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Asset Recovery and the Rule of Law

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1. Introduction

I am delighted to have been invited to give an opening address at this conference. I extend my gratitude, for both the invitation and the excellent organisation, to the US State Department Bureau of International Narcotics and Law Enforcement Affairs, and the National Center for State Courts.

It is a pleasure for me to renew my acquaintance with some of you here, and to have the chance to meet for the first time so many judges of the courts from which the Privy Council hears appeals, and other courts in the Caribbean region. I have read judgments by many of you, and I know others of you by name. I am pleased now to be able to put faces to the names and to get to know you in person.

A significant proportion of the appeals which the Privy Council hears have their background in financial crime. That is no accident. Many of the Privy Council jurisdictions, including those in the Caribbean, are important financial centres providing sophisticated banking, corporate and legal services to international clients. Such jurisdictions are inevitably liable to attract individuals and organisations wanting to commit financial crime: people like Bernard Madoff and Allen Stanford, both of whom used entities based in Caribbean jurisdictions to carry out colossal Ponzi schemes, the fall-out from which is still giving rise to litigation around the world.

Offshore financial centres are also liable to attract persons wanting to conceal the proceeds of criminal activities. One does not have to look very far in this region to find drug cartels, people smugglers and other criminal gangs who want to launder their profits or hide their gains behind an opaque screen of offshore trusts and companies. Indeed, many of the other appeals we hear from Caribbean jurisdictions are criminal cases arising out of the ruthless violence deployed by criminal gangs.

[1] President of the Supreme Court of the United Kingdom and the Judicial Committee of the Privy Council. I am grateful to my judicial assistant, Alexander Hughes, for his assistance in the preparation of this lecture.

This is not only a matter of violence. We are all aware of the human misery caused by the drugs trade. And the trafficking of people, particularly women and children, for forced and exploitative labour, including sexual exploitation, is widespread and growing, and an affront to human dignity. These are international as well as national problems, as the drug syndicates and people traffickers take advantage of the open borders, free markets and technological advances of the modern world.

A further problem in some countries in the region, again reflected in the cases that come before us, is corruption. Like financial crime, and drug and people trafficking, it is a phenomenon found in all countries, big and small, rich and poor. But it is in the Global South that its effects are most devastating, as it diverts funds that are badly needed for development, and discourages inward investment.

But the Caribbean jurisdictions are also committed to combating money laundering and to the confiscation of the proceeds of crime more generally. All or almost all of them are signatories of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (the Vienna Convention), the United Nations Convention against Transnational Organized Crime 2000 (the Palermo Convention) and the United Nations Convention against Corruption 2003 (the Merida Convention). These conventions send a clear message that the signatories are determined to prevent and control these problems, using tools which include the civil recovery of the proceeds of crime. They reaffirm the importance of core values of any civilised society, such as honesty and respect for the rule of law. And they provide a clear framework for effective action and international cooperation.

This conference is an invaluable opportunity for us to learn from one other in relation to a very important topic. The agenda for the next two days includes talks by leading practitioners and judges on a number of interesting and important issues. There may be some overlap between my remit and subsequent items on the agenda, but I expect there will be sufficient differences in perspective and emphasis to avoid undue repetition.

In my remarks I am going to focus on decisions of the Privy Council, particularly in appeals from Caribbean jurisdictions, and to a lesser extent on decisions of the UK Supreme Court. Of course, our decisions on appeals from one country will not automatically translate to another, where there are material differences in the law. And UK judgments concerned with the European Convention on Human Rights have to be treated with a degree of caution, as the Convention is not in identical terms to Caribbean constitutions and applies in a context which

is not the same. But the relevant laws on asset recovery tend to be in broad alignment, and the underlying constitutional principles tend also to be aligned, as one would expect in liberal democracies.

Given the theme of this conference, I will focus my attention on the civil asset recovery jurisdiction, and more specifically on the relationship between civil asset recovery and the rule of law. I will take civil asset recovery broadly, so as to cover not only the forfeiture of specific property but also orders for the confiscation of the value of criminal proceeds.

