
**Trinity Term**
[2020] UKPC 15
**Privy Council Appeal No 0041 of 2018**

# JUDGMENT

# Williams (Appellant) *v* The Supervisory Authority (Respondent) (Antigua and Barbuda)

## From the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda)

**before**

**Lord Kerr**
**Lord Hodge**
**Lord Lloyd-Jones**
**Lord Briggs**
**Lord Sales**

## JUDGMENT GIVEN ON

## 8 June 2020

**Heard on 6 February 2020**

*Appellant*
Paul Taylor QC
David Dorsett PhD
(Instructed by
AxiomStone Solicitors)

*Respondent*
Justin L Simon QC
Desiree A A Artesi
(Instructed by Royds Withy
King (London))

**LORD SALES:**

1. This case is concerned with the operation of the regime in Part IV of the Money Laundering (Prevention) Act 1996 (as amended) ("the MLPA"), headed "Freezing and Forfeiture of Assets in Relation to Money Laundering", and in Part IVB of that Act, headed "Civil Forfeiture", and the effect upon that regime of the Constitution of Antigua and Barbuda ("the Constitution"). The respondent, the Supervisory Authority ("the Authority"), is an agency established under the MLPA charged with taking enforcement action under it. The regime in Part IV will be referred to as "the freeze order regime"; that in Part IVB as "the civil forfeiture regime"; and together they will be referred to as "the combined regime".

*The MLPA*

2. The MLPA enacts a range of measures to counter money laundering and to deprive persons of the proceeds of crime. For present purposes, its relevant provisions are as follows. In this judgment, unless otherwise indicated, references to section numbers are to sections of the MLPA.

3. In the preliminary part of the MLPA, section 2H explains the meaning of money laundering activity for the purposes of the Act:

> "2H. In this Act a reference to money laundering activity by a person is a reference to anything done by the person that at the time was a money laundering offence whether or not the person has been charged with the offence and, if charged:
>
> (a) has been tried; or
>
> (b) has been tried and acquitted; or
>
> (c) has been convicted (even if the conviction has been quashed or set aside)."

4. Section 2(1) states, in relevant part, that "money laundering offence" means:

"an offence against:

(a) sections 3 and 5 of this Act;

(b) sections 11A and 18 of this Act

(c) section 61 of the Proceeds of Crime Act, 1993; or

(d) sections 4, 5, 6(3), 7 and 8 of the Misuse of Drugs Act, Cap 283; …"

5. Section 6(3) of the Misuse of Drugs Act provides, in relevant part:

"(3) … it shall be an offence for any person to have a controlled drug in his possession whether lawfully or not, with intent to supply it to another in contravention of section 5(1)."

6. An offence against section 12(1) of the Misuse of Drugs Act (possession of controlled drugs with intent to sell or transfer such controlled drug to any other person) was only added to the list of money laundering offences in section 2(1) of the MLPA by an amendment made by the Money Laundering (Prevention) (Amendment) Act 2009 ("the 2009 Act"), with effect from 21 December 2009. There does not appear to have been any good reason for the original omission of offences against section 12 of the Misuse of Drugs Act from the list of money laundering offences: it seems that this was a drafting oversight eventually corrected by the 2009 Act.

7. Part IV of the MLPA commences with section 19. Section 19(1) provides:

"19(1) Where a person (referred to in this Part as 'the defendant') -

(a) has been convicted of a money laundering offence; or

(b) has been, or is about to be charged with a money laundering offence; or

(c) is suspected of having engaged in money laundering activity.

the Supervisory Authority may apply to the High Court for an order freezing property in which there is a reasonable suspicion that the defendant has an interest."

8. Section 19A provides in relevant part as follows:

"19A(1) Where an application is made pursuant to paragraph 19(1)(a), the High Court shall make a freeze order.

…

(1B) Where an application is made pursuant to paragraph 19(1)(c) the High Court shall not make a freeze order unless -

(a) the application for the order is supported by an affidavit of an authorised officer stating that he suspects that the defendant has engaged in money laundering activity; and

(b) the court is satisfied, having regard to the matters contained in the affidavit, that there are reasonable grounds for holding that suspicion.

(2) Where a freeze order is made upon the basis that -

(a) the defendant has been charged or is about to be charged with a money laundering offence; or

(b) the defendant is suspected of having engaged in money laundering activity;

the freeze order will cease to have effect thirty (30) days after it is made unless by that time the defendant has been charged with a money laundering offence, or an application for a civil forfeiture order or civil proceeds assessment order has been filed."

9. Section 19B provides:

> "19B(1) Where the High Court makes a freeze order, the Court may, at any time when it makes the freeze order or at any later time, make any ancillary orders that the Court considers appropriate and, without limiting the generality of the Court's power, the Court may make any one or more of the following orders:
>
> (a) an order varying the property to which the freeze order relates;
>
> (b) an order varying a condition to which the freeze order is subject;
>
> (c) an order for the examination on oath before the Court of any person, including:
>
> (i) a person whose property is the subject of the freeze order (in this section called the 'owner'); or
>
> (ii) a person who is the defendant within the meaning of section 19 in relation to the offence to which the freeze order relates (in this subsection called the 'defendant');
>
> about the affairs (including the nature and location of any property) of;
>
> (iii) anyone who is either the owner or the defendant or both; and
>
> (iv) if the person to be examined is either the owner or the defendant or both - that person;
>
> (d) an order directing
>
> (i) the owner; or

(ii) if the owner is not the defendant - the defendant; or

(iii) if the owner or the defendant is a body corporate - a director of the body corporate specified by the court:

to give to:

(iv) where the freeze order is, or includes, an order made under section 19(4)(b) - the trustee; and

(v) in any other case - the applicant for the ancillary order or such other person as the court directs;

within a period specified in the ancillary order, a statement sworn on oath setting out such particulars of the property, or dealings with the property, of the owner or the defendant, as the case may be, and as the court thinks proper;

(e) where the freeze order directed a trustee to take custody and control of property:

(i) an order regulating the manner in which the trustee may exercise his or her powers or perform duties under the freeze order;

(ii) an order determining any question relating to the property to which the freeze order relates, including any question relating to:

(a) the liabilities of the owner; or

(b) the exercise of the powers, or the performance of the duties, of the trustee with respect to the property to which the restraining order relates;

(2) An order under subsection (1) may be made on application by:

(a) the Supervisory Authority;

(b) the owner;

(c) where the freeze order directed a trustee to take custody and control of property - the trustee; or

(d) with the leave of the court - any other person.

(3) An ancillary order made in relation to a freeze order does not cease to have effect merely because the freeze order, or part of it, ceases to be in force.

(4) Where:

(a) a person (in this subsection called the defendant has been) -

(i) convicted of a money laundering offence or money laundering activity; or

(ii) charged with a money laundering offence or money laundering activity or is about to be charged with a money laundering offence or money laundering activity; or

(iii) joined as a defendant in an application pursuant to sections 20A or 20B or is about to be joined as a defendant in such an application;

(b) the High Court has made a freeze order against any property under section 19; and

(c) a person having an interest in the property applies to the court for a variation of the order to exclude the person's interest from the order;

the High Court shall grant the application if:

(d) where the applicant is not the defendant and the freeze order was not made by virtue of section 19A(3) - the High Court is satisfied that:

(i) the applicant was not, in any way, involved directly or indirectly in the commission of the offence or money laundering activity; and

(ii) the applicant had no knowledge of the commission of the offence or money laundering activity or any illegal use to which instrumentalities the subject of the application may have been put (providing that this lack of knowledge was not the result of wilful blindness); and

(iii) the applicant's interest in the property was not acquired by means of a gift from the defendant or any person or entity under the effective control of the defendant; and

(iv) where the applicant acquired the interest at the time or after the commission, or alleged commission, of the offence or money laundering activity - the applicant acquired the interest without knowledge, or in circumstances such as not to arouse a reasonable suspicion, that the property was an instrumentality;

(e) where the applicant is not the defendant and the freeze order was made by virtue of section 19A(3) - the High Court is satisfied that:

(i) the applicant was not, in any way, involved in the commission of the offence or money laundering activity; and

(ii) the applicant's interest in the property is not subject to the effective control of the defendant; and

(iii) the applicant had no knowledge of the commission of the offence or money laundering activity or to any illegal use to which instrumentalities the subject of the application may have been put (providing that this lack of knowledge was not the result of wilful blindness); and

(iv) the applicant's interest in the property was not acquired by means of a gift from the defendant or any person or entity under the effective control of the defendant; and

(v) where the applicant acquired the interest at the time or after the commission, or alleged commission, of the offence or money laundering activity - the applicant acquired the interest without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was an instrumentality.

