containing a white rock like substance.

There were nine pieces of white rock like substance altogether. On analysis, the substance was found to weigh 1.90 grams. Around 81 per cent of the substance consisted of cocaine freebase, colloquially known as "crack". Cocaine is a controlled drug.

(b) Inside the right boot was a large brown paper twist containing three plastic bags.

(i) One of the plastic bags contained two separate plastic bags and a brown paper twist. Inside each of the two plastic bags was a white rock like substance, while the brown paper twist contained a hard substance.

(ii) Each of the other two plastic bags contained three pieces of white rock like substance.

On analysis, the substance, which consisted of twelve pieces of white rock like substance, was found to weigh 102.85 grams. Around 75 per cent of the substance consisted of crack cocaine.

(2) On a rack on the bathroom door were hanging several jackets. From the police photographs there appear to be four or five. One of them was a black "fur Co" leather jacket. There were two or three jackets hanging on top of it. In the left side pocket of the black leather jacket were a single-edge yellow widget razor blade, some brown papers, and a brown paper twist containing some white, rock-like granules. DC Gaskin showed Ms Smith the black leather jacket and asked her to whom it belonged. She replied, "*Honestly, I don't know*". He pointed to the rack and asked her, "*Is this where Tito Smith hangs his clothes?*" She replied, "*Yes, I gave him that brown one on the rack*". The black leather jacket was the only jacket to be seized. On analysis, the granules were found to weigh 1.65 grams. Around 76 per cent of the substance consisted of crack cocaine. The edge of the razor blade bore traces of crack cocaine.

(3) At the head of the bed on the floor, a Bank of Bermuda money bag. This contained seven stacks of US and Bermuda notes wrapped with rubber bands. DC Gaskin asked Ms Smith who the money bag belonged to and she replied, "*I don't know*". He then asked her, "*Have you seen this money bag and money before?*" She replied, "*I don't hardly go into this room*". The cash was then counted in her presence. The bundles consisted respectively of: $3,000; $6,000; $4,990; $3,980; $5,000; $4,900; and $5,900. The total amount was $33,770.

(4) In the top drawer of the dresser:

(a) A plastic bag containing brown plant material and a brown paper twist containing plant material. There was also another brown paper twist containing plant material. The plastic bag was at the bottom of the drawer underneath some clothes. DC Gaskin asked Ms Smith whether anyone other than Mr Smith occupied the bedroom, to which she replied, "*Only Tito*". He then asked her whether anyone had been occupying the room since Mr Smith's departure, or whether any of his friends had been in the room since she left. She stated that no one had. On analysis, the plant material, which weighed 11.31 grams, was found to be cannabis, which is a controlled drug.

(b) A plastic bag twist containing plant material. This was wrapped in a pair of black boxer shorts. On analysis, the plant material, which weighed 1.15 grams, was found to be cannabis.

(c) A small foil wrap containing a brown substance. On analysis, the brown substance, which weighed 0.21 grams, was found to be cannabis.

(5) In the third drawer of the dresser, a black handled switch blade knife covered in a black sheaf.

(6) In a plastic container between the bed and the dresser:

(a) One clear plastic twist, containing a hard, dark coloured substance; and one gold-coloured foil wrap, containing a hard, dark coloured substance. On analysis, the substance was found to be cannabis resin.

(b) Torn pieces of paper; a Camel Filter cigarette box; and torn Rizzle package. On analysis, traces of cannabis were found to be present.

(7) Two NT Butterfield books in the name of Mr Smith. One was under the mattress of the bed and the other was on top of the dresser.

30. One of the officers, DC 919 Astwood, who had been assigned the role of notes officer, took a contemporaneous note of the search. This was given to Ms Smith to read. DC Gaskin stated that she appeared to read the notes and that they were read over to her by her daughter in law, Mary Smith, who was present for part of the search. Ms Smith was asked to sign each page as a true record of the search, which she did. The record was also signed by DC Gaskin and DC Astwood.

31. Insofar as the Applicant relies upon the statements made by Ms Smith at the Apartment as evidence of the truth of their contents I admit them as hearsay evidence under section 27B of the Evidence Act 1905 ("the Evidence Act").