In essence, civil recovery mechanisms allow for the restraint, seizure and confiscation of assets derived from crime without the need to establish that a particular offence was committed in relation to the assets or that a particular person committed an offence in relation to them. An important feature of this jurisdiction is its wide scope of application. It can be used, for example, to recover assets in situations where the defendant is not susceptible to criminal prosecution in the jurisdiction. It can also be used where it is clear that assets represent the proceeds of crime but it is impossible to identify any specific crime.

Another important aspect of civil recovery is mutual legal assistance. Because of the speed with which assets can be moved from one jurisdiction to another, requests for assistance typically involve circumstances of urgency, where it is of critical importance to preserve assets before they are dissipated or hidden. Civil remedies are well suited to circumstances of urgency, partly because they are unencumbered by the constitutional protections attaching to criminal trials, such as proof beyond reasonable doubt and trial by jury. It is important that jurisdictions have a streamlined capacity to restrain forfeitable assets and accept the findings of the court of the jurisdiction in which the underlying criminal activity took place.

Some aspects of civil recovery have given rise to arguments about compliance with the rule of law. The rule of law can be difficult to define, but for present purposes I have in mind the fundamental principle that, as Lord Bingham put it, all persons and authorities within a state should be bound by and entitled to the benefit of the law.[2] This definition encompasses the principles of legality, certainty, equality and access to justice. Also inherent to the rule of law are procedural safeguards such as the right of access to a court and the right to a fair hearing before an independent and impartial judge. All of these principles are guaranteed directly or indirectly by the national constitutions of the jurisdictions represented here as well as by

[2] Tom Bingham, *The Rule of Law* (Penguin, 2010), p 37.

international human rights conventions, and are principles which any civil recovery regime should certainly respect.

2. Asset recovery as a means of promoting the rule of law

In the cases that come before us, attention tends to focus on the risks which are said to be posed by civil recovery mechanisms to the rule of law, and I will consider some of those risks shortly. But there is often less focus on the fundamental importance, also from a rule of law perspective, of having asset recovery regimes in the first place. I have already touched on this, but it is worth spending a little more time considering the role which civil recovery plays an important role in defending democratic institutions, national economies, and the rule of law. It is worth taking a moment to consider each aspect of that statement, without losing sight of the fact that they are inter-related.

The first aspect is defending democratic institutions. Civil recovery plays a central role in preventing illegally obtained funds from being used by corrupt individuals to achieve economic and political influence in our societies.[3] Corruption produces incalculable damage to governments and societies, and evidently weakens democracy and the rule of law.[4]

The second aspect is defending national economies. Preventing the entry of criminal gains into the legitimate economy ensures the integrity of that economy. As illicit funds enter the economy, they can threaten legitimate businesses, disrupt markets by offering artificially low prices, sabotage the integrity of financial indicators, undermine responsible economic policies, and promote economic distortion and instability of all kinds, ultimately reducing income and increasing inequality.[5]

The third aspect is defending the rule of law. Unless the victims of crime and law enforcement agencies have the ability to find, freeze, and recover assets as a means of securing proprietary remedies for unlawful conduct, victims are unable to vindicate their legal rights and, conversely, wrongdoers are enabled to evade the full reach of the law.

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[3] Organisation for Economic Co-operation and Development (OECD), "Confiscation of the instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia" (2018), p 7.
[4] OECD (n 9), p 7.
[5] John McDowell and Gary Novis, "Consequences of money laundering and financial crime" (2001) 6(2) Economic Perspectives 6, p 6.

Furthermore, the proceeds of crime can be, and in some places are, used to establish corrupt control over law enforcement institutions, and to ensure impunity for corruption and criminality. We all know countries where organised criminal syndicates have become powerful and entrenched, penetrating political parties, and undermining government and law enforcement. We, as judges, have a responsibility to prevent this from happening, by making effective use of the powers given to us by proceeds of crime legislation. Indeed, law enforcement bodies need to make much more effective use of these powers: the proportion of criminal assets that are recovered continues to be extremely small.