(5) Where:

(a) a person (in this subsection called the defendant) has been -

(i) convicted of a money laundering offence; or

(ii) charged with a money laundering offence or is about to be charged with a money laundering offence; or

(iii) joined as a defendant in an application pursuant to sections 20A or is about to be joined as a defendant in such an application;

(b) the High Court has made a freeze order against any property under section 19; and

(c) the defendant has an interest in the property;

(d) the defendant applies to the High Court for an order under this subsection in relation to the interest; and

(e) the court is satisfied that:

(i) the property was not used in, or in connection with, any unlawful activity and was not derived, directly or indirectly, by any person from any unlawful activity; and

(ii) the property was not related in any way, directly or indirectly, to any unlawful activity including (and without limiting the generality of the foregoing) any money laundering scheme established in Antigua and Barbuda or elsewhere,

the High Court may subject to paragraph (f) order that the freeze order, to the extent to which it relates to the interest in property the subject of the application, be discharged.

(f)(i) Where property or an interest in property, subject to an application under this subsection, is also subject to a freeze order for the purpose of securing an application for a civil proceeds assessment order pursuant to section 20B, the High Court may not make an exclusion order in respect of that property or interest in property pursuant to this subsection. It may instead declare that the property or interest in property satisfies the requirements of paragraph (e);

(ii) When a declaration is made in relation to property or an interest in property pursuant to subparagraph (i):

(A) section 20 shall not operate in relation to that property or any interest in that property;

(B) no civil forfeiture order may be made in relation to that property or any interest in that property.

(6) The onus of proof in an application made pursuant to subsections (4) or (5) lies upon the person seeking relief under those subsections.

(7) Where a person is examined before the High Court pursuant to an order under paragraph (1)(c), the person is not excused from answering a question when required to do so by the court on the ground that the answer to the question might tend to incriminate the person or make the person liable to forfeiture or a penalty.

(8) Where a person is examined before the High Court pursuant to an order under paragraph (1)(c), a statement or disclosure made by the person in answer to a question put in the course of the examination, and any information, document or thing obtained as a direct or indirect consequence of the statement or disclosure, is not admissible against the person in any criminal proceedings except a proceeding for giving false testimony in the course of the examination.

(9) A person whom an order under subsection (1)(d) directs to give a statement is not excused from giving the statement, or from setting out particulars in the statement, on the ground that the statement or particulars, as the case may be, might tend to incriminate the person or make the person liable to a forfeiture or penalty.

(10) Where a person gives a statement under an order made under paragraph (1)(d), neither the statement, nor any information, document or thing obtained as a direct or indirect consequence of

the statement is admissible against the person in any criminal proceedings except a proceeding in respect of the falsity of the statement."

10. Part IVB of the MLPA, headed "Civil Forfeiture", comprises sections 20A to 20C. Section 20A provides:

"20A(1) If a freeze order is in force under Part IV, the Supervisory Authority may apply to the High Court for a civil forfeiture order forfeiting to the Crown all or any of the interests in property that are subject to the freeze order when the forfeiture order takes effect.

(2) The High Court shall make a civil forfeiture order if the Court finds that it is more probable than not that the person (in this section called the 'defendant') in respect of whom the freeze order was made had, at any time, not more than six (6) years before the making of the application for the civil forfeiture order, engaged in money laundering activity.

(3) A finding of the High Court for the purposes of subsection (2) need not be based on a finding as to commission of a particular offence, and can be based on a finding that some offence or other constituting a money laundering activity was committed.

(4) When a civil forfeiture order is made pursuant to this section it must be made in respect of specified interests in property.

(5) The reference in subsection (2) to a period of six (6) years includes a reference to a period that began before the commencement of this section.

(6) The quashing or setting aside of a conviction for a money laundering offence does not affect the validity of a civil forfeiture order based on the same conduct that was made before or after the conviction was quashed or set aside.

(7) The making of a civil forfeiture order under this section does not prevent the making of a civil proceeds assessment order

which assesses the value of the proceeds of the money laundering activity on which the civil forfeiture order is based.

(8) The Supervisory Authority shall, in accordance with the manner prescribed in section 28D, give at least 14 days notice of an application made under this section to the defendant and to any other person he has reason to believe may have interest in the property subject to the application.

(9) Any person notified of an application pursuant to this section is entitled to appear and give evidence at the hearing of the application, but the failure or absence of that person to appear and give evidence does not prevent the court from making an order under subsection (2)."

11. Part IVE of the MLPA, headed "Protection of Third Parties", comprises sections 21 and 22. Where property is forfeited to the Crown under the MLPA, including under section 20A, these sections make provision for a person other than the defendant who claims to have had an interest in the property immediately before it was forfeited to apply to the High Court for an order protecting their interest.

12. Further relevant provisions of the MLPA are sections 28A and 28B:

"28A Any question of fact to be decided by a court on an application under this Act is to be decided on the balance of probabilities.

28B(1) Proceedings on an application under this Act are civil in nature, except as otherwise provided in this Act.

(2) The fact that criminal proceedings may have been instituted or commenced is not a ground on which a court may stay proceedings under this Act."

13. Part IVA of the MLPA (headed "Automatic Forfeiture upon Conviction of a Money Laundering Offence", which comprises section 20 in its current form) and Part IVB of the MLPA were inserted by amendment in 2001 and 2002. By contrast with the current provisions, in the original version of the MLPA as promulgated in 1996, section 20(1) provided that "[w]hen a person is convicted of a money laundering offence, the court shall order that the property, proceeds or instrumentalities derived from or

connected or related to such an offence be forfeited and disposed of in such manner as the Minister may direct." By the amendments, the legislature removed the requirement for the Authority, in seeking a freeze order or a forfeiture order, to show that there is a direct link between a specific money laundering offence and the property to be made subject to such orders.

*Constitutional Provisions*

14. For present purposes, the following provisions of the Constitution are relevant:

> "3. Whereas every person in Antigua and Barbuda is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, regardless of race, place of origin, political opinions or affiliations, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -
>
> > (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
> >
> > …
> >
> > (c) protection for his family life, his personal privacy, the privacy of his home and other property and from deprivation of property without fair compensation,
>
> the provisions of this Chapter [Chapter II: Protection of Fundamental Rights and Freedoms of the Individual] shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.
>
> …
>
> 7(1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.

…

9(1) No property of any description shall be compulsorily taken possession of, and no interest in or right to or over property of any description shall be compulsorily acquired, except for public use and except in accordance with the provisions of a law applicable to that taking of possession or acquisition and for the payment of fair compensation within a reasonable time.

…

(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section -

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right -

…

(ii) by way of penalty for breach of the law or forfeiture in consequence of breach of the law;

…

(iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;

…

15(1) If any person is charged with a criminal offence then, unless the charge is withdrawn, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence -

(a) shall be presumed to be innocent until he is proved or has pleaded guilty; …

(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence of for any criminal offence of which he could have been convicted at the trial for the offence, save upon the order of a superior court in the course of the appeal or review proceedings relating to the conviction or acquittal.

…

(8) Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any persons before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

*Factual background*

15. On 21 November 2007 two police officers approached a parked car in the village of New Winthropes. Three men ran from the car, including the appellant. One of the men, Lester Charles, was detained at the car. The appellant ran off but was followed and detained shortly afterwards. The third man escaped. Inside the car the police discovered about 3kg of cocaine, a firearm and ammunition and a significant sum of money.

16. The appellant and Mr Charles were charged with a series of offences in relation to these events, including that they and the other man unlawfully had in their possession some 3kg of a controlled drug, cocaine, with intent to supply another, contrary to section 6(3) of the Misuse of Drugs Act (possession with intent to supply); they had the cocaine in their possession with intent to sell it to another person, contrary to section 12(1) of that Act (possession with intent to sell); and that they were in unlawful possession of a firearm and ammunition.

17. On 26 May 2008 the Magistrate handed down judgment finding the prosecution had made out its case against the appellant and Mr Charles on each of these offences. The Magistrate proceeded to consider disposal and sentence. In relation to the offences under the Misuse of Drugs Act he said:

> "… the Eastern Caribbean Court of Appeal in *Ortiz* [1993] has directed that defendants should be convicted on the offence with the highest tariff because the lesser offence is included in the greater. It follows then that the complaint under section 12(1) of the Misuse of Drugs Act, possession with intent to sell, is the complaint with the highest tariff."