32. On 12th May 2002, Ms Smith was interviewed under caution in the presence of her attorney. She declined to make a voluntary statement and, I infer, answered "*no comment*" to the questions which she was asked.

33. On 14th May 2018, Mr Smith arrived in Bermuda (three days earlier than mentioned by Ms Smith) at LF Wade International Airport, whereupon DC Gaskin arrested him on suspicion of possession of a controlled drug with intent to supply. DC Gaskin searched Mr Smith and seized a Capital G Bank Limited deposit form dated "*02/08/01*" in the joint names of Tonisha

A Hollis and Mr Smith showing the deposit of $13,000. It is not clear whether the date on the form was 2nd August or alternatively 8th February. Later that day, DC Gaskin seized further items from Mr Smith: a used Continental airline ticket, a Bermuda passport, and $474 in cash.

34. Later that day, DC Gaskin interviewed Mr Smith under caution. No attorney was present. He informed Mr Smith about the search and said that he wanted to interview him about the substances and cash found in the bedroom. He asked Mr Smith whether he wished to make a statement regarding what he had just informed him. Mr Smith answered "*No comment*". DC Gaskin proceeded to carry out the interview. The questions he was asked included what the substances were; whether they belonged to him; to whom did the money belong; and where did the money come from. Mr Smith answered "*No comment*" to all the questions, as was his right under section 5(5) of the Constitution.

35. Mr Smith was interviewed again under caution the following day. He answered "*no comment*" to an invitation to make a statement and to the questions which he was asked.

36. On 16th May 2016, DC Gaskin attended the Apartment with Mr Smith, who was still in police custody, and other officers. He was in possession of another warrant under the MDA. They were admitted to the property by Ms Smith. Using the search notes taken on 9th May 2002, DC Gaskin pointed out to Mr Smith the areas from where he had seized the cash and various substances. He cautioned both Mr and Ms Smith. Mr Smith made no reply and Ms Smith said, "*Yes*". DC Gaskin asked Mr Smith to whom the cash and substances found in the house on 9th May 2002 belonged. Mr Smith replied "*No comment*".

37. DC Gaskin invited Ms Smith to attend Hamilton Police Station and she agreed to come. Mr Smith told her, "*You don't have to answer any questions, Mom*". Later that day, Ms Smith was arrested on suspicion of possessing a controlled drug with intent to supply. She was cautioned, and

replied, "*Okay*". She was then interviewed under caution in the presence of her attorney and answered "*no comment*" to an invitation to make a statement and to the questions which she was asked.

38. The police sent the substances for analysis. The analyst's report, which contains the results dated above, is dated 13th July 2002. On 24th October 2002, the report was served on Mr Smith's attorney and on Ms Smith in the presence of her attorney.

39. On 10th December 2002, the file was submitted to the Department of Public Prosecutions ("DPP's Office") for review. On 19th April 2004, the Director of Public Prosecutions ("DPP"), Vanette Graham-Allen, advised one of DC Gaskin's superiors, Superintendent Boyce, that the file was due to be reviewed, but that other pressing matters had taken precedence. The file remained dormant until 2009, when it was the subject of a meeting between Rory Field, who was Ms Graham-Allen's successor as DPP, DC Gaskin and DI Maxwell. DI Maxwell asked for the file, which was handed to him. However he subsequently had a number of medical issues and the file became dormant again. On 11th March 2016, the Deputy DPP, Cindy Clarke, met DC Gaskin and informed him that she had decided not to prosecute Mr Smith and Ms Smith. The fact that almost 14 years had elapsed since the search and seizure took place was no doubt a material factor in her decision. The file was passed to the enforcement authority for consideration.

40. On 29th June 2016, the Applicant wrote a letter before action to Mr Smith advising him that the enforcement authority intended to seek a recovery order in relation to the $33,770 seized during the search of the Apartment. The letter noted that the police also seized 106.40 grams of crack cocaine, 12.46 grams of cannabis, 0.46 grams of cannabis resin, and a yellow widget razor blade. It stated that in the Applicant's view the cash was obtained as a result of the sale of illegal drugs.