So civil recovery deprives criminals of the wealth that could be used to finance subsequent offences, to promote violence and harm against individuals and institutions, and to weaken the rule of law and democracy. It enables assets to be returned to their legitimate owners or re-invested in criminal justice agencies: a consideration which is particularly important where those agencies are under-resourced. Applied with international cooperation, it ensures that no person is beyond the reach of the law.

International cooperation plays a vitally important role in this. Criminal groups have wasted no time in embracing today's globalized economy and the sophisticated technology that goes with it. As Kofi Annan said in the foreword to the Palermo Convention, if crime crosses borders, so must law enforcement. If the rule of law is undermined not only in one country, but in many, then those who defend it cannot limit themselves to purely national means. If the enemies of human rights seek to exploit the openness and opportunities of globalization for their purposes, then those of us engaged in law enforcement must exploit those very same factors to defend human rights and defeat the forces of crime, corruption and trafficking in human beings.

So effective civil recovery regimes can, and should, uphold the rule of law on an international level. But we need to guard against the possibility of courts in different jurisdictions applying the law inconsistently, and taking an excessively parochial attitude to their jurisdiction and to wrongdoing in other countries. Treaties that provide for mutual assistance, for the disclosure and production of information, and for the recognition and enforcement of foreign judgments are particularly valuable in ensuring cross-border harmonisation, and in precluding the need for parallel proceedings, thereby providing for clarity, efficiency and economy in the civil recovery process. Civil recovery regimes must

therefore be viewed and developed from an international perspective, facilitated by conferences such as this one.

3. Asset recovery and the risks it poses to the rule of law

Despite the many international, regional, and national initiatives endorsing the rationale of civil recovery and promoting its implementation, it has been the subject of some criticism, and many challenges in court. Much of the criticism, and most of the challenges, have challenged the essential nature of civil recovery: that since by definition it precludes the need for a criminal conviction, it does not ensure that defendants enjoy all the due process protections afforded to them in criminal cases. Instead, many arguments have been advanced, based on the premise that civil recovery should properly be regarded as a criminal law measure, and as such should attract the full range of safeguards inherent to criminal proceedings, such as the criminal standard and burden of proof. There have also been other significant concerns, for example about the proportionality of confiscation orders, and of measures directed at lawyers,[6] and about the potential impact of confiscation orders on innocent third parties.

4. Finding the balance

In considering these issues, the starting point, as it seems to me, is to recognise that civil recovery which is ordered independently of a criminal conviction is not a criminal measure and does not involve the imposition of a penalty. As the Privy Council held in the case of *Williams v Supervisory Authority,*[7] on appeal from Antigua and Barbuda, civil recovery legislation establishes a general principle, essentially of private law, that good title cannot be derived from the proceeds of crime. 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. The essence of the regime is to remove from criminals the pecuniary proceeds of their crime, rather than punishment or deterrence. The civil recovery regime therefore operates in the civil law sphere, where the court has responsibility for determining property rights. [8]

[6] See, for example, *Attorney General v Jamaican Bar Association* [2023] UKPC 6.
[7] [2020] UKPC 15.
[8] Para 69.

Another way in which this idea has sometimes been expressed is to say that civil recovery is designed to reverse an unjust enrichment. For example, the Technical Guide to the UN Convention Against Corruption states that the theory that lies behind the value-based model of confiscation in the Convention – that is to say, the recovery either of the primary proceeds of crime or other property into which they have been converted – is "not to allow the offender to enrich himself or herself by illegal means".[9] The same language has also been used by the European Court of Human Rights, when holding that civil recovery does not involve the determination of a criminal charge and is not of a punitive nature, and therefore does not engage the presumption of innocence.[10]

The idea that a person should not be entitled to be unjustly enriched by reason of unlawful conduct is clearly different from the idea that a person should be punished for criminal wrongdoing. Even though a particular course of conduct may constitute both a criminal offence and grounds for the recovery of unjust enrichment, the entitlement of the state to impose a punishment for the criminal offence, and the nature of that punishment, are entirely distinct from the right of the state to recover the unjust enrichment.