18. On that basis, the Magistrate did not enter a conviction against the appellant and Mr Charles on the offence of possession with intent to supply charged under section 6(3) of the Misuse of Drugs Act, but instead reprimanded and discharged them in relation to that charge. Instead, the Magistrate convicted both men under section 12(1) of that Act on the charge of possession with intent to sell, sentencing each of them to five years in prison and a fine of $100,000.

19. The Board notes, with respect to the Magistrate, that this form of disposal was based on a misunderstanding of the guidance given in *Ortiz v The Police* (1993) 45 WIR 118. On the Magistrate's findings, the appellant and Mr Charles should have been convicted under section 6(3) of the Misuse of Drugs Act as well as under section 12(1) of that Act. In *Ortiz*, so far as material for present purposes, the defendant was convicted of both unlawful possession of cocaine and unlawful possession of that cocaine with intent to supply it, a more serious charge. He was fined $50,000 in respect of the former charge (with a prison sentence of 18 months in default of payment) and was fined $100,000 (with a prison sentence of three years in default of payment) in respect of the latter. Sir Vincent Floissac CJ in the East Caribbean Court of Appeal said at (1993) 45 WIR 118, 123, that the defendant was rightly convicted of both offences, but went on:

> "However, since the second offence included the first offence, it was wrong to have punished him separately for both offences. Accordingly, we must set aside the fine and alternative sentence of imprisonment imposed upon him with respect to the first offence."

20. This guidance in *Ortiz* does not indicate that in circumstances such as those in this case the defendant should not be convicted on the lesser offence charged, even though it is proved against him. Rather, it is directed to the stage of sentencing in respect of the greater and the lesser offences of which the defendant was convicted. However, although the Board thinks it right to note this point, in the present appeal nothing turns on this error of approach by the Magistrate.

21. The appellant appealed against his convictions and sentence. On 15 March 2010 the Court of Appeal dismissed his appeal against conviction and varied his sentence in certain respects which are not material.

22. In the meantime, the Authority identified two properties owned by the appellant, one at English Harbour and one at St Phillips South ("the English Harbour property" and the "St Phillips South property", respectively; together, "the properties").

23. On 17 March 2009 the Authority made an application without notice to the High Court pursuant to section 19(1)(a) of the MLPA for a freeze order in respect of the two properties. This was on the basis that, as the Authority maintained, the appellant had been convicted of a money laundering offence as defined in the MLPA, being an offence contrary to section 6(3) of the Misuse of Drugs Act. This was an error because, as explained above, the appellant had not in fact been convicted by the Magistrate of the offence charged under that provision. At the time of the application, which preceded the amendment of the MLPA by the 2009 Act, an offence contrary to section 12(1) of the Misuse of Drugs Act, of which the appellant had been convicted, was not included in the list of money laundering offences set out in the MLPA. Despite this, on 25 March 2009 the High Court granted a freeze order in respect of the properties to prevent their disposal or any dealings with them until further order of the court.

24. By application dated 9 April 2009 the appellant applied to the High Court for an order to discharge the freeze order in respect of the properties. In his application the appellant maintained that the properties were not used in, or in connection with, any unlawful activity and were not derived by him, directly or indirectly, from any unlawful activity. In the affidavit evidence filed in support of the application it was said that the St Phillips South Property was purchased in 2002, well before the offences committed in 2007; and the English Harbour Property was purchased by the appellant on 11 November 2003 with assistance from his father ("Mr Watty Williams") and his common law wife ("Ms Andre"), again well before 2007. The appellant had constructed three wooden houses on the English Harbour Property with the assistance of a construction loan from a bank in August 2004, which had been refinanced in March 2008. The appellant said that he was a businessman, involved in importing wood and as a partner in a motor repair business. He said he had held various jobs between 1993 and 1997, and that Ms Andre was also employed, and had been able to contribute to buying the English Harbour Property from her earnings. Ms Andre and Mr Watty Williams also filed affidavits in support of his application. The Authority filed a supplemental affidavit to exhibit the Magistrate's judgment and to say that the appellant had previously been convicted on 15 March 1999 of unlawful possession of cocaine and unlawful possession of a firearm and ammunition.

25. On 5 June 2009, having come to appreciate that it was proceeding on an erroneous basis, the Authority applied to the High Court to withdraw its application for

a freeze order pursuant to section 19(1)(a) and the existing freeze order was discharged. It seems that at that stage it was appreciated that the Authority would be issuing a new application for a freeze order, because the court adjourned the appellant's application of 9 April 2009 to be heard at a later date.

26. On 9 June 2009, the Authority entered a formal notice of discontinuance of the proceedings launched pursuant to section 19(1)(a). On the same day, it issued a new application without notice to the High Court for a freeze order in relation to the properties (together with the appellant's equitable interest in a further property which it was proposed the appellant would acquire in exchange for the St Phillips South property, from the same body which had sold him the St Phillips South property), this time relying on section 19(1)(c). The application was accompanied by an affidavit from the investigating officer, as required by section 19A(1B), setting out the grounds on which it was suspected that the appellant had engaged in money laundering activity as defined in section 2H. The officer exhibited the decision of the Magistrate and relied on, among other things, the factual findings made by the Magistrate that the appellant had committed an offence contrary to section 12(1) of the Misuse of Drugs Act and also an offence contrary to section 6(3) of that Act, even though he had not been convicted of the latter offence. The application for a freeze order was made with a view to applying for a civil forfeiture order under section 20A.

27. On 7 July 2009, Harris J made the freeze order sought by the Authority by its new application. On 27 July 2009 the Authority applied to extend the freeze order for 28 days after the expiration of the 30-day period stated in section 19A(2) and the court made an order accordingly, setting a return date of 31 August 2009. The appellant filed a new application under section 19B(5) to discharge this freeze order on 18 August 2009 and affidavits to the same effect as those he had filed previously were adduced in support. The relevant officer of the Authority filed an affidavit in response. His contention was that, having regard to tax records in respect of the appellant, there was no evidence of the appellant earning a legitimate income sufficient to enable him to purchase the properties in 2002 and 2003. Also, the appellant had not provided good evidence regarding the employment of Ms Andre at relevant times, nor that she or Mr Watty Williams had given him money to purchase the properties. The appellant filed a further affidavit in reply, exhibiting various documents said to support his case about the derivation of the funds used to acquire the properties. The officer of the Authority answered this in a yet further affidavit. At the hearing on 31 August 2009, case management directions were made, the freeze order was extended until further order and a hearing was scheduled for 10 September 2009.

28. On 10 September 2009, Harris J heard the appellant's application under section 19B(5) to discharge the freeze order. The trial of the application was conducted on the basis of the affidavit evidence and oral evidence given by the deponents. By a judgment dated 14 October 2009 the judge dismissed that application and confirmed the freeze order. He found the accounts of the appellant, Ms Andre and Mr Watty Williams

regarding how the acquisition of the properties was funded and why they were registered in the appellant's sole name as owner to be implausible and rejected them. The judge held that there had been a sufficient basis of suspicion to justify as lawful the application of the Authority under section 19(1)(c) and further held that the appellant had failed to show that, on the balance of probabilities, the conditions in section 19B(5) were satisfied.

29. In the opening paragraph of his judgment, Harris J described the application of the appellant as being to discharge the original freeze order made on the Authority's application pursuant to section 19(1)(a), without relating the history set out above whereby the Authority issued a new application and a new freeze order was made pursuant to section 19(1)(c) and the appellant's application to discharge the original freeze order was rolled over and treated as applicable in relation to the new freeze order. However, it is clear from the remainder of Harris J's judgment that he fully appreciated that this was the position, since he began his account of the factual background at para 2 by referring to the application of the Authority pursuant to section 19(1)(c) as being the application which resulted in the freeze order which was in issue, and referred thereafter to section 19(1)(c) as the relevant provision and the freeze order of 7 July 2009 as the relevant order.

30. On 5 August 2009 the Authority filed its application for an order under section 20A to forfeit the properties which were the subject of the freeze order of 7 July 2009. In opposition to this application, the appellant again filed affidavits from himself, Ms Andre and Mr Watty Williams to repeat the case made previously that the properties had been purchased using funds lawfully acquired by him and provided by them. In a supplemental affidavit filed by the appellant, he raised a series of constitutional complaints in relation to the combined regime in the MLPA and its operation in his case, relying on sections 3, 9 and 15 of the Constitution.