41. DS Hayden Small gave expert evidence in relation to the drugs seized. He had 27 years' service with the Bermuda Police, was attached to the Drug Unit office for 18 years from 1996 to 2014, and had attended a number of courses on drug related topics. He had retained a strong link with the local drug fraternity through informants and persons whom he and other officers had arrested, and as a result had kept abreast of the street value of controlled drugs in Bermuda and elsewhere.

42. DS Small exhibited a witness statement dated 6th November 2002 made by another police officer with similar expert knowledge of controlled drugs, DS 48 Dennis Gordon, who had since retired. DS Gordon stated that the amount of cocaine seized was equivalent to 663 rocks and that its estimated street value was $33,150. He estimated the street value of the cannabis at $600 and the cannabis resin at $50. He stated that from his experience, he could say that the quantities of controlled drugs were not for personal use but for sale or distribution. He noted that the cash was packaged in a manner similar to and in keeping with the actions of a drug dealer. He stated that razor blades are used to prepare what is known as a "line" of cocaine or to cut cocaine "rocks" or "crack" into respective weights for sale or distribution. I admit the statements of fact made by DS Gordon as hearsay evidence under section 27B of the Evidence Act.

43. DS Small reviewed DS Gordon's witness statement and the photos of the seized items. He stated that in his opinion the quantity of the controlled drugs found in the Apartment was for sale or distribution. He also stated that in view of the way that the cash had been wrapped in elastic bands and bundled, it was his opinion that it was attributable to drug trafficking or was the proceeds of criminal conduct. That is a question for the court and not the officer. The form of words used by DS Gordon to deal with this issue – that the cash was packaged in a manner similar to and in keeping with the actions of a drug dealer – is more appropriate.

44. Mr Smith gave affidavit evidence that the cash was his money and that it came from legitimate sources. He stated that it was now impossible for him

to produce paperwork or other records in relation to the cash, more than 15 years after it was seized.

45. Mr Smith stated that there were two sources for the cash. Most of it came from his earnings as a self-employed painter. He had worked as one since he was about 15 years, having learned the craft from his father. He also did carpentry and other maintenance work. He was almost always paid in cash.

46. However, around $8,000 came from the sale of a Peugeot motor car. Mr Smith had leased the car from a dealer under a hire purchase agreement when it was new. He paid an initial deposit, made instalment payments for a few years, then, when the term of the hire purchase agreement came to an end, paid a lump sum to complete the purchase. He was off island with his then girlfriend, Tanisha Hollis, from 19th April 2002 until 17th May 2002, and sold the car shortly before he left. The purchaser was a woman named Nicky who paid in cash. Since being served with the summons, he had tried to obtain information about her through the dealership and through the Transport Control Department ("TCD"). However, as she or someone else had changed the licence plate, they advised that, with the limited information which he had, they were unable to assist.

47. Mr Smith explained that at the time he had at least one bank account in his sole name. He tended to keep a pool of cash with him at home as he needed this for work related expenses, eg to purchase supplies, paint, tools, gas, and vehicle maintenance. People didn't worry about crime so much in those days, and rarely locked the doors to their houses. So he did not make much use of his bank account.

48. Mr Smith also had a joint bank account with Ms Hollis, who was in college overseas. Both he and her parents used to put money into the account to assist her. That was the account to which the Capital G deposit form for $13,000 related. He could not recall whether the form had been used, and if so, whether it represented monies which he had put into the account, or her parents had, or both. He could not recall whether the deposit was made up

of cash, or cheques, or both. The amount of the deposit, if there was a deposit, was unsurprising, as Ms Hollis was starting her second year at college that fall, and would have needed a substantial amount of money for expenses such as tuition fees and a rental deposit.

49. Mr Smith stated that, while on police bail, he made inquiries about getting his money and passport back, but was told to wait and see whether he was going to be charged. He made further inquiries after he was released, but was told that there wasn't anything he could do about it at the time. He assumed that after all these years he had lost the money and was unable to get it back. Similarly, he did not get his passport back from the police, but applied for a new one eight years later.

50. Mr Smith accepted that some or all of the cannabis was his, but stated that he purchased it for personal use. He used to smoke cannabis sometimes, as did other members of his family and friends. However he disputed DS Gordon's valuation, and stated that the cannabis would not have cost more than $250 –$300.