At the same time, although civil recovery does not engage the protections applicable in criminal proceedings, it does engage constitutional guarantees relating to due process and interests in property. In relation to due process, the Board emphasised in the case of *Williams* the need for legal proceedings to be fair, and in particular the need for a person to be given a fair opportunity to be heard before the state takes away his property. That requirement had been met on the facts of the case, as the defendant had been given proper notice of the relevant applications and was given a fair opportunity to respond.[11] In relation to the constitutional protection of property, the Board asked itself whether the application of the regime was 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. It observed that, in that regard, appropriate respect should be given to the assessment made by the legislature, which should be afforded a margin of appreciation. The approach is very similar to the one adopted by the European Court of Human Rights.[12] Applying that approach, the Board noted that the regime was potentially severe in its effect, but that it had been enacted with an important

[9] Technical Guide to the United Nations Convention Against Corruption, Part IV, referring to article 31(4) of the Convention.
[10] See, for example, *Gogitidze and Others v Georgia*, no. 36862/05, 12 May 2015, paras 106 and 107.
[11] Paras 85-86.
[12] See, for example, *Gogitidze and Others v Georgia,* paras 98, 101 and 108.

legitimate aim, and that the general community had a very strong interest in ensuring that effective preventive measures were taken to combat drug trafficking, which was in issue in that case.

In considering more specific aspects of the rule of law in relation to civil recovery, I will have to be selective, and will focus on five issues in particular that have arisen in appeals to the Privy Council: (i) the relationship between civil recovery and criminal proceedings, (ii) the standard of proof, (iii) the burden of proof, (iv) the proportionality of recovery, and (v) procedural irregularities.

(i) The relationship between civil recovery and criminal proceedings

In the case of *Williams v Supervisory Authority,* the Privy Council had to consider a full-frontal attack on the civil recovery regime in Antigua and Barbuda, on the basis that it should be classified as criminal in nature for the purposes of the constitution, with the consequence that the regime was unconstitutional in failing to provide the defendant with the protections required in criminal proceedings. Under the legislation, the authority had to establish on a balance of probabilities that the defendant had engaged in money laundering activity, in which event the burden of proof shifted to the defendant to establish that the property in question was not derived from unlawful activity. However, the court did not need to make a finding as to the commission of any particular offence. The Board rejected the challenge, noting that the operation of the regime did not depend on the defendant's being convicted of any offence, and did not lead to the imposition of any penalty. It was directed to the determination of private law rights in accordance with the civil standard of proof.[13] The relevance of a finding to the civil standard that the defendant had engaged in money laundering activity was to create a doubt as to the validity under the civil law of his ownership of the property rights which he claimed to have.[14]

Similarly, in an appeal arising from an application by the Jamaican Assets Recovery Agency for an evidence-gathering order in aid of a forfeiture investigation,[15] the Privy Council pointed out that where someone is misusing a business which has a legitimate reason to handle

[13] Paras 53 and 65-66.
[14] Paras 69 and 75.
[15] *Assets Recovery Agency (Ex parte)* [2015] UKPC 1. See also *Director of Public Prosecutions of Mauritius v Bholah* [2011] UKPC 44.

large sums of cash, such as a bureau de change or a casino, it may be that a money laundering service is being provided to a mixture of drug dealers, fraudsters and smugglers. It may be proved that there were numerous clandestine receipts of a great deal of cash, and payments out justified by invoices which can be proved to be forged documents emanating from non-existent suppliers. But exactly what the antecedent offences were may be uncertain. So it was not necessary, before an evidence-gathering order could be made, that the defendant should have been convicted of an offence. It was legitimate to investigate benefit, and the location of assets, from an early stage. In order to protect the rights of the defence, the judge had to ensure that the dominant purpose for which the order was sought was the forfeiture enquiry and not the underlying criminal investigation.