31. On 30 October 2009, the appellant issued a notice of application to the Court of Appeal for permission to appeal against the judgment of Harris J of 14 October 2009. It seems that this application was not pursued or that permission was refused. At all events, as things transpired, there was no appeal against Harris J's judgment.

32. On 10 September 2015, Henry J handed down judgment on the application of the Authority for a civil forfeiture order, making the order sought (subject to any application by Ms Andre or other application under section 21 to seek to establish a countervailing proprietary interest in the properties). It appears that the hearing before Henry J was conducted on the basis of affidavit evidence alone, but there was nothing to prevent either party applying for directions that oral evidence could or should be given.

33. In her judgment Henry J first addressed the appellant's constitutional challenge to the combined regime, in relation to which the submissions made on his behalf were limited to three points: (i) that the action for a civil forfeiture order in this case was in breach of his rights under section 3(a) of the Constitution; (ii) that section 2H is in breach of sections 3(a) and 15 of the Constitution, in that it is framed too widely and in draconian terms and should therefore be treated as of no effect; and (iii) that section 20A, and in particular subsection (6) thereof, which provides that a civil forfeiture order may be made in respect of money laundering activity even when not based on a finding as to the commission of a particular offence and even if a conviction for a relevant money laundering offence is quashed or set aside, is also draconian in effect and in breach of section 3(a) of the Constitution. Henry J rejected these complaints. She held that the application for a civil forfeiture order was a proceeding which was civil in nature and did not involve a criminal charge within the meaning of section 15 of the Constitution; and the provisions under challenge struck a fair balance between the rights of the individual and the interest of society in tackling crime effectively by removing the financial rewards which might be obtained from engaging in criminal behaviour, and so did not violate the Constitution.

34. Henry J then turned to the Authority's claim for a civil forfeiture order in respect of the properties, to reflect the terms of the freeze order of 7 July 2009. Like Harris J before her, Henry J found the explanation of the source of funding set out in the affidavit evidence filed on behalf of the appellant to be implausible and did not accept it.

35. The appellant did not dispute that he had been convicted of an offence under section 12(1) of the Misuse of Drugs Act (possession with intent to sell) and Henry J, having accepted the evidence filed by the Authority that the appellant had in fact engaged in the conduct reflected in his conviction, held that it was probable that he had engaged in money laundering activity as defined in section 2H. It can fairly be said that it appears that for this purpose the judge relied on the inclusion of section 12(1) of the Misuse of Drugs Act in the list of money laundering offences in the MLPA; and that this was an error, since in November 2007, at the time of the relevant activity of the appellant, section 12(1) was not included in that list, being added only later, and without retrospective effect, by the 2009 Act.

36. However, as explained below, nothing turns on this error. On the findings made by the judge, on 21 November 2007 the appellant had engaged in activity which fell within the statutory definition of money laundering activity applicable at that time. This is because the activity which the judge found the appellant had engaged in also satisfied the ingredients of an offence under section 6(3) of the Misuse of Drugs Act (possession with intent to supply), which was included in the list of money laundering offences which was applicable at that time, and so was within section 2H as it fell to be applied in relation to that time.

37. Finally, Henry J addressed the question whether the money laundering activity had taken place within the period specified in section 20A(2). She correctly held that it had. She had found that the appellant engaged in money laundering activity on 21 November 2007, and the Authority's application for a civil forfeiture order was issued in August 2009. The money laundering activity to which the application referred was therefore well within the period of six years before the making of the application, as specified in section 20A(2). The Authority did not have to prove that the properties were acquired from the proceeds of a specific crime, and in particular did not have to prove that they were acquired from the proceeds of the money laundering activity which had been found to have taken place on 21 November 2007.

38. The appellant appealed to the Court of Appeal. The notice of appeal was filed by new counsel instructed by him for the purposes of the appeal, Dr David Dorsett. From this time Dr Dorsett has continued to act for the appellant. The grounds of appeal as set out in the notice of appeal (as amended) were that (i) Henry J had erred in failing to find that section 20A(2) violated the appellant's rights under section 3 of the Constitution in that it permits civil forfeiture upon a finding that a person has committed a criminal offence proved only on the balance of probabilities, rather than beyond reasonable doubt; and (ii) Henry J should have found that section 20A(2) was draconian in effect and hence contravened section 7(1) of the Constitution. Ground (ii) was a complaint which had not been raised before, but in due course the Court of Appeal allowed the appellant to take the point in his appeal. The notice of appeal sought a declaration that section 20A(2) is unconstitutional and of no effect and an order setting aside the forfeiture order made by Henry J.

39. For the hearing in the Court of Appeal Dr Dorsett filed extensive written submissions which ranged more widely than the notice of appeal in terms of constitutional challenges to the combined regime in the MLPA. The Authority raised no objection to the appellant raising the further constitutional arguments in these written submissions. The written submissions focused principally on what was submitted to be the unconstitutional effect of section 20A(2), relying on sections 3(a), 7, 9, and 15(2)(a), (5) and (8) of the Constitution.

40. On 13 July 2017 the Court of Appeal handed down its judgment. It dismissed the appeal. The Court of Appeal rejected the appellant's submissions regarding alleged incompatibility of the combined regime with the Constitution and upheld the forfeiture order made by Henry J. Although in November 2007 section 12(1) of the Misuse of Drugs Act was not included in the list of money laundering offences for the purposes of the MLPA, the court accepted the submission of the Authority that the activity of the appellant which Henry J had found to be proved on the balance of probabilities met the definition of conduct which constituted an offence under section 6(3) of the Misuse of Drugs Act and hence qualified as money laundering activity for the purposes of the MLPA.

41. The principal submission of the appellant in the Court of Appeal was that the combined regime in the MLPA should be classified as criminal in nature for the purposes of the Constitution, which involved charging the defendant in an application for a civil forfeiture order with a criminal offence within the meaning of section 15 of the Constitution. This was also the principal basis for the appellant's submission that there had been a violation of his rights under section 3(a) of the Constitution, in that he claimed his right to enjoyment of property had not been respected and he had not had the proper protection of the law because he had not been afforded the protections associated with criminal proceedings.

42. Section 15 of the Constitution broadly corresponds with the part of article 6 of the European Convention on Human Rights ("the ECHR") which deals with criminal charges, and both parties relied on decisions of the European Court of Human Rights ("the ECtHR") and the courts of the United Kingdom in relation to article 6 in their submissions about the constitutionality of the statute. The Court of Appeal analysed the position in the light of those authorities and, applying the criteria laid down in *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647 for determining whether a legal process involves a criminal charge, held that an application under the MLPA for a civil forfeiture order is civil in nature and falls outside section 15 of the Constitution.

43. The Court of Appeal also dismissed the appellant's complaint based on section 3(a) of the Constitution. It held that the combined regime in the MLPA, taken as a whole, contained due process of law guarantees which were sufficient in the context of a procedure which was civil rather than criminal in nature. The court upheld the submission of the Authority that the regime constituted a proportionate response to the serious threat to society posed by organised crime, by enabling proceedings to be taken which are effective to deprive persons of the proceeds of crime, while including procedural protections which strike a fair balance between the rights of individuals and the interest of the general community.

44. The Court of Appeal dismissed the appellant's constitutional complaint based on section 7(1) of the Constitution, saying that it had no merit.

45. For reasons which are unclear, the court did not refer to the appellant's complaint based on section 9 of the Constitution (protection from deprivation of property), even though counsel for the appellant and counsel for the Authority confirmed to the Board that this complaint was mentioned in the oral submissions which Dr Dorsett made to the Court of Appeal as well as in his written submissions. It seems that the complaint based on section 9 of the Constitution may not have been given as much prominence in Dr Dorsett's wide-ranging constitutional submissions to the Court of Appeal as other provisions of the Constitution, so that the court did not find it necessary to address it. However that may be, and even though section 9 was not mentioned in the appellant's notice of appeal to the Board, it has been included as an issue in the statement of facts

and issues for the appeal and has been relied upon by the appellant in this appeal. Since section 9 was also relied on in the court below and has been raised without objection by the Authority on this appeal, the Board considers that it is open to the appellant to raise it.

*The issues*

46. According to the statement of facts and issues prepared by those acting for the appellant, the central issues for determination on the appeal are (i) whether the legal nature of the civil forfeiture order regime in the MLPA is civil or criminal and (ii) whether that regime is inconsistent with any of sections 3, 7, 9 or 15 of the Constitution. The appellant also seeks to raise the question whether the freeze order of 7 July 2009 was validly granted.