51. Mr Smith stated that he did not know anything about the cocaine. He said that he did not buy or sell cocaine, and that he would not have had it in his home knowingly. The Apartment formed part of the main house on the family homestead. Other family members lived in the main house – his mother, brother, brother's wife, and nephew. Two uncles both had cottages in the homestead grounds. They all had unfettered access to the main house. In addition, in the evenings and at weekends the main house was a social gathering spot. People coming into the main house usually used the back door and went through Mr Smith's bedroom. That was the closest entrance for his uncles. They could have hung their jackets on the rack on the bathroom door and taken off their boots or shoes and put them in the closet.

52. Mr Smith had reviewed the photographs taken by the police when searching the apartment. The boots in which they found the cocaine looked like his but could have been his brother's or his uncles'. As to the jackets, he

recalled the brown one but not any of the others. He could not say for sure whether the black one was his. However the items found in the boots and jacket were not his and he knew nothing about them.

53. DC Gaskin swore a second affidavit in response to Mr Smith's statement. He stated that on 20th April 2017 he had emailed TCD to enquire whether Mr Smith had sold a car sometime prior to May 2002. TCD replied by an email dated 20th April 2017 to say that they had searched the Drivers Vehicle Registration System but did not find any transaction under Mr Smith's profile of the sale of a vehicle prior to May 2002.

54. DS Small also swore a second affidavit. He stated that he had contacted the Tax Commissioner's Office, to enquire about payroll tax, and the Department of Social Insurance, to enquire about any social insurance payments made by Mr Smith on his earnings. He was advised that neither held any records for Mr Smith.

55. DS Small further stated that, based upon a review of his own expert statements from 2002, at that time a quarter of cannabis, ie 7 grams, was sold for between $125 and $150 dollars, and a unit of $0.5 grams of cannabis was sold for $25. It was therefore his expert opinion that DS Gordon's valuation of the cannabis seized from the Apartment was correct.

56. All three witnesses gave oral evidence and were cross-examined. DC Gaskin stated that he had seized both the cash and the controlled drugs under the MDA warrant as he had formed the opinion that the money belonged to the drugs. On re-examination, he stated that on completing the search he had endorsed the back of the warrant with a concise summary of the exercise, including the words, "*Items liable to seizure seized*".

57. He could not say that all the shoes in the closet were the same size. Neither could he recall asking Ms Smith to whom the boots from which the cocaine was seized belonged. He could not recollect whether the bedroom door was open or closed when he entered the Apartment, or whether Ms Smith needed to get a key to unlock it.

58. One of the police photographs showed a number of papers on the bed. DC Gaskin had not seized or read all of them, and could not say whether any of them related to the money. He could not recall whether he checked the documents for names. He was asked about the bank deposit form. He could not remember how the $13,000 deposit was made up or whether the deposit form was stamped.

59. DC Gaskin accepted that if there had been five people living in the Apartment it was possible that he would have arrested them all as he could not say whose drugs they were. He had intended to charge both Mr Smith and Ms Smith and let the court figure out whose drugs they really were. Today, packages on drugs are often checked for fingerprints and analysed for DNA, but that happened less often in 2002 and did not happen in the present case.

60. DC Gaskin was cross-examined about his second affidavit. He had no record of whether or when any purchaser of Mr Smith's supposed car had registered the sale. Eg whether it had been registered after May 2002. As to payroll tax and social insurance records, DC Gaskin accepted that many people did painting and carpentry work without getting registered. He could not say whether there was a requirement to be registered in 2002.

61. DS Small stated that the current street value of seven grams of cannabis was $150 – $175. He agreed that since 2002 inflation had not been very high in relation to the value of such a small amount of cannabis. His acceptance of DS Gordon's valuation of the cannabis seized at $600 was based on selling it in very small quantities of 0.5 grams. Back in 2002, the quantity of cannabis seized, if purchased all at once, would not have cost anything near $600. If sold in quarter grams it would also cost quite a bit less. He could not say that the cannabis seized was necessarily for supply.