Most recently, in the *Stanford Asset Holdings* case, decided on appeal from Mauritius, the Privy Council emphasised that there should not be a presumption that the civil courts should decline to assist a fraud victim if a criminal investigation is ongoing. In principle a court is entitled, indeed should be encouraged, to assist the victims of fraud to pursue their own civil remedies, and should not limit that assistance to cases where it can be shown that there is cause for complaint about how the public agencies are performing their duties.[16]

(ii) The standard of proof

Since civil confiscation does not form part of the criminal justice process, it does not require a finding of guilt according to the criminal standard of proof beyond a reasonable doubt. Applying the balance of probabilities standard enables civil recovery laws to be applied quickly and effectively, particularly in circumstances where time is of the essence.

The adoption of the civil standard of proof has been recognised to be consistent with the UN Convention against Corruption. The Technical Guide refers to the adoption of "civil procedures of confiscation that operate in rem and are governed by a standard of the preponderance of evidence".[17] The European Court of Human Rights has also found it legitimate for confiscation orders to be made on the basis of proof on a balance of probabilities.[18]

[16] *Stanford Asset Holdings Ltd v AfrAsia Bank Ltd* [2023] UKPC 35; [2024] 1 WLR 1118, para 41.
[17] Part IV, discussing article 31(8) of the Convention.
[18] *Gogitidze and Others v Georgia,* para 107.

Although defendants have often sought to challenge the legitimacy of the civil standard of proof, such challenges have been rejected by the courts on grounds consistent with the rule of law. In the Northern Ireland case of *Walsh*,[19] for example, the claimant argued that the proceedings were criminal, not civil, and therefore required the criminal standard of proof. The argument was rejected by the Court of Appeal, which observed that civil recovery proceedings "are not directed towards [the defendant] in the sense that they seek to inflict punishment beyond the recovery of assets that do not lawfully belong to him. As such, while they will obviously have an impact on [the defendant], these are predominantly proceedings in rem. They are designed to recover the proceeds of crime, rather than to establish, in the context of criminal proceedings, guilt of specific offences."[20] The Court of Appeal also referred to similar conclusions reached in other jurisdictions, including the decision of the US Supreme Court in the 1996 case of *Ursery*.[21] The Privy Council approved the reasoning in *Walsh* in the case of *Williams v Supervisory Authority,* where the Board observed that if proof of engagement in unlawful activity had to be beyond reasonable doubt, the efficacy of the civil recovery regime would be seriously undermined.[22]

Another illustration from the UK is the case of *Serious Organised Crime Agency v Gale*[23]*,* where the judge found on a balance of probabilities that property which the defendant held was derived from drug trafficking, money-laundering and tax evasion. The defendant appealed to the Supreme Court on the basis that part of the evidence relied on had also been before a Portuguese court, where he had been acquitted of drug trafficking charges. He argued that the legislation infringed the presumption of innocence guaranteed by the European Convention by adopting the civil standard of proof, and by undermining the effect of the acquittal in the Portuguese proceedings. His appeal was dismissed by the Supreme Court. The fact that he had been acquitted in criminal proceedings concerned with a charge of drug trafficking, and with a part of the evidence, had no bearing on the question before the court in the civil proceedings, whether the property in question was the proceeds of crime.

(iii) The burden of proof

[19] *Walsh v Director of the Assets Recovery Agency* [2005] NICA 6.
[20] Ibid, para 41.
[21] *United States v Ursery* 518 U.S. 276 (1996).
[22] Para 94.
[23] [2011] UKSC 49.