47. The latter issue merits comment. The appellant did not pursue an appeal against the grant of the freeze order in the local courts (see para 31 above). Ordinarily in such circumstances, the Board would not allow such an issue to be raised in an appeal against a different order, namely the civil forfeiture order made on 10 September 2015. However, under the combined regime in the MLPA there is a strong link between the making of a freeze order and the making of a civil forfeiture order consequential upon that (see, in particular, section 20A(2)). In the courts below, the appellant argued that the civil forfeiture order should be set aside on grounds closely similar to the grounds on which he seeks to impugn the freeze order. Indeed, having regard to the terms of section 20A(2), it seems to the Board that the appellant could have raised the issue he wishes to raise (see para 59 below) in relation to the civil forfeiture order in this case, without needing to go back to the freeze order. The Authority has not objected to the appellant raising the issue of the validity of the freeze order in the appeal. Moreover, to determine the appeal it is necessary to review the operation of the freeze order regime in combination with the civil forfeiture regime and it is desirable that the Board should give guidance regarding the operation of both regimes in combination. Therefore, in the particular circumstances of this case, the Board gives permission for the appellant to raise the issue of the validity of the freeze order.

48. It is convenient to address the issues in the following order: (1) the operation of the combined regime in the MLPA; (2) the challenge to the lawfulness of the freeze order; (3) the civil or criminal nature of the combined regime and the application of section 15 of the Constitution; (4) the application of sections 3 and 9 of the Constitution; and (5) the application of section 7 of the Constitution.

*(1) The operation of the combined regime*

49. The freeze order provisions of the MLPA and the civil forfeiture provisions are intended to operate in combination as an integrated regime. In combination, those provisions contain a number of protections for an individual who is made a defendant to an application by the Authority for a freeze order and then for a civil forfeiture order.

50. The process for obtaining a civil forfeiture order begins with an application for a freeze order made pursuant to section 19(1). In the relevant application in the present case, section 19(1)(c) was the gateway on which the Authority relied. In support of its application it adduced evidence to explain why it suspected the appellant of having engaged in money laundering activity as defined in section 2H.

51. According to the definition in that provision, the relevant question is whether a defendant has in fact done something that at the time (ie in the case of the appellant, on 21 November 2007) was a money laundering offence as defined in the MLPA, not whether he has been charged with or convicted of such an offence. Although at the time of the application under section 19(1)(c) the Authority just has to explain to the court its belief that the defendant has engaged in money laundering activity and the court has to be satisfied that there are reasonable grounds for holding that suspicion (section 19A(1B)), in due course when a consequential application is made for a civil forfeiture order the test is whether the Authority can establish this on the balance of probabilities (section 20A(2), also section 28A). As stated in section 20A(3), a finding of the court for the purposes of section 20A(2) need not be based on a finding as to commission of a particular offence.

52. The application under section 19(1) is for a freeze order directed against particular property in which there is a reasonable suspicion that the defendant has an interest, and the High Court may order that such property is not disposed of or dealt with by any person (section 19(4)(a)). In this sense, a freeze order operates *in rem* rather than purely *in personam* as an ordinary freezing injunction would do. The application is to be made ex parte (section 19(1A)), presumably in recognition of the fact that there may often be a need for speedy action without notice to a defendant who might try to dispose of the property in issue. However, a freeze order may be made even where there is no risk of disposal of the property (section 19A(4)), and where there is no such risk there seems to be no reason why the application could not be made ex parte, but with the Authority giving a fair degree of notice to the defendant and other affected persons (ie by proceeding in a manner which is sometimes described as ex parte on notice). In such circumstances it would be good practice for the Authority to proceed in that way, so as to optimise the opportunities for the defendant to contest what is being done.

53. The features of the legislation referred to above are significant for two reasons. First, it does not follow from the grant of a freeze order or the eventual grant of a civil forfeiture order that the defendant is treated as having been convicted of a criminal offence. He does not acquire a criminal record and is not liable to imprisonment or being fined. Secondly, and linked to the first point, the issue of engagement of the statute is treated as a civil matter relating to determination of private law property rights and subject to application of the usual civil standard of proof. These points are reinforced by the declaration in section 28B(1) that proceedings for a freeze order and a civil forfeiture order are civil in nature.

54. Where a freeze order is granted, the Authority has to give at least 14 days notice of it to the defendant and any other person it has reason to believe may have an interest in the property affected by the order (ie before proceeding to apply for a civil forfeiture order in relation to that property) (section 19(1B) and section 19A(5)).

55. When an application to discharge a freeze order is made pursuant to section 19B(4) (by a third party) or section 19B(5) (by a defendant), or in due course the Authority applies for a civil forfeiture order, the court should be careful to ensure that the defendant (and any person who may wish to make an application under section 19B(4) or sections 21 and 22 to establish their interest in the property) is granted such extensions of time as fairness may require to allow them to put together the evidence needed to contest the order obtained or sought by the Authority. The Board notes that this was done in the present case.

56. The interaction of the freeze order provisions and the civil forfeiture provisions is evident from section 20A(1) and (2). If a freeze order is in force, the Authority may apply for a civil forfeiture order and the High Court "shall make" a civil forfeiture order if it finds it more probable than not that the defendant in respect of whom the freeze order was made had engaged in money laundering activity within the relevant period. The Authority has to prove at the section 20A(2) stage that the defendant engaged in money laundering activity within the relevant period and the defendant can seek to defend himself by evidence directed to showing that he did not. But it is also important that the defendant can seek to protect himself by an application pursuant to section 19B(5) to remove property from the scope of the freeze order, and hence from the scope of any civil forfeiture order which can be made.

57. An application pursuant to section 19B(5) can be made at any stage, including by making an application to the court in the course of the Authority's application for a civil forfeiture order. In some cases, it may be desirable for the Authority's application for a civil forfeiture order to be heard at the same time as the defendant's application under section 19B(5) for an order to discharge the freeze order in respect of his property, since the evidence about the defendant's alleged involvement in money laundering

activity and the evidence about how he acquired the property may both have a bearing on the issues which arise on each application.

*(2) The lawfulness of the freeze order*

58. In the appellant's case, the Authority and the local courts relied on the findings of the Magistrate and the evidence deployed in the proceedings before him (as recited in his judgment) regarding the conduct of the appellant on 21 November 2007 in order to say that he had engaged in money laundering activity and did so within the relevant six year period stipulated in section 20A(2). At the hearing before Henry J, as the judge recorded at para 33 of her judgment, the appellant did not contest or dispute the facts presented in the criminal proceedings which formed the basis of the charges against him under the Misuse of Drugs Act. Although he asserted in general terms that he was innocent of the charges against him, he did not seek to put in issue in any significant way the findings made by the Magistrate nor the correctness of his conviction under section 12(1) of the Misuse of Drugs Act. Before the Board, it has not been suggested by the appellant that it was not open to the Authority and the local courts to treat the conviction, the Magistrate's judgment and the recitation of evidence set out in that judgment as relevant forms of evidence for the purposes of the Authority's applications for a freeze order and for a civil forfeiture order, so it is not necessary to consider whether and in what circumstances a judgment of a criminal court may be treated as evidence for the purposes of section 20A(2) that a defendant has engaged in money laundering activity.

59. The point taken by the appellant in challenging the freeze order is that on 21 November 2007, although an offence contrary to section 6(3) of the Misuse of Drugs Act (possession with intent to supply) was a money laundering offence for the purposes of the MLPA, the appellant was not convicted of such an offence; on the other hand, an offence contrary to section 12(1) of the Misuse of Drugs Act (possession with intent to sell), of which the appellant was convicted, was not at that time a money laundering offence and therefore (the appellant contends) his conviction under that provision cannot be relied on to show that he engaged in money laundering activity on that date within the meaning of section 2H. Nor, argues the appellant, can his conviction under section 12(1) be relied on to show that the Authority had reasonable grounds to believe that he had engaged in money laundering activity.

60. The Board rejects these submissions for the same reason as the Court of Appeal. The conduct on the basis of which the Magistrate convicted the appellant under section 12(1) of the Misuse of Drugs Act and which Henry J ultimately found to be proved on the evidence (namely, that on 21 November 2007 the appellant had the cocaine in his possession with intent to sell it) includes having possession of the cocaine with intent to supply it (that is, conduct made an offence by section 6(3) of the Misuse of Drugs Act), which was within the definition of money laundering activity for the purposes of

the definition in section 2H as it had effect in relation to November 2007. It was therefore established to the relevant standard that the appellant had engaged in money laundering activity on 21 November 2007. As explained above, that was within the relevant six year period before the Authority's application for a civil forfeiture order, as required by section 20A(2).