62. DS Small was asked about the bundles of cash. He accepted that in drug seizures one often saw uniform bundles, but that in this case the bundles were not uniform. In his experience of drug seizure he had sometimes found

mixed bundles of US and Bermudian notes, although he could not recall whether the bundles in the present case were mixed in this way. He agreed that drug dealers were not the only ones who might bundle up their money, and agreed that painters and carpenters, among others, often dealt in cash.

63. Mr Smith stated that he would have kept his bedroom door locked while he was overseas. He explained that he lived with his mother in the Apartment. He couldn't say whether anyone had been there in his absence. He had placed the cash under his bed. When asked why, he said that this was where he always kept his money. He had bundled the cash. When asked why, he said because that was how he did it.

64. Mr Smith agreed that he used to do odd jobs – painting, carpentry etc – and said that he still did. He used to travel to these jobs by bike, on which he used to carry his supplies. He could not say how much it cost to fill up the bike as this was a long time ago. Asked about the cost of the supplies he said that it depends. Sometimes customers used to buy their own supplies so that he didn't have to. He had to buy tools maybe every couple of months. Eg paintbrushes and stuff like that. This would cost him $5 a brush, maybe less. He used to get his bike checked once a year. The cost depended upon how much was wrong with the bike. He was asked whether he needed to purchase any other work supplies but replied that he did not. When it was put to Mr Smith that he did not need a float of that size to cover his business expenses he said that he did. He disagreed with the suggestions that the money was acquired from drug transactions and that he had kept the money in cash because it was acquired by illegal means.

65. Mr Smith was shown police photographs which, he agreed, showed his closet, which contained his belongings, and his bathroom door. He reaffirmed that part of the cash seized came from the sale of his Peugeot 206 motor car and disagreed with suggestions that it did not and that he had never sold a car. It was put to him that the crack cocaine, razor blade and other items found in the boots and the side pocket of the black leather jacket were his. He said that they were not.

66. On re-examination, Mr Smith was asked why he needed the money in his room. He said he left the money there for an emergency, in case his mother needed the money while he was abroad. He also needed the money for his business, as anything could have come up. He confirmed that he would have locked the door while he was overseas. However he had no way of knowing what happened to the door while he was off the island. He was shown a police photograph of the items in his closet, which included a curling iron. He said that the curling iron was not his. When he had said that the closet contained his belongings, he meant his clothes and his sneakers.

67. Mr Smith was shown three police photographs of his boots with the cocaine inside them and asked whether he had any idea that "*that*", which I took to mean the cocaine, was in the closet. He said that he did not. In response to a question from me, he said that the black leather jacket was not his. In his affidavit he had stated merely that he could not remember whether it was his. In a follow-up question, counsel asked why his room would contain the belongings of someone who did not live there. Mr Smith replied that he didn't know as he wasn't there at the time.

**Discussion**

68. I shall begin with the question of laches. Ms Mulligan sought to rely upon laches based simply on delay. But, as is apparent from the analysis earlier in this judgment, that does not provide a defence to the applicant's claim as the claim is based in law not equity and is subject to a twenty year statutory limitation period. Ms Mulligan did not argue laches based on acquiescence. This would be inapplicable because there was no conduct by the applicant, or indeed any state actor, from which it can be inferred that the applicant has waived its right to bring civil recovery proceedings.

69. Ms Mulligan did not argue a constitutional claim based on delay, although it would be open to Mr Smith to do so by bringing a separate action under section 15 of the Constitution. The difficulty he would face is that he was

informed of the cash seizure at an early stage and given the opportunity to provide an explanation. He exercised his constitutional right not to do so, and I draw no adverse inferences from that. But his failure to provide an explanation at the time would undermine the force of an objection that it was unfair to expect him to provide one now. The police questions put him on notice that the cash was allegedly the proceeds of drug dealing. He would have known that it would assist his case at trial if he could explain its provenance, and he would have known that any corroborative evidence which he could gather would lend credibility to his explanation.