The possibility of imposing the burden of proof in civil recovery cases on the defendant is contemplated by the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which provides that "each party may consider ensuring that the onus of proof is reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings".[24] The UN Convention against Corruption contains a similar provision.[25] This can readily be understood. It is significantly easier for a person to establish that his property was lawfully acquired, or not acquired directly or indirectly from the commission of an offence, than it is for the authorities to establish the contrary.

The European Court of Human Rights has held, in the light of these and other international instruments, that "the onus of proving the lawful origin of the property presumed to have been wrongfully acquired may legitimately be shifted onto the respondents in such non-criminal proceedings for confiscation, including civil proceedings *in rem"*.[26] For example, in a case from Georgia concerned with property held by the relatives of a corrupt official, the court said that it was "only reasonable" to expect them to discharge the burden of proof by refuting the prosecutor's substantiated suspicions about the wrongful origins of their assets: suspicions which were substantiated by a considerable discrepancy between their income and their wealth.[27] But the European case law suggests that reversal of the burden of proof is only acceptable if the authorities have submitted a substantiated claim.

The Privy Council accepted in the case of *Williams v Supervisory Authority* that it is reasonable for the burden of proof to be placed on the defendant, under the legislation in Antigua and Barbuda, where the authority has established engagement in money laundering activity on a balance of probabilities. As the Board stated, 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 aims of the legislation, it is fair to put the burden of proof on him.[28]

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[24] Article 5(7).
[25] Article 31(8).
[26] *Gogitidze and Others v Georgia,* para 105.
[27] *Gogitidze and Others v Georgia,* paras 108 and 112.
[28] Para 96.

(iv) The proportionality of recovery

Since civil recovery engages constitutional protections relating to property, it can raise questions about the proportionality of the measures taken. It is not always easy to determine the amount that should be recovered, and in that situation proportionality can be an important protection against arbitrariness, and therefore of the rule of law.

The point is illustrated by the UK case of *R v Waya*,[29] although it concerned a criminal confiscation order. The defendant had told a lie about his income when he applied for a mortgage in order to buy a flat. He bought the flat with the help of the mortgage, and later repaid the mortgage. Later again he took out another mortgage, honestly obtained, for about twice as much. Later still, he was prosecuted and convicted of the original mortgage fraud. By this time, the flat had more than doubled in value. The courts had the greatest difficulty working out the appropriate amount of the confiscation order. Was it the amount of the original mortgage? Or was it the proportion of the current value of the flat which corresponded to the proportion of the purchase price which had been met by the mortgage? Or was it some other amount? Importantly, the Supreme Court held that a confiscation order which did not conform to the test of proportionality would constitute a violation of the defendant's right to peaceful enjoyment of his property, as guaranteed by the European Convention, and that in order to be proportionate a confiscation order had to bear a proportionate relationship to the legislation's purpose, which was to remove from criminals the pecuniary proceeds of their crime. It therefore read into the UK legislation a qualification so that it required the making of a confiscation order "except in so far as such order would be disproportionate". In the case of *Williams v Supervisory Authority,* the Privy Council held that it would be possible to read a similar qualification into the legislation in force in Antigua and Barbuda, if necessary to avoid a violation of a defendant's constitutional rights.[30]

Another illustration of proportionality in action, again in the context of criminal confiscation, is the case of *R v Ahmad,* [31] **w**hich concerned co-conspirators who jointly acquired the proceeds of a fraud. The Supreme Court held that confiscation orders could be made against each conspirator in the full amount of the proceeds of the fraud, as they had jointly obtained that amount, but that, since it would be disproportionate and contrary to the European

[29] [2012] UKSC 51; [2013] 1 AC 294.
[30] Para 97.
[31] [2014] UKSC 36; [2015] AC 299.

Convention for the state to take the same proceeds twice over, each order would provide that it was not to be enforced to the extent that an amount had been recovered under the other order.