61. Accordingly, there is no valid challenge to the freeze order made on 7 July 2009. In light of the evidence before the Magistrate, his findings and the conviction of the appellant under section 12(1) of the Misuse of Drugs Act, the Authority plainly had reasonable grounds to suspect the appellant of having engaged in money laundering activity: see section 19A(1B). It also had good reason to believe that the appellant owned the properties, since he was registered as owner.

*(3) The civil or criminal nature of the civil forfeiture regime and section 15 of the Constitution*

62. The main complaint of the appellant under this heading is that a civil forfeiture order can only be made on the basis of a finding that the defendant has engaged in money laundering activity (section 20A(2)) and that the allegation that he has done so constitutes a criminal charge for the purpose of section 15 of the Constitution. On that basis, section 15 requires the application of a standard of proof of beyond reasonable doubt, and it is incompatible with that constitutional provision for the statute to stipulate in section 20A(2) that the civil standard of proof applies.

63. There is an immediate difficulty for the appellant. The Magistrate found the appellant guilty of the conduct which constituted engagement in the relevant money laundering conduct, to the criminal standard. As noted above, the appellant has not challenged the Authority's reliance on the Magistrate's decision for the purposes of application of section 20A(2). So even if section 15 of the Constitution applies as the appellant says it does and section 20A(2) falls to be interpreted so as to be compatible with it, it would not assist the appellant. Put another way, the appellant cannot complain of breach of his constitutional rights if, on the facts of his case, there has been no breach.

64. Despite this, the Board is prepared to consider the appellant's complaint about the incompatibility of section 20A(2) with section 15 of the Constitution. There was full argument below on this complaint, as there was before the Board, and detailed consideration of it by the local courts. It is appropriate to provide guidance which may assist in other cases. Further, since the Board agrees with the Court of Appeal that this complaint cannot be sustained, this is an additional reason why the appellant's appeal in relation to it falls to be dismissed.

65. The combined regime in the MLPA is explicitly stated to be civil in nature (section 28B(1)). The detailed provisions of that regime also indicate that it is civil in nature, in that its operation does not depend upon conviction of a defendant of any offence and it is directed to determination of private law rights in accordance with the civil law standard of proof: see para 53 above.

66. The regime does not lead to imposition of any criminal penalty. On the basis of a suspicion that the defendant has engaged in money laundering activity, the Authority may apply for a freeze order in relation to any property owned by the defendant or in which he appears to have an interest, and is not limited to seeking to freeze or forfeit property obtained as a result of conduct constituting an offence of which the defendant is convicted.

67. Instead, a finding under section 20A(2) that a defendant has engaged in money laundering activity in the relevant period before the application for a civil forfeiture order is issued operates as a threshold condition for the making of such an order, save to the extent that the defendant by a counter-application under section 19B(5) can prove pursuant to sub-paragraph (e) of that provision that the property was not used in or in connection with any unlawful activity and was not derived from or related to any unlawful activity. The practical effect of a finding that a defendant has engaged in money laundering activity in the relevant period, therefore, is to put the defendant to proof that his property which is made the subject of the freeze order and hence potentially the subject of a civil forfeiture order is not related to or derived from unlawful activity. The regime thus operates to put in issue the defendant's property rights generally, throwing the burden on him in relation to any particular item of property to show on the balance of probabilities that he acquired it by legitimate means and from legitimate sources of funds. This is a very significant effect of the regime, which requires to be taken into account in the discussion of sections 3 and 9 of the Constitution, below.

68. However, the Board does not consider that it is appropriate to regard this effect as being in the nature of a penalty for a criminal offence of which the defendant is convicted. The operation of section 20A(2) does not depend upon conviction of any offence. Further, if, on the balance of probabilities, the defendant is able to satisfy the requirements of section 19B(5) in relation to any particular item of property, he will not be deprived of it.

69. In the Board's view, in the context of the combined regime in the MLPA, the relevance of a finding to the civil standard that the defendant has engaged in money laundering activity in the relevant period is to create a doubt for the purposes of the civil law generally as to the validity of his basis of ownership in respect of property rights which he claims to have. It will have been shown that the defendant has been willing to take part in such activity, and it is uncertain to what extent he may in fact have acquired

property in the past as a result of doing so. The MLPA establishes a general principle, essentially of private law, that good title cannot be derived from the proceeds of money laundering activity. It operates in a way similar to the illegality principle in private law, that a person should not be able to profit from their own unlawful acts: see *Patel v Mirza* [2016] UKSC 42; [2017] AC 467; *R (Best) v Chief Land Registrar* [2015] EWCA Civ 17; [2016] QB 23, paras 43-68; and the famous US case, *Riggs v Palmer* 115 NY 506 (1889) (holding that a beneficiary under a will who murders the testator cannot take property under the will). As was said in the UK Supreme Court of a similar civil forfeiture regime under review in *R v Waya* [2012] UKSC 51; [2013] 1 AC 294, para 21, the essence of the regime "is to remove from criminals the pecuniary proceeds of their crime", rather than punishment or deterrence. It being established that the defendant is the sort of person who has been prepared to engage in money laundering activity, the onus is then placed on him in respect of any property he owns which the Authority seeks to obtain from him to show, to the civil standard, that the property was not so derived: section 19B(5) and (6). The timing requirement in section 20A(2) is broadly analogous to a limitation period in civil law: a defendant's title to property cannot be put in issue unless it is proved he engaged in money laundering activity in the six years before the application for a civil forfeiture order is made. A third party who claims to have an untainted interest in the property is also in a position to vindicate his or her property rights: section 19B(4) and sections 21 and 22. The combined regime in the MLPA therefore operates in the civil law sphere, where the court has responsibility for determining property rights.

70. The disconnection between the property affected by a freeze order and the civil forfeiture order which may flow from it under the combined regime, on the one hand, and the conviction of a defendant of a specific criminal offence, on the other, is underlined by contrasting the current regime with the previous forfeiture regime under the original section 20 of the MLPA. That was limited to forfeiture of property derived from a specific crime of which the defendant was convicted: see para 13 above.

71. For the reasons given above, in the Board's judgment the courts below were right to conclude that section 15 of the Constitution had no application in relation to the grant of the civil forfeiture order in this case. The Board's view is reinforced by consideration of the authorities relied on in the proceedings below and on the appeal.

72. In examining the application of section 15 of the Constitution, the parties and the courts below have proceeded by reference to European and United Kingdom authorities on article 6 and article 7 of the ECHR. Article 6 states that in the determination of his civil rights and obligations "or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (article 6(1)) and that "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law" (article 6(2)); and article 6(3) provides for certain minimum rights for everyone charged with a criminal offence. Article 7(1) provides, by its second sentence, that "a heavier penalty"

shall not be imposed "than the one that was applicable at the time the criminal offence was committed".

73. The Board considers that it is appropriate to proceed in the same way, albeit with a degree of caution. The ECHR is not in identical terms to Chapter II of the Constitution, but the scheme of Chapter II and many of the fundamental rights and freedoms which are protected by the provisions in that Chapter are broadly similar in terms of structure and drafting to those protected under the ECHR. Within liberal democracies such as the United Kingdom and Antigua and Barbuda it would be surprising if instruments designed to protect fundamental human rights were intended to operate in very different ways or with widely divergent effect. Further, British lawyers had a major role in drafting the ECHR as well as the Constitution, so the similarities between them are not accidental. Accordingly, the Board considers that the European and United Kingdom decisions to which it was referred by the parties are relevant as persuasive authorities on the interpretation and effect of the Constitution. This is in line with the Board's approach to the interpretation of similar constitutional instruments: see eg *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32; [2012] 1 AC 1, paras 20-25 (interpretation of the Constitution of Trinidad and Tobago). The degree of the persuasive force of authorities on the ECHR will depend on the text of the provision under review and its place in the general scheme of the ECHR and the local constitution, respectively. There is a close similarity between the criminal aspect of article 6 of the ECHR and section 15 of the Constitution, both in terms of text and in terms of the protections they are designed to afford an individual under the scheme of both instruments.