70. Mr Smith gave unchallenged evidence that he was told after his release from police bail that there was nothing he could do to get the cash back "*at that time*", ie when no charging decision had yet been made. It is not clear why he assumed, as he says he did, that he could *never* get the cash back. If the cash represented his legitimate earnings, it is at first blush surprising that he did not pursue its return more vigorously. Perhaps, in view of the drugs seized from the Apartment, he thought it more prudent to let sleeping dogs lie, but that is speculation.

71. Although I am not explicitly concerned with the issue of fairness, I shall bear the above considerations in mind when considering the quality of the evidence which Mr Smith did put forward about the cash.

72. Turning briefly to an ancillary matter, I derive no assistance from the bank deposit slip. The mere fact that it was found in Mr Smith's possession on his return from overseas is not sufficient to connect it with the proceeds of sale of controlled drugs or other criminal activity.

73. I turn next to the controlled drugs that were seized. The amounts of cannabis and cannabis resin were consistent with personal, or at least social, use. They were not indicative of possession for purposes of commercial supply. As Ms Mulligan rightly points out, there was no surveillance evidence or evidence of an extravagant lifestyle, such as is often found in drug dealing cases.

74. Counsel contested whether the short passage between the bathroom and the back door could properly be characterised as part of the bedroom. Ms Mulligan described it as an "*entryway*", through which people would regularly have passed coming into and out of the main house, using the bathroom rack to hang their jackets and maybe the closet temporarily to store their shoes. Ms Dill-Francois characterised it as an extension of the bedroom, and noted that there was no door or curtain between the passage and the bedroom. Insofar as this is more than an exercise in semantics, I agree with Ms Dill-Francois. Mr Smith kept his boots and shoes in the closet and his jackets on the rack on the bathroom door. The crack cocaine was found inside what I am satisfied were most likely his boots and his black leather jacket. The razor blade was also found in the jacket. There is no evidence that anyone else put them there. His mother, although I treat her evidence with caution, said that no-one else had been in the room during his absence. I am satisfied that the crack cocaine and the razor blade most probably belonged to Mr Smith. The quantity of the drug was inconsistent with personal use. I am satisfied that it was intended for commercial supply.

75. I find that Mr Smith lied when he said that the crack cocaine was not his. This is relevant when assessing the truthfulness of his evidence concerning the cash. However, the fact that the crack cocaine was his does not necessarily mean that the cash was the proceeds of drug dealing.

76. It is, however, a notorious fact that drug dealers deal in cash. The cash and, I am satisfied, the crack cocaine were found in the area of the Apartment occupied by Mr Smith. The amount of crack cocaine was commensurate with a drug dealing business capable of generating the amount of cash seized. The way in which the cash was bundled is reminiscent of the way in which drug dealers bundle cash, although I accept that anyone running a cash business might have bundled the cash in a similar way.

77. I attach no weight to the fact that there are no payroll tax and social insurance records for Mr Smith. Many self-employed painters and carpenters are in the same position. However, he did not explain how his

painting and carpentry business, which he accepted consisted of doing odd jobs, was able to generate the largest part of the seized cash. His explanation as to why he needed so much cash in the house was implausible – going by the sort of expenses that he mentioned, he would not have required a float anywhere near that size. In suggesting that the cash was also an emergency fund for his mother while he was abroad, which he mentioned for the first time in re-examination, Mr Smith appeared to me to be making up his evidence as he went along.

78. Mr Smith produced no documentary evidence that he had ever had a car, let alone that he had sold one. This is the sort of evidence that he might reasonably have been expected to gather shortly after he knew that the cash had been seized. He said that he had made inquiries of the DVLA, but he did not produce any evidence to substantiate this, such as a letter or email sent by him or his attorneys, or any reply. He did not call any witnesses from the DVLA. Ms Mulligan suggested that the documents photographed on the bed might have included documents relating to the sale of the motor car. But there is no reason to suppose that they did. Mr Smith did not say so.

79. In all the circumstances, I am satisfied that the $33,770.00 seized from the bedroom of Mr Smith is recoverable property in that it represents the proceeds of dealing in controlled drugs, most probably crack cocaine. I find that explanation for its provenance more probable than the alternative explanation given by Mr Smith. I make a recovery order accordingly.

80. I shall hear the parties as to costs.

DATED this 15th day of May, 2018

Hellman J