A final illustration of proportionality, again in the context of criminal confiscation, is the case of *R v Andrewes,*[32] which concerned a person who applied for a senior position in the National Health Service in the UK. He lied in his job application about his academic qualifications and employment experience. He was appointed and worked successfully in the post for over ten years, until his fraud was discovered and he was dismissed. A confiscation order was made on the basis that the benefit he had received from the fraud was the entirety of his earnings, net of tax, over the ten years. The Court of Appeal quashed that order, on the basis that the defendant had given full value for the salary paid. It held that any confiscation order would be disproportionate. The Supreme Court reversed that decision, holding that the benefit obtained from the fraud was the difference between the higher net earnings obtained as a result of the fraud and the lower earnings that the defendant would otherwise have been expected to achieve, and that an order made on that basis would not be disproportionate.

I should also draw to your attention an important decision of the Privy Council concerned with the proportionality of measures taken in relation to attorneys under the Jamaican money laundering regime.[33]

(v) Procedural irregularities

The Privy Council has allowed a number of appeals, such as the Bahamian case of *Attorney General v Knowles*[34] and the Jamaican case of *Powell v Spence,*[35] where the Court of Appeal treated a procedural defect, or what they considered to be a procedural defect, as invalidating civil recovery proceedings. A particularly technical approach has sometimes been taken in cases concerned with mutual legal assistance. As the House of Lords explained in *R v Soneji*,[36] the consequences of a failure to comply with a statutory procedure depend on an analysis of what the legislature intended those consequences to be. A technical fault is unlikely

[32] [2022] UKSC 24; [2022] 1 WLR 3878. For another example, see *R v Harvey* [2015] UKSC 73; [[2017] AC 105, where it was held that it would be disproportionate to make a confiscation order on the basis that VAT which an offender had correctly charged on the hire of stolen property, and which he had remitted to the tax authorities, had been obtained by him from criminal activity.
[33] *Attorney General v Jamaican Bar Association* [2023] UKPC 6.
[34] [2017] UKPC 5.
[35] [2021] UKPC 5.
[36] [2005] UKHL 49; [2006] 1 AC 340.

to have been intended to defeat the public interest in international co-operation in the removal from criminals of the proceeds of their crime. The position would be different, as the UK Supreme Court held in the case of *R v Guraj,*[37] if the procedural defect gave rise to unfairness to the defendant which was beyond cure.

A similar issue sometimes arises in relation to ex parte applications for a restraint order. The authority applying for it is, of course, under a duty of full and frank disclosure. In ordinary civil proceedings, a material non-disclosure would normally result in the discharge of the order. However, in the context of an application for a restraint order in connection with proceeds of crime, it is necessary to take account of the public interest when determining what consequences should follow a material non-disclosure. The proper approach is to consider whether the public interest does or does not call for the order to stand, now that the true position is known, and taking into account the previous failure of disclosure. This is a matter which will be discussed in a forthcoming judgment of the Privy Council on appeal from the Bahamas.[38]

5. Conclusion

To conclude, it is clear that civil recovery regimes provide a vital tool to tackle crime and corruption, and so to protect our democracies, our economies, and the rule of law. The risk which organised crime poses to our societies, and the ease and speed with which assets can be transferred from one jurisdiction to another, require that in civil asset recovery laws the courts should be as effective and determined as the criminals who generate the proceeds of crime.

While regimes of this kind undoubtedly raise a range of serious issues in relation to legal and constitutional values, it is possible to put robust rule of law safeguards in place to ensure that civil recovery laws can be applied effectively to deprive criminals of their gains without jeopardising fundamental rights. A well-constructed civil recovery scheme, effectively applied by the courts, can be compatible with the rule of law, and indeed is vital to its protection. With enhanced international cooperation in this field, the courts can have a real impact on the ability of international criminals to operate successfully, and can help citizens everywhere in their struggle for safety and dignity in their homes and communities.

[37] [2016] UKSC 65; [2017] 1 WLR 22.
[38] *Attorney General v Reid.*