74. The leading decision of the ECtHR on the criteria for criminal proceedings for the purposes of article 6 of the ECHR is the *Engel* case, which was concerned with the boundary between criminal charges and disciplinary charges in a military context. It was not sufficient that the state did not treat a charge as criminal in its domestic law. The ECtHR held (para 82) that three criteria had to be considered: (i) whether the provisions defining the offence charged belong, according to the legal system of the respondent state, to criminal law, disciplinary law or both concurrently - but this is only a starting point of relative value; (ii) a factor of greater import is the very nature of the offence: if it involved alleged contravention of a legal rule governing the operation of the armed forces that would suggest a disciplinary classification; and (iii) "the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental".

75. Applying those criteria with suitable adaptation for the different context in which the issue arises, the Board agrees with the Court of Appeal that they point towards a civil classification of the combined regime in the MLPA: (i) the legislature has created a regime which is intended to operate in the civil rather than the criminal sphere; (ii) the

threshold condition for application of the regime is that the defendant has engaged in money laundering activity, which is not a concept relevant to the definition of any criminal offence, and although the concept refers to a series of money laundering offences defined by the criminal law, it is not necessary that the defendant should be charged in criminal proceedings with having committed such an offence and nor is it necessary that it be established that any particular offence may have been committed by him: the better analysis, as explained above, is that money laundering activity is a general category of conduct defined for the purposes of the operation of the civil law, like the doctrine of illegality in civil law, and does not constitute a criminal offence; and (iii) as explained above, when it is established according to the civil standard that the defendant has engaged in money laundering activity he does not acquire a criminal record and is not liable to imprisonment or being fined; it by no means follows that he suffers any loss of property, he is only made subject to a property law regime which allows for contestation of his ownership of property, which is a matter in the sphere of civil law.

76. The Court of Appeal relied in particular on *Walsh v Director of the Assets Recovery Agency* [2005] NICA 6; [2005] NI 383, a decision of the Court of Appeal in Northern Ireland presided over by Sir Brian Kerr LCJ (as he then was). The defendant in the case was charged with counts of obtaining services and property by deception, but was acquitted. Despite the acquittal, the Director of the Assets Recovery Agency brought a claim against him under Part 5 of the Proceeds of Crime Act 2002 (UK) ("the 2002 Act") for a recovery order in respect of property said to represent the proceeds of crime. Part 5 established a civil recovery regime similar to the combined regime in the MLPA. As under section 20A(2) of the MLPA, under the relevant provision in the 2002 Act proof of the unlawful conduct relied upon for the purposes of making a recovery order was on the balance of probabilities. The defendant complained that this was incompatible with the presumption of innocence in article 6(2) of the ECHR. The Northern Ireland Court of Appeal rejected this complaint. It applied the *Engel* criteria and in an extended discussion, in which it considered the relevant authorities, it held that the recovery order regime was properly to be regarded as civil in nature and that article 6(2) had no application. The Board agrees with the reasoning and conclusion in the *Walsh* case, which is in line with the Board's analysis above, and considers it should be followed in the present case, subject to one point mentioned below in relation to the application of the third of the *Engel* criteria.

77. In *Walsh*, the court observed that aspects of the three *Engel* criteria overlapped. In relation to the first criterion, the court relied in particular on the decision of the Board in *McIntosh v Lord Advocate* [2001] UKPC D1; [2003] 1 AC 1078, in which it held that an application for a confiscation order in respect of the proceeds of crime after the defendant had been convicted of offences did not involve the bringing of a criminal charge against him within the meaning of article 6(2) of the ECHR. At paras 26-27 the Northern Ireland Court of Appeal said:

> "26. … We do not regard the fact that there was no inquiry into drug trafficking offences [in *McIntosh*] as pivotal to the decision. This was referred to, we are satisfied, merely to highlight the difference in the type of proceeding involved in the confiscation proceedings from a criminal trial. Moreover, we do not accept that it is in any way inevitable that the recovery proceedings will be confined to an examination of specific offences committed by the appellant. We consider that it would be open to the agency to adduce evidence that the appellant had no legal means of obtaining the assets without necessarily linking the claim to particular crimes. Finally, the purpose of the recovery action is to obtain from the appellant what, it is claimed, he should not have - property that has been acquired by the proceeds of crime. It is not designed to punish him beyond that or to establish his guilt of a precise offence.
>
> 27. We are satisfied that all the available indicators point strongly to this case being classified in the national law as a form of civil proceeding. The appellant is not charged with a crime. Although it must be shown that he was guilty of unlawful conduct in the sense that he has acted contrary to the criminal law, this is not for the purpose of making him amenable as he would be if he had been convicted of crime. He is not liable to imprisonment or fine if the recovery action succeeds. There is no indictment and no verdict. The primary purpose of the legislation is restitutionary rather than penal."

78. In relation to the second criterion, the court found that there were compelling indications, also relevant in the context of the MLPA, that the proceedings were civil in character. At para 29 it observed:

> "… The allegation made against the appellant does not impute guilt of a specific offence; the proceedings do not seek to impose a penalty other than the recovery of assets acquired through criminal conduct; and they are initiated by the director of an agency, which, although it is a public authority, has no prosecutorial function or competence. …"

The court relied on the judgment of the ECtHR in *Phillips v United Kingdom* (2001) 11 BHRC 280, paras 34-35, which indicated that although a confiscation order could be regarded as a penalty for an offence within the meaning of article 7 of the ECHR, yet since the purpose of the confiscation procedure was not to secure the conviction of the applicant it did not constitute the preferring of a criminal charge against him within the meaning of article 6 and article 6(2) was not applicable. The Northern Ireland Court of

Appeal held at paras 32-35 that the purpose of Part 5 of the 2002 Act could be viewed more generally "as the state's response to the need to recover from those who seek to benefit from crime the proceeds of their unlawful conduct" (para 32), which object was emphasised by the availability of protection for third parties with interests in the property sought to be recovered (paras 34-35). Application of article 6(2) would be inappropriate in the context of a scheme with this object and would undermine its efficacy in an unwarranted manner.

79. As regards the third criterion (whether the recovery order constituted a penalty), the Northern Ireland Court of Appeal did not find it necessary to reach a definitive view. It referred in particular to the judgment of the ECtHR in *Welch v United Kingdom* (1995) 20 EHRR 247, a case on the meaning of criminal "penalty" in article 7(1). The ECtHR held that under the particular regime in issue the retrospective imposition of a confiscation order was in breach of article 7(1); but this was because of the very direct relationship between the conviction of the defendant of a specific criminal offence and the imposition of the confiscation order to confiscate from him the proceeds (or presumed proceeds) of that offence, which along with other features of the regime meant that it should be regarded as having a punitive purpose: paras 28-35. At para 30 the ECtHR drew a distinction between punitive purposes (which tended to indicate that a measure was a penalty) and preventive purposes (which tended to indicate that it was not), and identified relevant preventive purposes of the confiscation order in issue in that case as "[t]he preventive purpose of confiscating property that might be available for use in future drug trafficking operations [and] the purpose of ensuring that crime does not pay …". However, in the particular context, the indications that the confiscation order had a punitive purpose were stronger.

80. In *Walsh*, the court said (para 38):

> "A distinction between confiscation orders and recovery proceedings can be drawn in that, as Lord Bingham pointed out in *McIntosh's* case, the sum ordered to be confiscated need not be the profit made from the drug trafficking offence of which the accused has been convicted, whereas recovery may only be ordered in relation to assets that have been acquired by proven unlawful conduct. The recovery of assets may more readily be described as a preventative measure, therefore. After all, the person who is required to yield up the assets does no more than return what he obtained illegally. It is clear, however, from the judgment in *Welch v UK* that the European Court considered that a provision will not be classified as non-penal solely because it partakes of a preventative character and since it is unnecessary for us to decide the point, we will refrain from expressing any final view on whether recovery of assets should be regarded as penal within the autonomous meaning of that term."

81. In the context of the combined regime in the MLPA, the Board considers that the relevant characterisation of the regime is as preventive in nature, rather than involving the imposition of a criminal penalty. The *Welch* case is distinguishable, because it turned on there being a direct connection between the applicant having been convicted on a criminal charge and the consequences for him in terms of being made subject to a confiscation order in respect of that charge. By contrast, in the context of the combined regime there is no equivalent direct relationship between a civil forfeiture order and the conviction of a defendant on a criminal charge; the preventive aspect of the regime is predominant; and the operation of the regime, the concepts it employs and the relevant standard of proof on issues which may arise are all in the civil sphere or civil in nature. Accordingly, the Board feels able to be more definite than the court in *Walsh*. In the Board's view, as explained above, it is not appropriate to describe the effect of the combined regime as involving the imposition of a penalty.

82. For the reasons given above, the Board concludes, in agreement with the courts below, that section 15 of the Constitution has no application in the present case. The claim for a civil forfeiture order does not involve charging the appellant with a criminal offence. There is therefore no incompatibility between section 20A(2) and section 15 of the Constitution.

*(4) Sections 3 and 9 of the Constitution*

83. Section 3(a) of the Constitution provides protection for "the enjoyment of property" and for a right to "the protection of the law". Section 3(c) also refers to protection of property. Section 9(1) provides for protection against the state compulsorily taking property without payment of compensation, but is subject to qualifications in section 9(4), set out above. The Board considers that the nature of the combined regime in the MLPA as a regime to govern property entitlements in the sphere of civil law, as analysed above, means that it is section 9(4)(a)(ii) and (iv) which are the relevant qualifications in this context (respectively, acquisition of any property "by way of … forfeiture in consequence of breach of the law" and by way of "the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations").

84. Section 3(a) and (c) and section 9 of the Constitution are similar in their terms and constitutional function to article 1 of Protocol 1 to the ECHR, the first paragraph of which states:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

85. The Court of Appeal said (para 86) that section 3(a) of the Constitution has two relevant aspects: (i) that all legal proceedings must be fair and that one must be given notice of proceedings and a fair opportunity to be heard before the government takes away one's property; and (ii) that no law should be immeasurable, arbitrary or oppressive. The Board proceeds on this basis.

86. The Board agrees with the Court of Appeal that there has been no breach of the first, procedural limb of section 3(a) in this case. The appellant was given proper notice of the freeze order and of the application for a civil forfeiture order and was afforded a fair opportunity to respond to both measures.

87. The Board finds the question of compliance with the second, substantive limb of section 3(a) more finely balanced. It is appropriate to consider section 3(a) and (c) in conjunction with section 9. In the Board's view, the question of compliance with these provisions can be addressed by asking whether the application of the combined regime is proportionate to protect a legitimate public interest, so as to strike a fair balance between the rights of the individual and the interest of the general community. In that regard, appropriate respect should be given to the assessment made by the legislature, which should be afforded a margin of appreciation.

88. As Lord Sumption summarised the approach to the question of proportionality in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700 at para 20:

> "… the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

See also, in the context of the application of article 1 of Protocol 1 to the ECHR in relation to a civil forfeiture regime, the judgment in *R v Waya* at para 12.

89. The combined regime in the MLPA is potentially severe in its effect. According to section 20A(2) a civil forfeiture order can be made on the basis of a very low threshold condition, in that it is sufficient for the Authority to prove on the balance of probabilities that any money laundering activity has taken place in the relevant period,

however minor the activity might have been. If that threshold is crossed, there is a very significant effect upon the position of the defendant. The Authority can obtain a civil forfeiture order in relation to any of his property, whenever acquired by him, including at any time before the money laundering activity proved by the Authority, save insofar as the defendant is able to prove on the balance of probabilities, with the burden of proof being on him (section 19B(6)), that the property was not derived from the proceeds of money laundering activity and does not fall within the other categories set out in section 19B(5).

90. To a degree, the appellant can say that his own case is affected by these concerns. It is true that the money laundering activity in November 2007 which has been proved against him is of a serious nature and it was proved beyond reasonable doubt; but the civil forfeiture order was sought in respect of properties which were acquired well before that activity took place. The appellant was also convicted of an earlier drugs offence in 1999, but this was more minor in character.

91. In the Board's view, even though the combined regime can have these effects, the regime is compatible with the constitutional rights of defendants in general under sections 3(a) and (c) and 9 of the Constitution. Further and more particularly, the Board considers that there has been no violation of the appellant's constitutional rights under those provisions arising from the application of the combined regime in his case.

92. The combined regime in the MLPA has been enacted with an important legitimate aim, to try to ensure that persons who engage in money laundering activity (including drug trafficking) do not profit thereby. The general community has a very strong interest in ensuring that effective preventive measures are taken to combat what the ECtHR referred to in the *Welch* judgment at para 36 as "the scourge of drug trafficking". The public interest in achieving this is especially strong because of the potential profits to be made from this sort of criminal activity, which can attract people into engaging in it, and the widespread human misery and social problems caused thereby. Further, the qualifications in section 9(4)(a)(ii) and (iv) of the Constitution show that court orders made under authority of law which involve taking property in this type of context pursue legitimate objectives identified in the Constitution.

93. The judgment of the legislature that preventive measures in the form of the combined regime in the MLPA are required to protect the interest of the general public is entitled to substantial respect. The requirement for a judgment to be made about the extent of the problem in society and how pressing is the need to address it and the difficulty of assessing how best to fashion preventive measures which are capable of being efficacious, mean that it is appropriate to afford the legislature a significant margin of appreciation when a court comes to assess the proportionality of the regime in the light of that legitimate aim.

94. In the Board's view, having regard to the legitimate aim pursued by the combined regime and its importance, there is no ready or obvious substitute for a clear rule regarding the threshold condition for the making of a civil forfeiture order as set out in section 20A(2). Further, as pointed out in *Walsh*, if proof for engagement in unlawful activity had to be beyond reasonable doubt, the efficacy of the regime would be seriously undermined and the legitimate aim would be put in jeopardy.

95. Where the condition in section 20A(2) is satisfied, the defendant has a fair opportunity to defend his property against forfeiture, by making an application under section 19B(5). He has to show on a balance of probabilities that the property in issue is not derived from or tainted by unlawful activity. To that end he can give evidence by affidavit or orally, and can adduce affidavit or oral evidence from other witnesses. If the property was acquired long in the past, a court can be expected to make due allowance for the fact that records might have been lost when making its assessment of the evidence.

96. In this context it is reasonable for the burden of proof to be placed on the defendant by virtue of section 19B(6). As was pointed out by Lord Bingham in the *McIntosh* case at para 35, the defendant can be expected to know the source of his income and his assets. He is in a much better position than the Authority to know how he came to acquire his property and, having regard to the legitimate preventive aims of the legislation, it is fair to put the burden of proof on him. In practice, if the defendant calls evidence to show innocent derivation of property, an evidential onus will arise on the Authority to discredit or disprove the defendant's case. In the Board's view, the legislature's assessment that this aspect of the combined regime is a proportionate measure in support of the legitimate aim of the regime and maintains a fair balance between the rights of the defendant and the interests of the general community is one within its margin of appreciation and does not involve any breach of the Constitution.

97. The making of the civil forfeiture order in the present case was a proportionate measure which did not violate the appellant's constitutional rights. It is not necessary in this case for the Board to decide definitively whether in every possible case brought under the combined regime in the MLPA the award of a civil forfeiture order will be proportionate. As presently advised, the Board thinks it unlikely that many, if any, cases would arise in which the due application of the combined regime in accordance with its terms would be disproportionate and in breach of a defendant's constitutional rights under section 3(a) or (c) or section 9. However, the Board notes that if a situation arose in which it would be disproportionate to make a civil forfeiture order, it would be open to the court, in applying section 20A(1), to hold that although the statute says that the Authority may apply for such an order, it would be inconsistent with the defendant's constitutional rights under section 3(a) or (c) or section 9 to permit it to do so. Further, it would be possible to read an appropriate qualification into section 20A(2), so that it required the making of a civil forfeiture order "except in so far as such order would be disproportionate and thus breach section 3(a) or (c) or section 9 of the Constitution": a

similar qualification was read into the United Kingdom civil forfeiture legislation in the *Waya* case, at para 16. The same qualification can be read into section 19A(1A) in relation to the making of a freeze order.

*(5) Section 7 of the Constitution*

98. The Board considers that the Court of Appeal was right to give the appellant's complaint based on section 7(1) of the Constitution short shrift. That provision is concerned with the imposition of punishment and is primarily concerned with the physical conditions to which an individual is subjected by the state. Section 7(1) has no bearing on the present case. The making of the freeze order and the civil forfeiture order in relation to the appellant was not by way of a punishment. Further, contrary to the appellant's argument that he was treated inhumanely or in a degrading way, his dignity as an individual was fully respected in the MLPA procedures to which he was subject, in which he had a fair opportunity to participate and present his case.

*Conclusion*

99. In the Board's judgment, the freeze order of 9 July 2009 and the civil forfeiture order of 10 September 2015 should be upheld. The Board will humbly advise Her Majesty that the appeal should be dismissed.